

# Public Report

July 26, 2018: Use of Force Complaint



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## **INCIDENT**

On July 26, 2018, Fairfax County Police Department (hereinafter “FCPD”) officers assigned to the McLean District Station and its Neighborhood Patrol Unit (hereinafter “NPU”) arrested an individual with the initials J.N. (hereinafter “JN”) based on two warrants authorizing his arrest. The arrest occurred in the Falls Church area of Fairfax County.

Second Lieutenant #1 (hereinafter 2LT#1”) developed a plan for the arrest, taking into consideration existing FCPD documentation that reflected JN had several prior encounters with the FCPD, and had attempted to flee or otherwise resist officers’ efforts on prior occasions. Officers confirmed that JN was in a townhome where he resided with his mother. At approximately 8:30 p.m., 2LT#1, Police Officer First Class #1 (hereinafter “PFC#1”), and Police Officer First Class #2 (hereinafter “PFC#2”) went to the front door, while three other officers, including Police Officer First Class #3 (hereinafter “PFC#3), went to the back of the residence.

### **The following is how the FCPD officers involved described the incident:**

When JN’s mother opened the front door after the officers there knocked and announced their presence, she was told they had a warrant for her son and that they would be coming in to execute the arrest. At this time, one of the officers behind the townhome observed JN climb out of a second-floor window and drop from it into an adjacent townhome’s backyard. When Police Officer First Class #4 (hereinafter “PFC#4”) announced this over his police radio, 2LT#1, PFC#1, and PFC#2 tried to race through the townhome to the backyard, but were unable to get out through the rear sliding glass door. They went back through the townhome and out the front door to find JN. PFC#4 yelled at JN to stop, but JN was able to get into his own backyard and back into the residence through the rear sliding glass door. PFC#1 pulled down part of the backyard wooden fence in an effort to make contact with JN, but JN was able to retreat inside before contact was made. At the same time, PFC#3 was able to get over the backyard fence and get inside through the same sliding glass door JN had entered. PFC#3 caught up to and grabbed JN, and took him down onto a couch in the living room. 2LT#1 re-entered the residence through the front door and joined the struggle taking place on the couch. PFC#3 gained control of JN’s right arm, but JN continued to try to break free from his grasp.

As the struggle to control and handcuff JN continued, officers gave verbal commands to JN while he and at least one of his family members in the home shouted expletives at the officers. Someone yelled for the officers to get off of JN; and, simultaneously, JN's younger brother (later determined to be twelve years old) approached the officers and appeared to be intent on helping his brother. PFC#3 quickly reacted and used his right hand to push the brother away from the arrest and ordered him to stay back. At this point, PFC#1 arrived inside the residence and began to assist with securing JN. The three officers were then able to handcuff JN. JN was stood up and placed against a wall, with PFC#3 putting a hand near JN's collarbone to keep him there.

While secured in handcuffs, JN continued to shout profanities at the officers, and continued to flail his body and head. The officers decided to escort him outside to get away from the hectic scene within the townhome. Because he continued to flail his body and his head, PFC#3 grabbed JN's hair to control his head. As the officers escorted JN out, he continued to thrash his body, causing items in the home to be damaged by his actions.

Once outside PFC#3 placed JN against a police cruiser so that he could be searched.<sup>1</sup> Following the search, the officers placed JN in the rear of PFC#1's police vehicle. JN advised that his shoulder had been injured during the scuffle with the officers and requested to be examined by medical personnel. Fairfax County Fire and Rescue personnel responded.

PFC#1 thereafter transported JN to the Fairfax County Adult Detention Center (hereinafter "ADC"). During the transport to the ADC, the in-car video camera recorded JN telling PFC#1 that PFC#3 choked him during the arrest and had "assaulted" his younger brother.

**The following is how JN and his mother<sup>2</sup> described the incident:**

Prior to his arrest on July 26, 2018, JN was upstairs in the townhome when officers knocked on the door and explained to his mother that they had an arrest warrant for JN. Although JN's mother allowed the officers to enter, the officers came in with their guns already

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<sup>1</sup> The United States Supreme Court case Chimel v. California, 395 U.S. 752 (1969), and its progeny, allow law enforcement officers to search arrestees incident to their arrest without a search warrant.

<sup>2</sup> Their accounts differ in some respects, most notably being that JN's mother recounted that JN did initially flee and make it outside before re-entering the townhome and being arrested there. JN did not acknowledge leaving the house after the officers arrived.

drawn and acted "unprofessional and aggressive."<sup>3</sup> Officers “tackled and bashed”<sup>4</sup> JN onto a couch. During a struggle on the couch, JN’s younger brother was pushed away by PFC#3, constituting an assault on him. After JN was handcuffed, an officer’s knee was pressed on the back of his neck. While acknowledging that the officers gave him verbal commands during the encounter, JN denied resisting.

