

Public Report

July 7, 2022: Officer-Involved
Shooting; Deployments of Electronic
Control Weapons
IPA-22-08



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Independent Police Auditor

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A Public Report by the Fairfax County
Independent Police Auditor

Publication Date: May 1, 2024



A Fairfax County, Va., Publication

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NOTE TO THE READER: The Fairfax County Police Department revised its policy on use of force shortly after this incident occurred. That revised General Order (General Order 540) took effect on August 12, 2022. The force used during this incident will be analyzed using the policy provisions that were in effect on July 7, 2022 (i.e., General Order 540, et seq., effective March 1, 2021).

INCIDENT

At approximately 7:11 p.m. on July 7, 2022, the Fairfax County Police Department (hereinafter “FCPD”) received a call for service for a person experiencing a mental health crisis in a home on Arbor Lane in McLean, Virginia. Officers from the FCPD’s McLean district station were dispatched to the call; a designated “co-responder” unit¹ also responded to the location. The two-person co-responder unit consisted of a Master Police Officer (hereinafter “MPO#1”) with Crisis Intervention Team (hereinafter “CIT”) training and a clinician from the Sharon Bulova Center for Community Health in Merrifield. They arrived at the home at 7:26 p.m. At that time, the person in crisis was no longer there. The responding officers looked for the individual at the home and in the neighborhood for approximately twenty minutes, but they did not locate him. Before leaving the call at approximately 8:00 p.m., the officers learned from the caller that she was a family friend who had been asked by the family to check on the individual in crisis (hereinafter identified by his initials, “A.L.”). The friend advised that A.L. asked her to call 9-1-1 for him. The friend also told the officers that A.L.’s sister was on her way to the home.

At 8:34 p.m., A.L.’s sister’s boyfriend placed a second call for service requesting the police to respond back to the residence. He advised that A.L. had returned home, was still in crisis, and was throwing and breaking objects inside the home. Police Officer First Class #1 (hereinafter “PFC#1”), Police Officer First Class #2 (hereinafter “PFC#2), and Police Officer First Class #3 (hereinafter “PFC#3”) responded to this second call and arrived between 8:45 and

¹ The Fairfax County Co-Responder Program is a partnership between the [Fairfax County Police Department | Police](#) and the [Fairfax-Falls Church Community Services Board | Community Services Board \(fairfaxcounty.gov\)](#). It pairs a Crisis Intervention Team (CIT) trained police officer with a CSB Crisis Intervention Specialist to respond to public safety calls that are related to behavioral health issues. [Co-Responder Program | Community Services Board \(fairfaxcounty.gov\)](#), accessed on October 6, 2023.

8:48 p.m.² After leaving the first call for service, the co-responder unit returned to the Sharon Bulova Center for Community Health in Merrifield and did not respond to the second call.³ All three of the officers who did respond to the second call for service were trained in CIT.

A.L.'s sister and her boyfriend were outside of the residence when the officers arrived. They spoke for seven minutes, with the officers explaining that they would ask A.L. to voluntarily seek treatment. They also discussed the possibility of A.L.'s sister seeking an emergency custody order⁴ if A.L. refused to get treatment voluntarily.

At 8:52:50, PFC#2 entered the home, PFC#3 remained near the doorway, and PFC#1 stood on the landing just outside the residence's front door. After five seconds, A.L. entered the front room, holding a wine bottle in his right hand and a wooden tribal mask in his left hand. He twice slammed the wine bottle against a table, but it did not break. The officers calmly reminded A.L. that he had asked for them to be called, and repeatedly told him to "put it down." A.L. threw the wooden mask in the direction of PFC#2 at 8:53:11. PFC#2 immediately deployed his electronic control weapon (hereinafter "ECW" and commonly referred to as a taser) two times within two seconds. The ECW deployments had no effect.

Almost immediately after the ECW attempts, A.L, now gripping the wine bottle with both hands, moved quickly toward PFC#3. PFC#1 yelled for A.L. to "Back up!," and PFC#3 deployed his ECW at 8:53:15. It did not prevent A.L. from continuing to approach, but he did drop the wine bottle. At 8:53:16, PFC#1 fired two rounds from his handgun at A.L., followed by two more shots at 8:53:17. Also at 8:53:17, A.L. collided with PFC#3, causing them both to fall.

² PFC#1 and PFC#3 had also responded to the earlier call for service. PFC#3 was accompanied during both calls by a pre-hire academy recruit. The recruit did not enter the residence or interact with A.L. during either call.

³ At 8:40 p.m., MPO#1 sent a message over the computer-aided dispatch ("CAD") system advising that "we are back at the center," meaning the Sharon Bulova Center for Community Health in Merrifield. They were not requested to return.

