

Public Report

Jan. 16, 2017: Officer Involved
Shooting; Deployment of Electronic
Control Weapon; Use of .40mm
Impact Projectile Weapon



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It should be noted that Fairfax County Police Department Use of Force General Order 540 was revised and took effect on March 31, 2017. The officers' actions reviewed in this report occurred while the prior Use of Force General Order 540 was in effect; therefore, those actions were analyzed using that earlier General Order. When appropriate, this report will reference provisions contained in the revised G.O. 540 which became effective on March 31, 2017.

INCIDENT

The following recitation of the incident does not include information learned later through investigation by the FCPD. This is in keeping with Supreme Court precedent which states that uses of force must be judged based on what the officers knew (or reasonably believed) at the time force was used, and not with the benefit of 20/20 hindsight.¹

On January 16, 2017, at approximately 2:38 pm,² the Fairfax County Department of Public Safety Communications received a 9-1-1 call from M.T.D. advising that he and his brother, M.H.D. had both been shot by a third brother, M.A.D., and that they (the two shooting victims) were in route to a local hospital. M.T.D. further advised that M.A.D. remained at the location of the shooting – 13316 Covered Wagon Lane in Herndon. At approximately 2:41 pm,

¹ Graham v. Connor, 490 U.S. 386 (1989).

² The times utilized herein are based on FCPD analysis of three independent sources: Reston Main Channel Radio Traffic; helicopter (FX01) video and audio; and iPad video and audio recorded by a neighbor who was in close proximity to the events.

a police dispatcher dispatched members of the Fairfax County Police Department (FCPD) to that location.

At approximately 2:45 pm, the first patrol officers from the Reston District Station arrived on scene at 13316 Covered Wagon Lane. Information conveyed by police dispatchers to the first responding officers, as well as to those responding to the scene shortly thereafter, was that the occupant of 13316 Covered Wagon Lane had shot his two brothers with a .45 caliber pistol, and that there was a possible hostage (another resident of 13316 Covered Wagon Lane) in the location. Several officers interviewed during the subsequent investigation commented that the presence of the possible hostage inside the residence changed the police response dramatically. Specifically, had the police been dealing with a barricaded subject only, time would have allowed them to negotiate with the subject indefinitely. However, the presence of the hostage (and subsequent setting of fires in the structure) required a more immediate resolution to the situation.

As early as 2:45 pm, a 9-1-1 dispatcher attempted to contact the subject on his cell phone in an effort to negotiate a peaceful surrender. Additional calls were made to the subject's cell phone at 3:00 pm, 3:01 pm, and at 3:03 pm, all of which were directed to voicemail. The "surrender ritual" was also attempted by responding officers on the scene almost immediately after their arrival there. The "surrender ritual" consisted of on-scene officers advising the subject that the FCPD was outside of the location and that he needed to surrender. Numerous callout attempts asking for M.A.D. to surrender went unheeded.

The first arriving officers on the scene at 13316 Covered Wagon Lane heard gunshots inside the residence shortly after their arrival. Minutes after their initial arrival, officers also realized that the townhouse was on fire because they saw smoke and flames billowing from the

townhouse and upstairs window. Evacuation of nearby residences was undertaken by officers to protect neighbors from the shooting and the possibility of the fire spreading.

Based on a SWAT team callout, members of the FCPD SWAT team began arriving to the location by 3:32 pm. When enough members of the SWAT team (both full-time and supplemental members) were on the scene, a “reaction team” was assembled and staged; and the initial responding patrol officers were relocated behind the assembled “reaction team.”

At 3:43 pm M.A.D. was seen trying to punch out the front window of his townhouse; at 3:44 pm, he was seen ripping off the blinds on the front window; and at 3:45 pm, he was seen cutting the blinds with a knife in his hand. At 3:46 pm, the dispatcher confirmed in a transmission that there was a “hostage inside,” and that the “subject won’t let him out.”³ But, by 3:52 pm, based on communications with the purported hostage, the dispatcher advised that M.A.D. was unaware that the “hostage” was in the premises. However, while he was not actually being held hostage, the roommate refused to leave the bathroom in which he was located due to fear that M.A.D. would harm him if he was discovered.