After being handcuffed, JN was placed against a wall. Despite being compliant with the officers, PFC#3 put a hand around JN’s neck and choked him. Only then did JN become aggressive towards the officers. He was then dragged from the townhome, which included PFC#3 unnecessarily grabbing him by his hair.

After his arrest, JN contacted the FCPD’s Internal Affairs Bureau (hereinafter “IAB”) to lodge a complaint regarding the force used during the arrest, prompting this review of IAB’s internal investigation. He also complained about a 2014 Possession of Cocaine charge against him following his arrest by PFC#3; and, about a 2016 incident in which another FCPD officer arrested him but then released him because the officer mistakenly thought JN was someone else.<sup>5</sup>

## **CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION**

The FCPD conducted only an administrative investigation into the FCPD officers’ use of force during this incident. No referral was made to the Office of the Commonwealth’s Attorney. After arriving at the ADC, a warrant was obtained charging JN with Obstruction of Justice<sup>6</sup> based on what occurred during his arrest. This warrant was in addition to the two previously outstanding arrest warrants.

## **INTERNAL ADMINISTRATIVE INVESTIGATION**

The internal administrative investigation into this incident included: interviews of JN and his mother; interviews of the officers involved in the use of force; the review of in-car camera

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<sup>3</sup> FCPD Internal Affairs Bureau (hereinafter “IAB”) interview of JN conducted on August 1, 2018.

<sup>4</sup> *Id.*

<sup>5</sup> Neither of the earlier allegations included a use of force, and both predated the establishment of both the Office of the Independent Police Auditor and the Police Civilian Review Panel.

<sup>6</sup> Code of Virginia § 18.2-460.

footage recorded following JN's arrest; and, the review of cellphone video footage taken by JN's mother. The other allegations made by JN following this incident were also investigated by the FCPD's IAB, but will not be addressed in this report.<sup>7</sup> Based on my review of this investigation, my opinion is that it was complete, thorough, objective, impartial, and accurate.

The FCPD concluded that the officers' use of force on JN and on his brother complied with departmental policy, specifically FCPD General Order (hereinafter "G.O.") 540, *et seq.* The FCPD finding was that the officers complied with G.O. 540 when arresting JN because the force they used was objectively reasonable.

## CONCLUSIONS

The United States Supreme Court, in its Graham v. Connor decision,<sup>8</sup> pronounced 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."<sup>9</sup> In that case, the Court also determined that such uses of force by law enforcement officers in this country are to be analyzed under the Fourth Amendment.<sup>10</sup> Finally, to be lawful under that Fourth Amendment standard, an officer's use of force must be objectively reasonable. When determining objective reasonableness, the Court pointed out that hindsight could not be considered, and that allowance must be made "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."<sup>11</sup>

FCPD policy on the use of force closely parallels the Graham opinion. FCPD G.O. 540.0, in relevant part, instructs 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. Force should be based upon the totality of the circumstances 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

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<sup>7</sup> *Supra*, note 5.

<sup>8</sup> 490 U.S. 386 (1989).

<sup>9</sup> *Id.* at 396.

<sup>10</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.

<sup>11</sup> *Supra*, note 8, at 397.

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.”

The departmental general orders go on to define “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.”<sup>12</sup>

The question thus becomes, under both the relevant legal standard and departmental policy, whether the amount of force used on JN and on his brother was objectively reasonable.

The situation leading up to and during the arrest of JN was certainly “tense, uncertain, and rapidly evolving.”<sup>13</sup> The officers were at the townhome to execute outstanding arrest warrants on an individual known to them to have fled or resisted during previous encounters with the police. Shortly after officers arrived, JN leapt from a second-floor window and briefly ran through an adjoining backyard before re-entering his residence. During the struggle to arrest JN, PFC#3 perceived JN's brother to be approaching to interfere, possibly by assaulting 2LT#1. Pushing him away with an open hand was objectively reasonable under the circumstances.

The force used on JN was also objectively reasonable. Officers were arresting him based on outstanding arrest warrants. He initially fled and physically resisted<sup>14</sup> when he was taken down onto the couch in the townhome. He tried to prevent the officers from handcuffing him; and after being handcuffed, continued to flail his body and head while yelling and cursing at the officers. The officers escorted JN out of the residence as soon as they could to get out of the chaotic environment. When they got JN outside and into a police vehicle, the situation became much less volatile.

FCPD G.O. 540.4 II. dictates that “[o]fficers must only use the amount of control that is objectively reasonable to overcome resistance in order to take lawful action.” That same general order allows for “less-lethal force”<sup>15</sup> to “gain compliance from individuals offering resistance.”<sup>16</sup> Among the less-lethal options contemplated for this purpose is the use of “empty-hand tactics,

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<sup>12</sup> FCPD G.O. 540.1 I. L.

<sup>13</sup> *Supra*, note 11.

<sup>14</sup> JN was engaged in active resistance throughout the incident. See GLOSSARY for definition.