⁴ Va. Code § 37.2-808 provides, in relevant portion, that "[a]ny magistrate shall issue, upon the sworn petition of any responsible person, treating physician, or upon his own motion, or a court may issue pursuant to § 19.2-271.6, an emergency custody order when he has probable cause to believe 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. Any emergency custody order entered pursuant to this section shall provide for the disclosure of medical records pursuant to § 37.2-804.2. This subsection shall not preclude any other disclosures as required or permitted by law.

At 8:53:20, PFC#1 fired his fifth and final shot at A.L. while A.L. was on top of and struggling with PFC#3. A.L. was pronounced deceased at the scene.

RELEASE OF INVOLVED OFFICER’S IDENTITY

FCPD Chief Kevin Davis complied with departmental policy directive—to release the name(s) of officers involved in an officer involved shooting within 10 days of the incident—by releasing a statement and PFC#1’s identity on July 17, 2022.⁵ He also released the body-worn camera (hereinafter “BWC”) footage within thirty days of the incident on August 4, 2022.⁶

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted both a criminal and an administrative investigation into the actions of the officers involved in the shooting of A.L. The results of the criminal investigation were provided to the Office of the Commonwealth’s Attorney. Commonwealth Attorney Steve T. Descano issued a report on April 5, 2024, in which he concluded that none of the three officers who used force on A.L. violated any criminal laws.⁷

INTERNAL ADMINISTRATIVE INVESTIGATION

The FCPD’s Internal Affairs Bureau (hereinafter “IAB”) conducted the internal administrative investigation into PFC#1’s shooting of A.L., as well as PFC#2’s and PFC#3’s uses of their ECWs against A.L. That internal investigation into this incident was, in my opinion, complete, thorough, objective, impartial, and accurate.

The criminal and administrative investigations into this incident included: a review of all Incident Reports prepared; a full crime scene examination, authorized by a search warrant for the residence where the incident occurred; interviews of all officers and civilians who made or responded to both calls for service; an interview of and a full written review prepared by a

⁵ [Officer-Involved Shooting at McLean Home | Fairfax County Police Department News \(wordpress.com\)](#)

⁶ *Id.*

⁷ [Report on July 7, 2022, Officer Involved Shooting](#)

departmental subject matter expert in the use of force and deadly force; review of Fairfax County Department of Public Safety Communications data, including computer-aided dispatch information and radio communications from the McLean police district station and Fairfax County Fire and Rescue dispatch; enhancement and review of all BWC footage captured during the incident; and, the review of records relating to training completed by PFC#1, PFC#2, and PFC#3.

The FCPD concluded that PFC#2's two deployments and PFC#3's one deployment of their ECWs were within departmental policy, specifically FCPD General Order (hereinafter "G.O.") 540.6. The FCPD also concluded that PFC#1 complied with departmental policy, specifically G.O. 540.8, when he used deadly force against A.L. The FCPD did determine, however, that PFC#1 violated two policy provisions separate from his use of deadly force. I agree with the FCPD's conclusions and will articulate my reasons in the following section of this report.

CONCLUSIONS

The FCPD examined the uses of force during this incident and determined that each of them was lawful and allowed by departmental policy. I believe the conclusions reached by the department were correct in this case, although I acknowledge they may be difficult to accept.

The death of A.L. was unquestionably tragic. But that does not mean that the force—even the deadly force—used during the incident was legally unreasonable. As Graham v. Connor⁸ instructs, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, *rather than with the 20/20 vision of hindsight.*"⁹ Still, it is important to explore the possibility that this situation could have ended differently had the co-responder unit been summoned back to the residence to handle the second call for service. In fact, the FCPD did examine, as part of its internal investigation, why that unit did not return.

One of the reasons the co-responder unit did not return for the second call for service was that, at the time of the second call for service, the two-person co-response team had returned to the Sharon Bulova Center for Community Health in Merrifield—approximately thirty minutes

⁸ 490 U.S. 386 (1989).

⁹ *Id.* at 396 (*emphasis added*).

away from the location. Also, all three officers who responded to the second call for service were trained in CIT and in handling situations involving people in crisis. Finally, neither MPO#1, nor the clinician who responded to the first call (who was a Crisis Intervention Specialist and a Licensed Clinical Social Worker), thought that A.L. posed a danger to himself or others based on telephone conversations they had with the first caller and with A.L.'s mother following the first call.

Hopefully, concerns over the limited availability of co-responder units will diminish as Fairfax County increases its number and presence of co-responder units. Starting in June 2023, the County implemented changes to its behavioral health crisis response as required by a new state law,¹⁰ and is currently expanding its co-responder program.¹¹ Whether the co-responder unit should have returned for the second call on July 7, 2022, is subject to debate. The decision was made to not summon the unit back; and the analysis into whether the force used during this incident was reasonable (from a legal and policy standpoint) must be done without using the 20/20 vision of hindsight.