A Master Police Officer (hereinafter “MPO#1”) was the first SWAT team member to arrive at the subject location, and established his position on the back deck of a townhouse located on Covered Wagon Court. This vantage point gave MPO#1, a certified sniper on the SWAT team, a view of M.A.D.’s townhouse with the ability to see inside through windows of the unit. The back deck on which MPO#1 established his position was approximately 70-80 yards away from 13316 Covered Wagon Lane. By 3:47 pm, MPO#1 recognized the urgency of the situation, especially for the suspected hostage (roommate) stuck inside. Expecting to get verbal authorization, or a “standing order,” from a commander on the scene that deadly force

³ Reston Channel 5 radio traffic.

was authorized based on the overall situation, MPO#1 initially did not shoot when he first considered using deadly force. This was due, at least in part, because the standing order he anticipated - that deadly force was justified - was not given by a commander. Instead, the commander on scene stated that the department general orders on employing deadly force should be relied upon. In fact, Special Operations Division (SOD) Standard Operating Procedure (SOP) covering "SWAT TEAM HOSTAGE/BARRICADE RESPONSE" does state that "Incident command may issue the pre-determined code word advising all personnel the criteria has been met to utilize deadly force to resolve the incident." The SOD SOP goes on to state that "[t]he precision rifleman shall be governed by departmental general orders, unless the Incident Commander announces the code word to them during the operation." This event transpired under the latter circumstances: no standing order was given. Had that standing authorization to use deadly force been given, based on the circumstances that had already transpired, deadly force would not only have been justified, it might have been utilized earlier than it actually was. In keeping with the PD's philosophy on the sanctity of life, because no standing order was ever issued, there was additional opportunity for M.A.D. to surrender or for the situation to be otherwise resolved without the use of deadly force. Unfortunately, neither of these desired outcomes resulted during the additional time.

During the ensuing minutes, additional gunfire was heard from within the subject's townhouse. At least one officer stated in his interview that he thought the subject could have been shooting the hostage in the bathroom.

By 3:53 pm, M.A.D. was visible on FCPD Helicopter (FX01) video standing in the doorway of his residence waving a knife. Officers on the scene believed the fire was getting worse based on the amount of smoke coming from the townhouse. At 3:54 pm, the dispatcher

announced on air, “Okay the hostage advised, he’s in the bathroom, there’s no window, it’s filling up with smoke, we need to get him out.”⁴

At 3:55:02 pm, MPO#1 fired one shot from his .308 caliber rifle at M.A.D.’s chest. M.A.D. was able to then close the front door, leaving MPO#1 and his spotter unsure whether the rifle round had struck M.A.D. When it was confirmed to the “reaction team” staged near the front door to the townhouse that the sniper shot had been taken, team members carefully began to approach the residence with the goal of rescuing the hostage. As they approached, the subject re-opened the front door, allowing a “reaction team” member to toss a flash bang diversion device into the entry of the townhouse at 3:55:25 pm. Nonetheless, M.A.D. came back outside with a large knife in one hand. He was given verbal commands to drop the knife. Instead, M.A.D. moved toward the approaching “reaction team” waving the knife.

The lead “reaction team” member then called for “less lethal”⁵ to be deployed.⁶ At 3:55:33 pm, Police Officer First Class (Hereinafter “PFC#1”) deployed a .40mm impact projectile weapon⁷ at M.A.D., specifically aiming for his abdomen. PFC#1, a supplemental member of the SWAT team, had his .223 rifle with him when he arrived on the scene. However, as SWAT officers were relieving members of patrol at the front perimeter, he needed to borrow the single-launch .40mm impact projectile weapon from one of those patrol officers because PFC#1 did not have one permanently assigned to him. When PFC#1 deployed the .40mm, M.A.D. bent over but continued to advance toward the responding team of officers. When called upon to fire another .40mm impact projectile, PFC#1 was unable because the impact projectile

⁴ Reston Channel 5 radio traffic.

