

# Public Report

June 23, 2017: Use of Force Complaint



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## **INCIDENT**

On June 23, 2017, a 9-1-1 call placed by an Internal Revenue Service (hereinafter “IRS”) employee to the Fairfax County Department of Public Safety Communications alerted the call-taker that there was a potentially suicidal individual at a residential address in Fairfax County, Virginia. The 9-1-1 caller explained that the individual was currently on a phone call with an IRS representative, and that earlier during the call the individual had alluded to committing suicide. After being alerted by the IRS to this ongoing emergency, the Fairfax County Police Department (hereinafter “FCPD”) dispatched officers from the McLean District Police Station to the address to check on the welfare of its occupants.

Upon their arrival, Police Officer First Class #1 (hereinafter “PFC#1”) and Police Officer #1 (hereinafter “OFC#1”) were greeted at the front door by a young man who asked them to wait while he got his father, W.S. W.S. appeared at the front door still talking on the phone and when he saw the officers, spoke loudly into the phone something to the effect, “You called the [expletive] police?” or “I can’t believe you called the [expletive] police.”

W.S. then ended the phone call to speak to the police officers. When PFC#1 asked whether W.S. was contemplating suicide, W.S. acknowledged that he had made comments regarding suicide to the IRS and admitted that he still considered it to be an option at this point. Upon hearing this, PFC#1 asked whether W.S. would voluntarily consult with a mental health professional. When W.S. said he would not, PFC#1 decided to take W.S. into custody based on the authority of an Emergency Custody Order (hereinafter “ECO”).<sup>1</sup> He ordered W.S. to place his hands behind his back so that handcuffs could be put on him. When PFC#1 and OFC#1 reached for W.S.’s arms, W.S. began to resist by swinging his arms, and refused to put them behind his back. At this point, Police Officer First Class #2 (hereinafter “PFC#2”), who had arrived shortly after PFC#1 and OFC#1, approached to assist with getting control of W.S. As PFC#2 approached, W.S. moved his body and struck PFC#2 in the chest

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<sup>1</sup> As per the Code of Virginia, Title 37.2 § 808 G., “[a] law-enforcement officer who, based upon his observation or the reliable reports of others, has probable cause to believe that a person meets the criteria for emergency custody as stated in this section may take that person into custody and transport that person to an appropriate location to assess the need for hospitalization or treatment without prior authorization.”

with his lowered right shoulder. Despite the resistance, PFC#2 got control of W.S.'s upper body while PFC#1 and OFC#1 each held onto one of W.S.'s arms, and the three officers took W.S. to the ground to gain better control over him. PFC#1 indicated that he utilized the arm-bar takedown technique to get W.S. to the ground. After getting control of W.S. on the ground in the driveway, one or two of W.S.'s children came out of the house but were told to go back inside. Just before or while being taken to the ground by the officers, W.S. stated that he would now be willing to voluntarily speak to a mental health professional. However, because of the resistance demonstrated by W.S., he was arrested and transported to the Fairfax County Adult Detention Center (hereinafter "ADC"), where he was criminally charged with Assault on a Law Enforcement Officer and with Destruction of Property.<sup>2</sup>

On December 1, 2017, W.S.'s wife sent a letter to FCPD Chief Edwin C. Roessler Jr., complaining of her husband's arrest. A police department internal investigation was initiated, and on December 8, 2017, an email addressed to the Independent Police Auditor (hereinafter "IPA"), complaining about the force used on and the arrest of her husband, initiated the IPA monitoring and review of the FCPD internal investigation. In her complaint, W.S.'s wife indicated that the couple's three adult children were all at the home when this incident took place.

## **CRIMINAL INVESTIGATION**

The FCPD conducted only an administrative investigation into the three officers' use of force. No referral regarding their actions was made to the Office of the Commonwealth's Attorney.

As indicated previously, W.S. was charged with Assault of a Law Enforcement Officer in violation of Virginia Code § 18.2-57 and with Destruction of Property in violation of Virginia Code § 18.2-137. The prosecuting attorney for the Commonwealth's Attorney's Office requested that the FCPD refrain from interviewing any witnesses as part of its administrative investigation until the criminal case was resolved. The criminal case was resolved in March,

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<sup>2</sup> The Destruction of Property charge was based on the breaking of PFC#2's sunglasses when W.S. lowered his shoulder and struck PFC#2 in the chest.

2018. At that point, W.S. and his children were afforded the opportunity to provide a statement to the FCPD as part of the administrative investigation, but the offer was declined.

## **INTERNAL ADMINISTRATIVE INVESTIGATION**

The FCPD internal investigation into W.S.'s wife's complaint was conducted by personnel assigned to the FCPD McLean District Station. The three officers involved in the incident were interviewed, but W.S. and his children turned down the invitation for a police interview. The in-car video (hereinafter "ICV") captured during the transport of W.S. to the ADC was reviewed. No other video or audio recording of the incident was available.