Federal Law

In its landmark Graham v. Connor opinion,¹² the United States Supreme Court analyzed the use of force by law enforcement officers in this country and recognized 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.”¹³ In the same opinion, Chief Justice William Rehnquist recognized that the standard by which an officer’s actions in these situations must be judged is found in the Fourth Amendment to the United States Constitution.¹⁴ Because it is the Fourth Amendment standard that is used, an officer’s use of force must be objectively reasonable to be lawful. The Supreme Court has also

¹⁰ See [Marcus Alert | Community Services Board \(fairfaxcounty.gov\)](#) and [State Plan for the Implementation of the Marcus-Davis Peters Act](#).

¹¹ See [Safety and Security Committee Meeting \(fairfaxcounty.gov\)](#), presented to the Fairfax County Board of Supervisors during the August 1, 2023, Safety and Security Committee meeting.

¹² *Supra*, note 8.

¹³ *Id.* at 397.

¹⁴ 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.

pronounced that the use of deadly force¹⁵ is objectively reasonable only when an “officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others.”¹⁶ Finally, probable cause is based on the “totality of the circumstances,”¹⁷ known to the officer at the time, and the probable cause [to believe] standard is met when there is a “fair probability”¹⁸ that the belief is accurate.

State Law

Virginia state law provides guidance similar to the federal law to law enforcement officers in the Commonwealth. First, Virginia Code § 19.2-83.3 defines "excessive force" as “any force that is objectively unreasonable given the totality of the circumstances, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.”¹⁹

Specific to the use of deadly force, Virginia law prohibits the use of “deadly force against a person unless:

1. The law-enforcement officer reasonably believes that deadly force is immediately necessary to protect the law-enforcement officer or another person, other than the subject of the use of deadly force, from the threat of serious bodily injury or death;
2. If feasible, the law-enforcement officer has provided a warning to the subject of the deadly force that he will use deadly force;
3. The law-enforcement officer's actions are reasonable, given the totality of the circumstances; and
4. All other options have been exhausted or do not reasonably lend themselves to the circumstances.”²⁰

Additionally, state law provides that “[i]n determining if a law-enforcement officer's use of deadly force is proper, the following factors shall be considered:

1. The reasonableness of the law-enforcement officer's belief and actions from the perspective of a reasonable law-enforcement officer on the scene at the time of the incident; and

¹⁵ See GLOSSARY.

¹⁶ Tennessee v. Garner, 471 U.S. 1, at p. 4 (1985).

¹⁷ Illinois v. Gates, 462 U.S. 213 (1983).

¹⁸ *Id.*

¹⁹ These three factors were articulated in Graham v. Connor, *supra*, note 8, and are often referred to as the Graham factors.

²⁰ Va. Code § 19.2-85 A.

2. The totality of the circumstances, including (i) the amount of time available to the law-enforcement officer to make a decision; (ii) whether the subject of the use of deadly force (a) possessed or appeared to possess a deadly weapon and (b) refused to comply with the law-enforcement officer's lawful order to surrender an object believed to be a deadly weapon prior to the law-enforcement officer using deadly force; (iii) whether the law-enforcement officer engaged in de-escalation measures prior to the use of deadly force, including taking cover, waiting for backup, trying to calm the subject prior to the use of force, or using non-deadly force prior to the use of deadly force; (iv) whether any conduct by the law-enforcement officer prior to the use of deadly force intentionally increased the risk of a confrontation resulting in deadly force being used; and (v) the seriousness of the suspected crime.”²¹

FCPD Policy

Likewise, the FCPD’s policy regarding the use of force—up to and including deadly force—mirrors the pronouncements provided by the Supreme Court—in its Graham v. Connor and Tennessee v. Garner opinions—and Virginia state law. FCPD General Order 540.0 on USE OF FORCE, effective March 1, 2021, states, in part: “Force 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 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.”²² FCPD G.O. 540.1 defines “Objectively Reasonable” as follows: “The 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.”²³ Finally, FCPD policy provides that “[d]eadly force shall not be used unless it is objectively reasonable. The officer must believe, based on the totality of the circumstances known at the time, that deadly force is immediately necessary to protect the officer or another person, other than the subject of the use of deadly force, from the threat of

²¹ Va. Code § 19.2-85 B.

²² FCPD G.O. 540.0 II.

²³ FCPD G.O. 540.1 I. M.

serious bodily injury or death and that all other force options to control the individual(s) are not feasible, or have already proven to be ineffective.²⁴

PFC#2's ECW Deployments

The situation under review was certainly tense and uncertain, and it rapidly evolved after the officers entered the house to try to convince A.L. to voluntarily seek help. Within seconds, he appeared, holding a wooden tribal mask and a wine bottle. After throwing the large mask at PFC#2, PFC#2 deployed his ECW two times in rapid succession. His ECW deployments were reasonable.