⁵ General Order 540.1 defined “less-lethal” force as “[f]orce which may result in death or serious injury. When properly used, less-lethal weapons significantly reduce the probability of such outcomes.”

⁶ CIB Interview of PFC#1 on 1/16/2017.

⁷ A “less-lethal” weapon referred to in G.O. 540.1 as an “extended range kinetic energy impact projectile.”

weapon he had borrowed from the patrol officer was a single shot patrol version. Conversely, SWAT team members who are issued .40mm impact projectile weapons are issued the multi-launcher version.⁸

One second after PFC#1 fired the .40mm impact projectile round, a second rifle shot was taken by MPO#1 at 3:55:34 pm. MPO#1 fired only after noticing that the entry team's entry into the townhouse had stalled because of M.A.D.'s renewed presence outside; and, to prevent him from re-entering the residence.⁹ In spite of his attempt to prevent M.A.D. from re-entering the townhouse, he did, in fact, turn to re-enter. Three seconds after his second shot, at 3:55:38 pm, MPO#1 fired his third and final shot.

M.A.D. still managed to re-enter the residence briefly, but almost immediately came back out waving the knife in one hand in the direction of the "reaction team." At this point, a member of the team yelled for a Taser to be deployed. Although Master Police Officer (hereinafter "MPO#2") had his .223 raised with the safety off, he lowered the rifle and employed his Taser (hereinafter "electronic control weapon" or ECW) at 3:55:41 pm.¹⁰ MPO #2 was aware at the time that the "reaction team" member next to him also had a long weapon trained on the subject. M.A.D. immediately reacted to the ECW and fell to the ground. No additional force was used on M.A.D.

Some members of the "reaction team" immediately began rendering aid to M.A.D. while other members entered the townhouse to rescue the hostage (roommate). Within minutes the location was pronounced safe and Fairfax County Fire and Rescue personnel was inside to

⁸ CIB Interview of PFC#1 on 1/16/2017.

⁹ CIB Interview of MPO#1 on 1/18/2017.

¹⁰ The examination of MPO#2's ECW logs indicate that the device was "triggered" at 3:55:26 on 1/16/2017.

extinguish the fire. Despite the initial aid provided by “reaction team” members, as well as subsequent efforts by emergency medical personnel, M.A.D. was pronounced dead at 4:41 pm.

RELEASE OF INVOLVED OFFICER’S IDENTITY

FCPD Chief EDWIN C. ROESSLER, Jr. made every effort to comply with the new departmental directive to release the name(s) of officers involved in an officer involved shooting within 10 days. However, in this situation he had the justification necessary for withholding the identity. Based on the Ad Hoc Police Practices Review Commission recommendations, the new directive states that “[i]f a decision is made not to release the name within [10 days], [the department will] publicly share specific information that illustrates the reason the name is being withheld.” Chief ROESSLER did so in this case. First, a safety inquiry was initiated based on a legitimate concern for the safety of the officer involved. Before that investigation was complete, but with release of the name looming by February 7, 2017 (22 days after the incident), MPO#1 sought and successfully obtained a 3-day Temporary Restraining Order (TRO) issued by a United States District Court judge prohibiting Chief ROESSLER from releasing the information. A hearing to determine whether a preliminary injunction should be issued was scheduled but cancelled because, upon gaining new information calling the officer’s safety into question, Chief ROESSLER postponed the release of the name until the new information could be fully investigated. When that investigation was complete, and safety concerns resolved, Chief ROESSLER released the identity of MPO#1 on March 2, 2017. In addition to identifying MPO#1 as the officer involved in the current shooting, Chief ROESSLER also provided details surrounding prior uses of deadly force by MPO#1. It is my opinion that the 21-day delay from the lifting of the TRO to the release of the identity was both reasonable and necessary.