In my opinion the FCPD McLean District Station investigation into this matter was complete, thorough, objective, impartial, and accurate.

The McLean District Station investigators concluded that PFC#1 complied with FCPD General Order (hereinafter "G.O.") 603.3 D., regarding interactions with an Emotionally Disturbed Person (hereinafter "EDP"). This G.O. allows officers to "take an adult EDP into custody for an emergency health evaluation if the officer has PROBABLE CAUSE, based upon the officer's own observations or the reliable reports of others, that any person:

- (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future,
  - (a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any,
  - OR
  - (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs,
- (ii) is in need of hospitalization or treatment,  
AND
- (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment."

Clearly, this FCPD policy allowed PFC#1 to take W.S. into custody for his own well-being.

On the issue of the officers' use of force, the investigators found that the three officers again complied with departmental policy. Specifically, the FCPD finding was that the officers complied with G.O. 540.4 in using the amount of force they used to arrest W.S. Having established the authority to take W.S. into custody, G.O. 540.4 allowed the officers to "use the amount of control that [was] objectively reasonable to overcome resistance in order to take lawful action." I agree with the FCPD's conclusion that the amount of force used was objectively reasonable, and will articulate my reasons in the following section.

## CONCLUSIONS

The officers involved in this unfortunate situation were initially trying to transport W.S. to a mental health facility for evaluation; and, they had the legal authority to do so.<sup>3</sup> Few would question an officer's decision to transport a person for medical evaluation when that person had just admitted to the officer that he was contemplating suicide. It is the use of force to accomplish that transport that generates the question in this situation.

FCPD General Order 540.0 on USE OF FORCE states that "[f]orce is to be used only to the extent it is objectively reasonable to defend oneself or another, **to control an individual** during an investigative or **mental detention**, or to lawfully effect an arrest."<sup>4</sup> It is noteworthy that force is clearly authorized by FCPD policy even when arrest is not the goal of taking custody of a person upon whom force is used. That was clearly the case in this situation. It was only after W.S. actively resisted and struck PFC#2 that the decision was made to arrest W.S. Therefore, the remaining question is whether the force used on W.S. was objectively reasonable.

FCPD General Order 540.1, Use of Force- Definitions, Section I, defines the term "Objectively Reasonable" as "[t]he level of force that is appropriate when analyzed from the perspective of a reasonable officer possessing the same information and faced with the same set of circumstances. Objective reasonableness is not analyzed with the benefit of hindsight, but rather takes into account the fact that officers must make rapid and necessary decisions regarding the amount of force to use in tense, uncertain, and rapidly evolving situations." Furthermore, departmental policy dictates that "[f]orce should be based upon the totality of the circumstances

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<sup>3</sup> *Supra*, note 1.

<sup>4</sup> Emphasis added.

known by the officer at the time force is applied, without regard to the officer's underlying intent or motivation, and weighs the actions of the officer against their responsibility to protect public safety as well as the individual's civil liberties. Force shall not be used unless it is reasonably necessary in view of the circumstances confronting the officer.”<sup>5</sup>

In more specific language, FCPD policy clearly authorizes the amount of force used under the circumstances confronting the officers in this case. One applicable FCPD General Order defines Passive Resistance as “[w]here an individual poses no immediate threat to an officer, but is not complying with lawful orders and is taking minimal action to prevent an officer from taking lawful action;”<sup>6</sup> and Active Resistance as “[w]here an individual’s verbal and/or physical actions are intended to prevent an officer from taking lawful action, but are not intended to harm the officer.”<sup>7</sup> Police Department G.O. 540.4 II. A. goes on to list various “less-lethal force”<sup>8</sup> options available to gain compliance from individuals offering these types of resistance. These options include “empty-hand tactics, such as strikes, kicks, or *takedowns*.”<sup>9</sup> Finally, separate (but equally applicable) policy provisions state that “[e]mpty-hand tactics, such as strikes, kicks or takedowns, are considered less-lethal force”<sup>10</sup> and that such empty-hand tactics may be effective “[w]hen it is objectively reasonable to overcome a passive resisting person to effect a lawful arrest,”<sup>11</sup> when “[d]efending oneself or another from injury or assault,”<sup>12</sup> or when “[e]stablishing custody for a temporary detention order.”<sup>13</sup>

Much of these FCPD general orders are based on the United States Supreme Court’s Graham v. Connor decision<sup>14</sup> wherein the Supreme Court recognized that the Fourth Amendment to the United States Constitution<sup>15</sup> allows officers to use a reasonable amount of force to effect

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<sup>5</sup> FCPD G.O. 540.0 II.

<sup>6</sup> FCPD G.O. 540.4 I. A. 1.

<sup>7</sup> FCPD G.O. 540.4 I. A. 2.

<sup>8</sup> Defined in FCPD G.O. as “[a]ny level of force not designed to cause death or serious injury that is reasonably necessary to gain compliance by individuals offering resistance.”