In addition to the guidance laid out above, FCPD policy provides that “less-lethal” force options (such as strikes and ECWs) can be used when they are “reasonably necessary to gain compliance by individuals offering resistance.”²⁵ FCPD G.O. 540.4 I. A. 3. defines “aggressive resistance” as “[w]here 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.”²⁶ The officers involved in this incident were trying to get A.L. to voluntarily go for treatment, but they had the authority to defend themselves when A.L. immediately became resistant and threw the wooden mask at PFC#2. A.L. may have been in crisis, but his actions constituted aggressive resistance. PFC#2 attempted to gain A.L.’s compliance by using “less-lethal” force on him. The ECW was an objectively reasonable “less-lethal” force option and was therefore allowed by both law and policy.

PFC#3's ECW Deployment

When PFC#2's ECW deployments did not deter A.L., he continued to be aggressive. No longer holding the mask, he gripped the wine bottle with both hands and quickly approached PFC#3. PFC#3 responded by deploying his ECW. During PFC#3's interviews with FCPD investigators,²⁷ PFC#3 advised that after A.L. threw the mask in PFC#2's direction, he considered the wine bottle in A.L.'s hands to be a dangerous weapon. At this point, A.L.

²⁴ FCPD G.O. 540.8 I. A.

²⁵ FCPD G.O. 540.4 II. A. 2.

²⁶ See GLOSSARY for FCPD definitions of “passive resistance” and “active resistance.”

²⁷ PFC#3 was interviewed by FCPD's Major Crimes Bureau detectives on August 3, 2022, and by IAB investigators on August 26, 2022. He had not viewed BWC footage of the incident before either interview.

continued to be an aggressive resistor and PFC#3's single ECW deployment was clearly authorized by both law and department policy.

PFC#1's Use of Deadly Force

PFC#3's ECW deployment had little effect on A.L. He did drop the wine bottle, but he continued advancing toward PFC#3. PFC#1 yelled for A.L. to "Back up!" and he fired two shots from his firearm one second after PFC#3 fired his ECW. When he made the decision to use deadly force, PFC#1 explained²⁸ that A.L. was coming toward him and PFC#3, with the wine bottle raised.²⁹ In "fractions of a second," PFC#1 stated that he considered trying to tackle A.L., but believed that either he or PFC#3 would get hit by A.L.—who appeared to be swinging the bottle like a club—if he did.³⁰ He stated that A.L. was almost within arm's reach of PFC#3 when he fired what he believed was three shots.³¹

PFC#1 then saw A.L. collide into PFC#3, causing them both to fall to the ground. PFC#1 perceived A.L. to be struggling with PFC#3 and, therefore, a continuing threat to him. Three seconds after his earlier shots, PFC#1 fired one more shot, this one while he (PFC#1) was only 1'8" away from A.L.³² PFC#1 did not realize that A.L. was no longer holding the bottle until he, PFC#3, and A.L. were on the landing outside of the front door and A.L. was being handcuffed.

PFC#1 articulated that he believed A.L. was an immediate threat of death or serious injury to himself or to PFC#3 when he used deadly force against A.L. Because the use of deadly force is objectively reasonable only when an "officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others,"³³ it must be determined whether PFC#1's belief was objectively reasonable when considering the "totality of the circumstances"³⁴ known to him at the time.

²⁸ PFC#1 was interviewed by FCPD's Major Crimes Bureau detectives on August 2, 2022, and by IAB investigators on August 30, 2022. He had not viewed BWC footage of the incident before either interview.

²⁹ *Id.* At this point, PFC#1 was unaware that A.L. had dropped the bottle.

³⁰ *Supra*, note 28.

³¹ Subsequent review and analysis determined that he fired four shots within two seconds. PFC#1 was 9'8" away from A.L. when he fired the four shots. PFC#1 was farther away from A.L. than was PFC#3; therefore, A.L. was less than 9'8" from PFC#3 when PFC#1 fired the first four shots.

³² *Id.*

³³ *Supra*, note 16.

³⁴ *Supra*, note 17.