Separate from the release of the identity of MPO#1, the FCPD also publicly released 9-1-1 audio and FCPD helicopter video tapes of the incident on May 26, 2017.

CRIMINAL INVESTIGATION

Both a criminal and an administrative investigation were commenced on the date of this incident, and Internal Affairs Bureau (IAB) detectives were part of the initial investigation being coordinated at the scene by FCPD's Criminal Investigations Bureau (CIB). The criminal and administrative investigations were conducted separately but simultaneously (parallel), and the criminal investigation was reviewed as part of my review to get a full understanding of the police department's overall response to this matter.

It is my opinion that the FCPD criminal investigation into this matter was complete, thorough, objective, impartial, and accurate.

PROSECUTIVE DECISION

Commonwealth Attorney (CWA) RAYMOND F. MORROGH was provided with the results of the comprehensive criminal investigation conducted by CIB in this matter, and he concluded that the actions taken constituted justifiable homicide. Consequently, in his public report dated May 19, 2017, CWA MORROGH explained that no criminal prosecution would be pursued by the Office of the Commonwealth's Attorney.¹¹

¹¹ Morrogh, R. F. (2017). *Report of Investigation: Officer Involved Shooting*. Accessed in May, 2017 from: <http://www.fairfaxcounty.gov/news/2017/pdf/report-on-officer-involved-shooting-jan16-2017.pdf>.

INTERNAL ADMINISTRATIVE INVESTIGATION

Again, both the criminal and administrative investigations into this matter began immediately after the situation at 13316 Covered Wagon Lane had been resolved on the afternoon of January 16, 2017.¹² Many aspects of these two investigations overlap and allow for “parallel” investigations to proceed. As stated in FCPD Standard Operating Procedure (SOP) 12-045, “The Police Department shall thoroughly investigate, both criminally and administratively, all incidents that involve the use of deadly force.” SOP 12-045 goes on to state that “[b]oth MCD¹³ and IAB detectives may team up and interview witnesses and officers not directly involved in the incident,” but that “[d]etectives from IAB will not be present for criminal interviews of the directly involved officers or at any scene walk through by those officers.” This mandate was followed in these parallel investigations. The landmark United States Supreme Court decision in Garrity v. New Jersey¹⁴ makes parallel criminal and administrative investigations the most legally sound method to investigate matters such as officer involved shootings. However, that legal soundness oftentimes results in delays during the internal process which frustrates many people who desire quick conclusions to these incidents. It is my opinion that the FCPD IAB administrative investigation into this matter was not only complete, thorough, objective, impartial, and accurate, but that it was conducted within a reasonable timeframe as well.

¹² I did not start my position as Independent Police Auditor until April 17, 2017, and, therefore, I did not monitor the administrative investigation into this matter from the outset. I began monitoring this matter very shortly after assuming my role while the investigation was ongoing. As the Board of Supervisors mandated in creating the Independent Police Auditor position, the monitoring of future investigations may commence when the investigation first begins.

¹³ Major Crimes Division.

¹⁴ 385 U.S. 493 (1967).

CONCLUSIONS

Like many (if not most) police calls, the FCPD responded to a situation that in this case was “tense, uncertain, and rapidly evolving.”¹⁵ In its most notable analysis of law enforcement officers’ use of force, the United States Supreme Court recognized that it is under these type circumstances in which responding officers are called upon to make “split-second” decisions.¹⁶ The quick actions of the responding FCPD officers in this case almost certainly saved the life of the roommate who was trapped in the third-floor bathroom during the standoff; and, very possibly, prevented the fire from spreading to additional units in the complex, which could have put many additional lives at risk.¹⁷ While the last section of this report will include recommended changes to departmental policy as a result of what transpired in the matter under review, I agree with the internal findings of the FCPD that there were no legal or policy violations based on the actions of anyone involved in this incident. I believe the use of force was objectively reasonable, necessary, and most likely, life-saving.