<sup>9</sup> FCPD G.O. 540.4 II. A. 2. a. (emphasis added).

<sup>10</sup> G.O. 540.13 I. A.

<sup>11</sup> G.O. 540.13 I. B. 1.

<sup>12</sup> G.O. 540.13 I. B. 3.

<sup>13</sup> G.O. 540.13 I. B. 4.

<sup>14</sup> 490 U.S. 386 (1989).

<sup>15</sup> 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.



seizures of people. In the Graham case, the Supreme Court articulated that law enforcement officers must be judged based on what officers knew (or reasonably believed) at the time they acted, and not with the benefit of 20/20 hindsight. And, relevant language from the opinion includes the recognition that what “may later seem unnecessary in the peace of a judge’s chambers”<sup>16</sup> does not necessarily violate the Fourth Amendment. Clearly, both departmental policy and legal precedent allowed for force to be used in the incident under review, so long as the amount of force was reasonable. The officers in this incident were dealing with a suicidal individual who was actively resisting their attempt to take him into custody, making the limited amount of force used to establish control of W.S. reasonable based on what the officers knew at the time.

## **RECOMMENDATIONS**

While I agree with the FCPD finding that the officers involved in this situation complied with all relevant laws and policies, I also agree with an observation made by the commander of the McLean District Station after he reviewed the results of his district station’s investigation into the matter. In his memo to the commander of the FCPD Patrol Bureau II, documenting the results of his station’s investigation, the commander acknowledged that improvement is always possible. In the future, the commander recommends for his staff to at least consider, when dealing with an EDP, whether a Crisis Intervention Trained (hereinafter “CIT”) officer is available to respond. None of the three officers involved in this event were CIT at the time; however, one of them has since received the training. The commander also suggests that responding and investigating officers should seek additional information from family members and other witnesses, if time allows, about past behavior when dealing with a person in crisis. Finally, if time permits, the station commander puts forth that officers should request a Mobile Crisis Unit to engage an EDP and possibly assist with obtaining a voluntary commitment from the individual.

These recommendations are consistent with and will only enhance current departmental policy. General Order 603.3 I. already dictates that “[i]t is the policy of the Department that non-arrest resolution of cases involving emotionally disturbed persons (EDP) will be attempted whenever possible. Ideally, contacts with EDPs exhibiting symptoms of a mental illness will

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<sup>16</sup> *Supra*, note 14, at 396 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2<sup>nd</sup> Cir. 1973)).

result in a referral to appropriate facilities on a voluntary basis. When public safety demands otherwise, involuntary detentions must be resorted to; however, the placing of criminal charges for the purpose of taking such persons into custody is to be avoided if possible.” The officers involved in this situation, though not CIT officers, followed precisely this mandated progression. Unfortunately, W.S. did not voluntarily submit to a referral to a medical facility, nor did he allow the officers to take him into custody for the non-criminal ECO before physically resisting. At that point, diversion from jail was no longer an option. General Order 603.3 III. E. 1. clearly states that “EDPs who have committed a *non-violent misdemeanor offense* may be referred to the Jail Diversion program at the Woodburn Center in lieu of arrest.”<sup>17</sup> When the officers ultimately gained control of W.S., they had probable cause to believe W.S. had committed a violent felony<sup>18</sup> rather than a non-violent misdemeanor, thus eliminating the possibility of jail diversion.

Separate from the preference for jail diversion, police department policy addresses the notion of de-escalation and the preference for its use to reduce or eliminate the need for officers to use force. Specifically, General Order 540.2 I. A. states that “[d]e-escalation is the result of a combination of communication, tact, empathy, instinct, and sound officer safety tactics. The ultimate goal is to help achieve a positive outcome by reducing the need for force.” Furthermore, General Order 540.2 I. B. adds that “[w]hen possible, officers should seek to utilize de-escalation strategies to prevent situations from deteriorating to the point where they would need to use force. Officers should attempt to gain voluntary compliance and reduce the level of force required in a situation through verbal communication efforts. When force is applied, officers will adjust the amount of force used to overcome an individual’s resistance and to gain control.” The officers in this situation attempted to gain voluntary compliance from W.S., to no avail. It is possible, but certainly not definite, that the presence of a CIT officer or a Mobile Crisis Unit may have produced a different outcome in this matter. Absent either of those, additional information regarding W.S.’s history may have proven helpful to defuse the situation. Consequently, I join the commander of the McLean District Station in recommending that CIT officers or a Mobile Crisis Unit be sought, whenever possible, and that responding and

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<sup>17</sup> Emphasis added.

<sup>18</sup> VA Code § 18.2-57 C., in relevant part, mandates that “if any person commits an assault or an assault and battery against another knowing or having reason to know that such other person is a . . . law enforcement officer . . . engaged in the performance of his public duties anywhere in the Commonwealth, such person is guilty of a Class 6 *felony*.” (emphasis added).

investigating officers seek additional information from family members and other witnesses about past behavior to best handle situations like this in the future.