Objectively Reasonable Belief

There have been numerous confrontations between law enforcement officers and individuals who have armed themselves with unconventional—or non-traditional—weapons. Officers sometimes utilize force on the people armed with those weapons to prevent themselves or others from being hurt or killed. For example, in 2023, a New York Police Department officer shot a man who charged at officers holding a pair of scissors after throwing a backpack and a kitchen knife at them;³⁵ also in 2023, Los Angeles police shot a man walking quickly toward officers with a hammer in his hand;³⁶ and earlier this year in 2024, a California deputy shot a fifteen-year-old who had used a gardening tool to assault family members before running toward the deputy with the same tool in his hand.³⁷ As recently as April, 2024, a thirty-year veteran of the Prince George’s County (Maryland) Police Department shot an individual in the doorway of a home holding—and refusing to discard—a two-by-four.³⁸ There are other incidents involving people armed with unconventional—or non-traditional—weapons that have led to officers being hurt or killed when those officers did not respond by using sufficient force.³⁹ Based on examples like these, officers are trained to recognize that objects other than traditional weapons (i.e., guns and knives) can be used by people as a means to inflict death or serious injury on others.⁴⁰

PFC#1’s belief that A.L. posed a serious danger was also consistent with PFC#3, who considered the bottle in A.L.’s hands to be a dangerous weapon when he deployed his ECW. Consistent with the officers’ beliefs, the FCPD use of force expert who provided his opinion on this incident opined that the bottle could have been used by A.L. to inflict death or serious injury

³⁵ [BWC: Man charges at NYPD officers with scissors, throws knife before OIS \(police1.com\)](#)

³⁶ [Video: hatchet-wielding man charges at LAPD officers \(police1.com\)](#)

³⁷ [BWC: Teen runs at Calif. deputy with bladed gardening tool before fatal OIS \(police1.com\)](#)

³⁸ [4 hospitalized after two unrelated police shootings in Va. and Md. - The Washington Post](#)

³⁹ For example, in July, 2023, an Indiana deputy sheriff was killed by a handcuffed individual who assaulted him and used the links of the handcuffs securing him to choke the deputy ([Deputy Sheriff John Durm, Marion County Sheriff’s Office, Indiana \(odmp.org\)](#)); in April, 2023, an Indiana prison employee was killed when an inmate beat him with a steel pipe ([Maintenance Foreman Michael Robert Keel, Indiana Department of Correction, Indiana \(odmp.org\)](#)); in October, 2023, a Georgia correctional officer was killed when he was assaulted by an inmate using a “homemade” weapon ([Correctional Officer I Robert Danforth Clark, Georgia Department of Corrections, Georgia \(odmp.org\)](#)).

⁴⁰ Officers are also trained to recognize that people can pose a significant danger of death or serious injury even when not armed with any traditional weapon or any other object. FBI data reveals that from January 2020 through March 2024, sixteen law enforcement officers were killed by individuals using only “personal weapons” (i.e., their hands, fists, feet, etc.). See, [CDE \(cjis.gov\)](#).

on the officers. Based on the totality of the circumstances at the time he used deadly force, PFC#1's belief that A.L. was armed with a weapon and posed an immediate danger of death or serious injury to PFC#3 was objectively reasonable.

Alternatives to Deadly Force

PFC#2 and PFC#3 faced the same danger as PFC#1, and they each discharged their ECWs while PFC#1 used deadly force. The ECW deployments, unfortunately, had no effect on the threat posed by A.L. as he continued to advance toward the officers. And as already acknowledged, Virginia law prohibits the use of deadly force against a person unless “[a]ll other options have been exhausted or do not reasonably lend themselves to the circumstances.”⁴¹ The law further provides that when determining if a law-enforcement officer's use of deadly force is proper, among the factors that must be considered is “whether the law-enforcement officer engaged in de-escalation measures prior to the use of deadly force, including taking cover, waiting for backup, trying to calm the subject prior to the use of force, or using non-deadly force prior to the use of deadly force.”⁴²

Even with these mandates in place, there is still no legal or policy requirement to exhaust every possible option before deploying deadly force if its use is reasonable under the totality of circumstances. 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.”⁴³ In a case analogous to the incident under review—involving the use of deadly force against a handcuffed individual attacking an officer with a fireplace poker—a federal circuit court of appeals judge 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.”⁴⁴

⁴¹ *Supra*, note 20.

⁴² *Supra*, note 21.

⁴³ *Illinois v. Lafayette*, 462 U.S. 640 (1983).

⁴⁴ *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), cert. denied, 115 S.Ct. 81 (1994).

Likewise, the Department of Justice’s Bureau of Justice Assistance has pointed 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. There may be a range of alternatives that would have been reasonable.”⁴⁵

Finally, Fairfax County’s CWA Steve Descano examined PFC#1’s use of deadly force in this matter and concluded that he acted reasonably and did not violate state criminal law despite the fact that he used deadly force without first attempting a less-lethal option.⁴⁶

Based on the totality of the circumstances, PFC#1’s articulation for his use of deadly force, and the considerations discussed above, I agree with the FCPD’s conclusion that all five of the shots fired by PFC#1 were objectively reasonable and, therefore, both lawful and permitted by departmental policy.