While an argument can be made that other options should have been attempted prior to the use of deadly force, I disagree from both a legal and a policy standpoint. Based on the Graham v. Connor decision,¹⁸ the standard to review MPO#1’s (as well as PFC#1’s and MPO#2’s) actions in this case is objective reasonableness as set forth in the Fourth Amendment to the United States Constitution.¹⁹ It was objectively reasonable for MPO#1 to believe that at

¹⁵ Graham v. Connor, *supra*, note 1.

¹⁶ *Id.*

¹⁷ Even with the almost immediate entry into the structure when it was deemed safe for Fairfax County Fire and Rescue personnel, the Fire Marshal Incident Report estimated the amount of damage to 13316 Covered Wagon Lane to be \$56,250.00.

¹⁸ *Supra*, note 1.

¹⁹ Amendment IV to the U.S. Constitution: The right of the people to be free in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

least one individual (the roommate trapped in the bathroom) was in immediate danger of death or serious physical injury at the time of his use of deadly force. His actions also complied with FCPD policy on the use of deadly force. As stated in that policy in effect on January 16, 2017, deadly force was “reasonably necessary” because of “the officer’s belief based on the totality of circumstances known to the officer at the time that imminent threat of death or serious injury to any person exist[ed] and that all other methods of force to control the subject would [have] be[en] or ha[d] already proven to be ineffective.”²⁰ There is simply no legal or policy requirement to exhaust every possible option before deploying deadly force. In fact, the U.S. Supreme Court has noted (albeit in a non-use-of-force case) that the Fourth Amendment does not require police officers to choose “the least intrusive alternative, only a reasonable one.”²¹ A federal circuit court of appeals judge deciding a case more on point (involving the use of deadly force against a handcuffed individual attacking an officer with a fireplace poker) included the following language in his opinion for the appellate panel: “There is no precedent in this circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. There are, however, cases which support the assertion that where deadly force is justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first.”²²

If the argument is made that other options could have been tried prior to MPO#1 using deadly force, I would agree. But, that generates a potential change in policy for the FCPD to consider; it does not create any type of fault in the current incident under review. I reserve that potential policy change recommendation for the final section of this report.

²⁰ FCPD G.O 540.1 IV.A. in effect on January 16, 2017.

²¹ *Illinois v. Lafayette*, 462 U.S. 640 (1983).

²² *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 81 (1994).

While subject to much less public scrutiny than the use of deadly force, the use of both the .40mm impact projectile weapon and the ECW (referred to in FCPD policy as a “conducted energy weapon” at the time of this event) also need to be examined in this report.

As the use of deadly force was legal and within policy, so too was the use of the .40mm impact projectile weapon by PFC#1. While there is no legal requirement to attempt non-deadly force options when deadly force is justified, an officer certainly may attempt those options under the law. Separate from the legal analysis is the policy analysis. FCPD General Order 540.1 IV.E.3, in effect on January 16, 2017, stated that “[k]inetic energy impact projectiles may be used to resolve potentially violent situations, thereby reducing the likelihood of serious injury or death to oneself or to other persons. Kinetic energy impact projectiles will only be used when the following conditions exist:

There is reasonable belief it is unsafe for officers to approach;

Immediate action is necessary or circumstances (e.g., flammable liquids, etc.) preclude the use of a CEW;

The subject has an immediate ability to utilize force that is likely to cause death or serious injury.”

It is my opinion that all of these policy conditions were met when PFC#1 fired the .40mm impact projectile weapon at M.A.D.’s abdomen. Finally, as required by policy, perimeter units within the immediate area were advised that the projectile weapon was going to be deployed when the lead “reaction team” member called for “less lethal.” While the policy also called for notice to be provided to perimeter units after the projectile weapon had been deployed, I believe such notice was neither practical nor needed in these circumstances.