<sup>15</sup> See GLOSSARY for definition.

<sup>16</sup> FCPD G.O. 540.4 II. 2.

such as strikes, kicks, or takedowns.”<sup>17</sup> PFC#3 acknowledged taking JN down onto the couch, putting his hand near his collarbone to keep him against the wall, and intentionally grabbing his hair to control his movements. He denied choking JN, and no other officer observed JN being choked. Also, when examined by medical personnel, JN did not indicate that he had been choked. Although other “less-lethal” options<sup>18</sup> would have been permitted under FCPD policy, none were deployed. The force that was used was objectively reasonable under the circumstances.

## **RECOMMENDATIONS**

FCPD policy thoroughly addresses the possibility of its officers using force. It specifically allows for a reasonable amount of force to be used in order to effect an arrest,<sup>19</sup> and to overcome individuals offering resistance.<sup>20</sup> The FCPD policies in place also provide its officers with extensive guidance on the types of force that will typically be considered objectively reasonable in different situations.<sup>21</sup> As recognized earlier, these FCPD policy provisions align closely with the constitutional standards on the use of force. Following this incident, the FCPD analyzed the actions of its officers by examining their actions against the policies in place. I agree with the conclusions reached following that investigation. Therefore, I have no recommendations to make in relation to the officers’ use of force based on this incident review.

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<sup>17</sup> *Id.*

<sup>18</sup> Those listed in FCPD G.O. 540.4 II. 2 b.-e. include: impact weapons, oleoresin capsicum spray, electronic control weapons, and pepperball systems. See GLOSSARY.

<sup>19</sup> FCPD G.O. 540.6 I. A. 1.

<sup>20</sup> FCPD G.O. 540.4 II. 2.

<sup>21</sup> For example, FCPD G.O. 540.6 I. A. 1. provides that less-lethal force “may be effective . . . to [e]ffect an investigative stop or arrest.” Additionally, FCPD G.O. 540.4 II. A. 2. explicitly identifies “[e]mpty-hand tactics, such as strikes, kicks, or takedowns” as less-lethal force.

## **APPENDIX: GLOSSARY OF TERMS**

**FCPD** – Fairfax County Police Department

**FCSO** – Fairfax County Sheriff's Office

**G.O.** – General Order

**SOP** – Standard Operating Procedure

**UOF** – Use of Force

**BWC** – Body-worn Camera

**ICV** – In-Car Video

**ADC** – Adult Detention Center

**CWA** – Commonwealth's Attorney

**Force** – defined in Fairfax County Police Department General Order 540.1 I. G. as any physical strike or instrumental contact with an individual, or any significant physical contact that restricts an individual's movement. Force does not include escorting or handcuffing an individual who is exhibiting minimal or no resistance. Merely placing an individual in handcuffs as a restraint in arrest or transport activities, simple presence of officers or patrol dogs, or police issuance of tactical commands does not constitute a reportable action.

**Less-Lethal Force** – defined in Fairfax County Police Department General Order 540.1 I. I. as any level of force not designed to cause death or serious injuries.

**Deadly Force** – defined in Fairfax County Police Department General Order 540.1 I. B. as any level of force that is likely to cause death or serious injury.

**Serious Injury** – defined in Fairfax County Police Department General Order 540.1 I. Q. as an injury which creates a substantial risk of death, disfigurement, prolonged hospitalization, impairment of the functions of any bodily organ or limb, or any injury that medical personnel deem to be potentially life-threatening.

**ECW** – Electronic Control Weapon; considered less-lethal force. Defined in defined in Fairfax County Police Department General Order 540.1 I. C. as a device which disrupts the sensory and motor nervous system of an individual by deploying battery-powered electrical energy sufficient to cause sensory and neuromuscular incapacitation. Often referred to as a Taser.

**Empty-Hand Tactics** – considered less-lethal force. Described in Fairfax County Police Department General Order 540.4 II. A. 2. as including strikes, kicks, and takedowns.

**OC** – Oleoresin Capsicum; considered less-lethal force; often referred to as “pepper spray.”

**PepperBall System** – defined in Fairfax County Police Department General Order 540.1 I. N. as a high-pressure air launcher that delivers projectiles from a distance. Typically, the projectile contains PAVA powder which has similar characteristics to Oleoresin Capsicum. Considered less-lethal force.

**Passive Resistance** – defined in Fairfax County Police Department General Order 540.4 I. A. 1. as where an individual poses no immediate threat to an officer but is not complying with lawful orders and is taking minimal physical action to prevent an officer from taking lawful action.

**Active Resistance** – defined in Fairfax County Police Department General Order 540.4 I. A. 2. as where 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.

**Aggressive Resistance** – defined in Fairfax County Police Department General Order 540.4 I. A. 3. as where an individual displays the intent to cause injury, serious injury, or death to others, an officer, or themselves and prevents the officer from taking lawful action.