Other Policy Considerations

In its thorough investigation of this incident, the FCPD determined that PFC#1 violated two policies unrelated to his use of deadly force. First, he did not activate his BWC while conducting “law enforcement activity” related to the first call for service. FCPD G.O. 509 IV. E. 1. clearly states that “[o]fficers shall activate the recording feature of their BWC system prior to the following situations:

- a. Contacts with community members associated with the performance of official law enforcement duties, to include responding to calls for service, self-initiated encounters, arrests, traffic stops, field contacts, and all events that involve the rendering of public services or law enforcement activity.
- b. Actions conducted in the official performance of duty, to include emergency response driving as defined in FCPD General Order 503, Response Driving of Police Vehicles, vehicle pursuits, vehicle stops, searches of buildings and vehicles, searches and/or frisks of individuals, searches for fleeing suspects, collection of physical evidence of a crime, and/or transportation of any individual in custody.”

Although PFC#1 activated his BWC when he responded to the second call for service, his failure to do so during his response to the first call for service did not comport with FCPD policy.

⁴⁵ “Considerations and Recommendations Regarding State and Local Officer-Involved Use-of-Force Investigations,” p. 30, accessible at [Considerations and Recommendations Regarding State and Local Officer-Involved Use-of-Force Investigations \(ojp.gov\)](https://www.ojp.gov/inspections/reports/considerations-and-recommendations-regarding-state-and-local-officer-involved-use-of-force-investigations)

⁴⁶ *Supra*, note 7.

The second policy violation identified during FCPD's investigation was that PFC#1 did not have his departmental-issued ECW on his person when he responded to both the first and second calls for service. At the time of this incident, G.O. 540.16 II. A. made clear that "[s]ubject to equipment availability, all ECW certified uniformed officers shall carry an ECW on their support/weak side in the cross draw or straight draw position." Additionally, during the October 26, 2021, Board of Supervisors' Public Safety Committee meeting, Chief Davis advised the Board that every individual holding the rank of 2nd Lieutenant and below, as well as the four Captains assigned as "duty officers," would be personally issued a Taser.⁴⁷ Despite the availability and the mandate to carry an ECW on his person, PFC#1 did not have an ECW on his person during this incident. Rather, his ECW was in the trunk of his patrol car.

It has already been noted that based on the circumstances of this incident, PFC#1 would not have been required to use the ECW if he had it with him; therefore, the analysis of his use of deadly force does not change. When questioned about the ECW being in the trunk of his car, PFC#1 advised that he would have deployed his firearm when he did even if he had the ECW with him.⁴⁸ Nonetheless, not having the ECW on his person was identified as a clear policy violation.

RECOMMENDATIONS

1. Criminal and Non-Criminal Factors to Consider When Reviewing Force

The incident under review was a situation in which police officers were called upon to interact with an individual in crisis and the officers ultimately used both less-lethal and deadly force on that person. It could be argued that A.L. was committing a minor crime when the calls for service were made,⁴⁹ but the police were not there to arrest him. Rather, the officers were hoping to engage with A.L. to convince him to voluntarily get medical help.⁵⁰ PFC#1, PFC#2, and PFC#3 each used force in response to actions taken by A.L. Their uses of force were

⁴⁷ The 10/26/2021 Public Safety Committee meeting can be accessed at http://video.fairfaxcounty.gov/ViewPublisher.php?view_id=9. Chief Davis's comments begin at 36:23.

⁴⁸ *Supra*, note 28.

⁴⁹ Va. Code § 18.2-137 states that "[i]f any person unlawfully destroys . . . without the intent to steal any property, real or personal, not his own, . . . he shall be guilty of a Class 3 misdemeanor." When force was used on A.L., he was engaged in an assault on law enforcement officers in violation of Va. Code § 18.2-57.

⁵⁰ A.L.'s sister agreed to consider an emergency custody order if he refused. *Supra*, note 4.

analyzed under both legal and policy provisions that presuppose some type of law enforcement action—typically an arrest or other type of detention (for investigative purposes or based on a detention order).