For the same reasons that the use of the impact projectile weapon was authorized in this case, MPO#2’s use of the ECW was both lawful and within policy. FCPD G.O. 540 in effect at

the time of this event referred to the ECW as a “Conducted Energy Weapon,”²³ while FCPD SOP 06-025 referred to the device as an “Electronic Control Weapon.”²⁴ At the time of this incident, G.O. 540.1 IV.G.3 mentioned neither warnings being provided to the subject nor an announcement being provided to others on the scene before CEW deployment. However, SOP 06-025 did provide that “[w]hen practical, a warning should be given to a person prior to activating the ECW unless doing so would place any person at risk.” In any event, warnings were provided to M.A.D., and an announcement was made by the “reaction team” by way of his calling for a “Taser” to be employed before MPO#2 deployed the ECW.

It should be noted that policy revisions to G.O. 540 now in place do require, when feasible, a warning to the subject, as well as an announcement to personnel on scene, that an electronic control weapon is about to be utilized.²⁵

²³ G.O. 540.1 IV.G.3.

²⁴ Electronic Control Weapon (ECW) has been used throughout this entire report as that is now the standard term used by most agencies and how the current FCPD G.O. characterizes the device.

²⁵ G.O. 540.16 IV. L. and M.

RECOMMENDATIONS

The factual recitation of this incident in the INCIDENT section of this reports allows the reader to discern that this was a very volatile and fast-moving situation where multiple lives were at risk. And while the previous CONCLUSIONS section finds that no one violated the law or FCPD policy by their actions, I put forth a recommendation that there be a FCPD policy requirement that more “less lethal” options in the form of Kinetic Energy Impact Systems and PepperBall systems be available to each patrol shift. And, further, that 100% of full-time SWAT members and at least 50% of supplemental SWAT members be equipped with either a multi-launch Kinetic Energy Impact System and/or a PepperBall system. This should prevent a situation from occurring where a SWAT member needs to “borrow” a less lethal device from a member of patrol, which is what occurred in this situation. Had that random patrol officer not been in possession of the .40mm impact weapon, the deployment by PFC#1 of less lethal force would not have even been an option for him. If additional officers (both regular patrol and SWAT) are equipped with these less-lethal options, a situation where a SWAT officer needs to “borrow” from a patrol officer is less likely to be repeated. To preserve the sanctity of life to the greatest extent possible in future cases, more less-lethal options should be available to as many officers as possible. To reiterate, the need to borrow the .40mm projectile weapon in this situation has led to this policy recommendation; it was not, however, a policy violation in the matter under review. In fact, Use of Force General Order 540.1 E.2., in effect on January 16, 2017, dictated that “Kinetic energy impact projectiles are to provide a less-lethal alternative when the use of deadly force is not immediately necessary. However, the use of kinetic energy impact projectiles may not always be appropriate and should not be considered if not readily available and a delay in action would be detrimental to the situation.” (emphasis added).

Chief ROESSLER is to be commended for having already expanded the .40mm impact munition program as recently as July 14, 2016. That recent expansion, however, only mandated that .40mm impact weapons be issued at district stations and to duty officers. If implemented, the current recommendation merely expands the availability of these weapons to an even greater number of officers on patrol and extends mandatory issue of them to a finite number of SWAT members. This is also consistent with FCPD Standard Operating Procedure (SOP) #13-048, entitled "Hostage/Barricaded Persons," which at IV.A.7 states "the immediate action team should have at least three officers with designated roles and a range of appropriate use of force options as delineated in General Order 540.1." The SOD SOP entitled "SWAT Team SOP Hostage/Barricade Response" in Section V. states that "The Reaction Team should deploy as a 4-6 person team and may also deploy as two separate teams depending on circumstances. They should possess lethal, less lethal, and hands-on capabilities." Equipping more (and a minimum number of) SWAT members with the .40mm impact projectile weapon system and/or a PepperBall system will insure that these SWAT "reaction teams" do, in fact, possess all of the use of force options set forth in the SOP during future operations.

My analysis of this incident required an extensive review of newly adopted G.O. 540. In addition to the specific recommendations set forth above, I set forth other general policy recommendations for G.O. 540 which I outlined in the Independent Police Auditor's Annual Report for 2017.