At the time of this incident, FCPD’s G.O. 540.5 I. listed eight factors to consider when determining whether a particular use of force was objectively reasonable, beginning with the three Graham factors first identified in Graham v. Connor, which are: 1) whether the individual poses an immediate safety threat to the officer or others; 2) the severity of the crime at issue; and, 3) whether the individual is actively resisting or attempting to evade arrest. The FCPD’s list of factors also included: 4) weapon(s) involved; 5) presence of other officers or individuals; 6) training, age, size, and strength of the officer; 7) training, age, size, and perceived strength of the individual; and 8) environmental conditions. FCPD policy made clear that the listed factors were not exhaustive, and that objective reasonableness was ultimately determined by examining the “totality of circumstances in each particular case.”⁵¹ However, applying the traditional Graham (and FCPD’s additional) factors to determine whether a use of force was reasonable during a non-criminal event can be difficult. This can be especially difficult in an incident such as the one under review because the second Graham factor—the severity of the crime at issue—typically refers to the initial crime that prompted a police response rather than subsequent criminal activity prompting police to use force.⁵² A better alternative, in my opinion, would be to identify potential factors to consider in a non-criminal use of force context.⁵³

Some federal courts have already recognized that the Graham factors are not helpful in police use of force cases when they involve people who were not engaged in criminal activity—but rather people who were suffering from a medical or mental health crisis. Based on guidance provided by a judge in one of those cases,⁵⁴ I suggest that the following factors be considered when evaluating whether an officer’s use of force deployed against a person in crisis, as opposed to a person engaged in criminal activity, was reasonable: 1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under

⁵¹ FCPD G.O. 540.5 I.

⁵² In this situation, misdemeanor Destruction of Property (Va. Code § 18.2-137) rather than felony Assault on Law Enforcement (Va. Code § 18.2-57).

⁵³ I have made a similar recommendation on this topic to the FCPD subsequent to my review of two previous incidents. See, [Incident Report: April 14, 2017 Electronic Control Weapon \(ECW\) Deployment](#) and [Incident Report: July 19, 2021: Officer-Involved Shooting \(IPA-21-03\)](#).

⁵⁴ Estate of Hill v. Miracle, 853 F.3d 306 (6th Cir. 2017).

circumstances that posed an immediate threat of harm to himself or others? 2) Was some degree of force reasonably necessary to ameliorate the immediate threat? 3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?

When the FCPD revised its 55-page Use of Force General Order 540—in effect at the time of this incident—into a streamlined 19-page Use of Force General Order 540 (effective as of August 12, 2022),⁵⁵ it eliminated the list of factors to consider when determining objective reasonableness. Rather, the new G.O. 540 IV. A. simply dictates that “[t]he use of all force options must be objectively reasonable based upon the totality of the circumstances known by the deploying officer at the time force is applied.” Likewise, G.O. 540 VII. A. reads, “[t]he use of deadly force is only permissible where an officer reasonably believes, based upon the totality of the circumstances known at the time, that deadly force is immediately necessary in order to protect the officer or another person (other than the subject of the use of deadly force), from the threat of serious bodily injury or death, and that all other options have been exhausted, do not reasonably lend themselves to the circumstances, are not feasible, or have already proven to be ineffective.” While the elimination of enumerated factors in the new G.O. 540 may be an improvement over the prior G.O. 540 (which listed the eight factors), I remain convinced that enumerating specific non-criminal factors to consider for a use of force occurring in a non-criminal context is a better option. Therefore, I recommend including criminal factors (including the Graham factors) and adding non-criminal factors—using the explicit language from the Miracle case⁵⁶ provided above—to consider when determining whether force was objectively reasonable during a non-criminal situation, or when the individual was experiencing a medical or mental health crisis while also engaged in criminal activity.

While the preference is that no force is used on an individual who is experiencing a mental health or medical crisis and who may not be engaged in any criminal activity, this recommendation addresses the unfortunate reality that there are times when force will, in fact, be used in such situations. The recommendation should allow those responsible for reviewing the force used in those situations to more accurately address whether the force was appropriate.

⁵⁵ FCPD G.O. was revised again, effective April 29, 2024. G.O. 540 IV. A. and G.O. 540 VII. A. were not changed in the April 29, 2024, revisions.

⁵⁶ *Supra*, note 54.

2. Robust Implementation of Co-Response

My second recommendation based on my review of this incident is to reiterate the recommendation of many others (including the Fairfax County Board of Supervisors) that the Fairfax County Co-Responder Program be fully implemented as quickly as possible to potentially avoid another tragic incident like this one.

At the outset, it should be recognized that Fairfax County is not alone in grappling with the issue of how best to respond to mental health related calls; I would argue that it is the most pressing public safety issue confronting jurisdictions throughout the nation. When the Police Executive Research Forum (“PERF”) released its *“Rethinking the Police Response to Mental Health-Related Calls”* report⁵⁷ in October, 2023, PERF’s Executive Director Chuck Wexler introduced it in a letter to PERF members by noting: “This report addresses one of the most critical issues in policing today: the role of police in responding to calls for service involving people facing a mental or behavioral health (MBH) crisis. This has been a serious challenge for policing for decades, ever since mental health institutions were closed and people were discharged without adequate help to live in the community.”

Adding to the importance of properly responding to mental health calls is the potential exposure to liability for jurisdictions found to be in violation of the federal Americans with Disabilities Act (“ADA”)⁵⁸ for not properly responding. The ADA requires “reasonable accommodations” for people with mental health disabilities. In negotiations to establish two recent consent decrees in Minneapolis and Louisville, the United States Department of Justice identified civil rights violations, based on the ADA, caused by improper police response—amounting to illegal discrimination—to people in crisis in those cities.⁵⁹

While I am recommending an expedited full implementation of the County’s Co-Responder Program, it needs to be acknowledged that the Commonwealth of Virginia, Fairfax County, and the FCPD have already made substantial progress in its response to mental health calls. At the state level, Virginia law—referred to as the “Marcus Alert”—requires 9-8-8 crisis

⁵⁷ [Rethinking the Police Response to Mental Health-Related Calls: Promising Models.](#)

⁵⁸ Unites States Code Title 42 § 12101.

⁵⁹ [Office of Public Affairs | Justice Department Finds Civil Rights Violations by the Minneapolis Police Department and the City of Minneapolis | United States Department of Justice](#) and [Office of Public Affairs | Justice Department Finds Civil Rights Violations by the Louisville Metro Police Department and Louisville/Jefferson County Metro Government | United States Department of Justice](#)

call centers and that law enforcement and behavioral health agencies work together to improve responses to individuals in behavioral health crisis in Virginia communities.⁶⁰ Additionally, the “*State Plan for the Implementation of the Marcus-David Peters Act*”⁶¹ includes three protocols for localities to adopt: 1) divert behavioral health calls from the 9-1-1 public safety system to 9-8-8 Regional Crisis Call Centers; 2) formalize agreements between law enforcement and mobile crisis teams; and, 3) develop specialized law enforcement responses to behavioral health related events.

At the County level, the 9-8-8 Regional Crisis Call Center, required in the Marcus Alert law, was incorporated into the local behavioral health crisis response system on June 28, 2023. At the August 1, 2023, Fairfax County Board of Supervisors’ Safety and Security Committee Meeting, County officials outlined their plan to expand the Co-Responder Program⁶² to four teams operating seven days a week.⁶³ Also in Fairfax County, Marcus Alert protocols are aligned with existing initiatives, including “Diversion First” and the Co-Responder Program.⁶⁴

Finally, the FCPD has already accomplished some of the “best practice” objectives for law enforcement agencies contained in the aforementioned “*State Plan for the Implementation of the Marcus-David Peters Act*” and elsewhere. For example, the state plan recommends that law enforcement officers receive eight hours of mental health first aid training; that departments provide ongoing de-escalation training for all officers; and that departments use interactive, scenario-based de-escalation training specific to mental health scenarios, with a focus on time as a tactic.⁶⁵ The FCPD started these initiatives even before the Marcus-David Peters Act was introduced in 2020. Additionally, the FCPD began incorporating PERF’s widely recommended “*Integrating Communication, Assessment, and Tactics*” (“ICAT”) training into its training curriculum for all officers and recruits in 2021.

While continuing these efforts and striving to achieve full implementation of the County Co-Responder Program, the department must continually stress to all its officers the importance of utilizing time to their advantage, particularly when responding to calls for service involving

⁶⁰ Va. Code §§ 9.1-193 and 37.2-311.1.

⁶¹ *Supra*, note 10.

⁶² *Supra*, note 1.

⁶³ See [Safety and Security Committee Meeting \(fairfaxcounty.gov\)](https://www.fairfaxcounty.gov/safety-security-committee-meeting), presented to the Fairfax County Board of Supervisors during the August 1, 2023, Safety and Security Committee meeting.

⁶⁴ See [Marcus Alert | Community Services Board \(fairfaxcounty.gov\)](https://www.fairfaxcounty.gov/marcus-alert-community-services-board).

⁶⁵ *Supra*, note 10 at pp. 99-100.

people in crisis. Delaying response to a call of a person in crisis will not always be a viable option for first responders (e.g., when there are potential victims in a location with the individual in crisis). But when it is an option—as it was in this case—time (like distance and cover) should always be used to law enforcement’s advantage. Of course, even when time, distance, cover, co-response, de-escalation attempts, and less-lethal options are all used, these unpredictable and volatile events can still have undesirable outcomes.⁶⁶ But because the concept of using time, distance, and cover are part and parcel of the FCPD’s notion that the sanctity of human life is of paramount importance to the department,⁶⁷ these concepts must be continuously stressed and trained until—and even after—full implementation of the Co-Responder Program can be achieved.

⁶⁶ See, e.g., [Video: Man in mental health crisis attacks mother, runs toward LAPD officers with knife before OIS \(police1.com\)](#).

⁶⁷ FCPD G.O. 540.0 II.

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

Fourth Amendment to the United States 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.

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. R. 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 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 Spray – 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. O. 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.

