

# Public Report

Dec. 4, 2019: Use of Force - Serious Injury  
IPA-19-08



Richard G. Schott  
Fairfax County  
Independent Police Auditor

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Office of the Independent Police Auditor  
12000 Government Center Parkway, Suite 233A  
Fairfax, VA 22035

[www.fairfaxcounty.gov/policeauditor](http://www.fairfaxcounty.gov/policeauditor)

Contact Us: [IPAPoliceAuditor@fairfaxcounty.gov](mailto:IPAPoliceAuditor@fairfaxcounty.gov)

To request this information in an alternate format, call 703-324-3459, TTY 711.

## INCIDENT

Shortly after midnight on December 4, 2019, Fairfax County Police Department (hereinafter "FCPD") officers from the Reston District Station were dispatched to a hit-and-run accident on Reston Parkway. Officers determined that the fleeing driver was an individual with the initials T.G. (hereinafter "TG"). TG fled the accident scene on foot, leaving his vehicle at the accident site. Responding officers determined the direction in which TG had fled and began searching for him. Police Officer First Class #1 (hereinafter "PFC#1") responded to the incident with his police service dog (hereinafter "Lobo") to assist with locating TG. A helicopter from the FCPD's aviation unit also responded to aid in locating him.

Responding officers determined that the hit and run constituted a felony violation based on the extensive damage TG caused when he struck the victim's vehicle. The occupants of that vehicle described TG as behaving irrationally before fleeing the scene; and they related that TG told witnesses who approached his car to get the "fuck away from" his car. After he fled the scene, the Fairfax County Department of Public Safety Communications (hereinafter "DPSC") began receiving calls reporting that TG was running through a neighborhood and knocking on doors of houses.

Police Officer First Class #2 (hereinafter "PFC#2") located TG, but TG continued to run from him. PFC#1, along with Lobo, began tracking for TG from where he had evaded PFC#2. They tracked through several backyards and a ravine before being told by the helicopter unit that TG was on a cul-de-sac and just in front of PFC#1. When PFC#1 was able to see TG, he announced to TG, "police K9, get on the ground, or you will be bit." TG again ran, prompting PFC#1 to announce to him, "police K9, stop running or I'm going to release my dog and you're going to get bit." TG continued to run, at which point PFC#1 released Lobo with the bite command. Lobo quickly caught up to and did, in fact, bite TG.

TG went to the ground but immediately began punching Lobo. PFC#1 arrived to apprehend TG, but TG spit in his face and continued fighting with Lobo. He also resisted PFC's efforts, and yelled, "just fucking kill me, just fucking shoot me, just fucking kill me." He continued to make similar statements while fighting with PFC#1. During the continuing struggle, PFC#1 hit TG once with a closed fist to his head. At this point, TG rolled to his stomach with his hands underneath his stomach. PFC#1 then used hand strikes to TG's back to

try to get him to surrender his hands from underneath him. After repeated requests for backup during his struggle with TG, PFC#1 was joined by PFC#2. The two officers got one of TG's hands cuffed but were not able to complete the handcuffing as TG continued to struggle with them until additional officers arrived. When TG was finally handcuffed, PFC#1 immediately took control of Lobo and called for the Fairfax County Fire and Rescue Department (hereinafter "FCFRD") to respond and provide medical care to TG for the dog bite.

The responding FCFRD personnel determined that the injuries from the dog bite were minimal and treated them with saline and bandages. However, while being treated TG suffered a medical emergency (cardiac arrest) deemed life-threatening by the FCFRD. The handcuffs were removed so that life-saving treatment could be administered. TG was then transported to Reston Hospital where he received additional medical care. In May of 2020, TG was placed in a nursing home facility able to breathe on his own, but he remained non-verbal.

## **CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION**

The FCPD conducted both a criminal and an administrative investigation into PFC's canine deployment and his use of force on TG. The criminal investigation was conducted by the FCPD's Major Crimes Bureau (hereinafter "MCB"), while the administrative investigation was conducted by the Internal Affairs Bureau (hereinafter "IAB").

The MCB presented its findings to the Fairfax County Commonwealth Attorney's Office. On December 30, 2019, the Deputy Assistant Commonwealth Attorney advised FCPD Chief Edwin C. Roessler Jr. that there would be no criminal charges lodged against PFC#1 for the actions he took during this incident.

Although the FCPD had probable cause to charge TG with Assault on a Law Enforcement Officer, Obstruction of Justice/Resisting Arrest, Felony Hit and Run, and Driving While Intoxicated, no charges were brought due to TG's dire medical condition following the incident.<sup>1</sup>

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<sup>1</sup> Medical personnel later determined that the medical condition experienced by TG was the result of neither the PSD bite nor the ensuing struggle with and strikes delivered by PFC#1.

## **INTERNAL ADMINISTRATIVE INVESTIGATION**

The FCPD's IAB conducted the administrative investigation of this incident. That investigation included a review of the MCB's criminal investigation and of officer interviews conducted by the FCPD's Special Operations Division.<sup>2</sup> All appropriate interviews were conducted of FCPD officers, FCFRD personnel, medical staff who treated TG at Reston Hospital, the victims of the initial hit and run accident, the girlfriend of TG, his roommate, and residents of the neighborhood in which the foot pursuit occurred. In-car video camera footage and aerial video footage captured by the FCPD helicopter were examined. All police radio traffic and DPSC communications were collected. A full reconstruction of the initial hit-and-run accident was completed by the FCPD's Crash Reconstruction Unit (hereinafter "CRU"). Medical records were obtained and examined. Finally, a narrative—completed by an FCFRD paramedic describing the medical emergency and treatment provided to TG—was obtained and reviewed.

Based on the comprehensive investigation into this incident, the FCPD determined that PFC#1's deployment of Lobo, as well as his subsequent use of hand strikes to control and handcuff TG, complied with departmental policy. I agree with this conclusion; and, in my opinion the investigation upon which the conclusion was based was complete, thorough, objective, impartial, and accurate.

## **CONCLUSIONS**

### **I. Deployment of Patrol Service Dog**

The FCPD considers the utilization of a patrol service dog for apprehension to be the use of "less-lethal" force.<sup>3</sup> Less-lethal force options are authorized in various circumstances, including when used to "[e]ffect an investigative stop or arrest," to "[p]revent escape from lawful custody," and to "[d]efend oneself or another individual from injury or assault."<sup>4</sup> The

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<sup>2</sup> The FCPD's Special Operations Division includes the Canine Section and that division conducted limited interviews because of the canine deployment and subsequent biting of TG. See, FCPD General Order (hereinafter "G.O.") 530.1 IV. B. 5. a.

<sup>3</sup> FCPD G.O. 540.4 II A. 2. f. and G.O. 530.1 V. B. b. and c.

<sup>4</sup> FCPD G.O. 540.6 I. A. 1., 2., and 3.

deployment of Lobo to apprehend TG in this incident fell within all three of those circumstances. While FCPD policy allows for the use of less-lethal force to accomplish one or more of these objectives, the use of such force still must be objectively reasonable to comply with the department's overall use of force policy, and the law.

In its landmark Graham v. Connor opinion,<sup>5</sup> 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.”<sup>6</sup> In the same opinion, Chief Justice William Rehnquist firmly stated that the Fourth Amendment to the United States Constitution<sup>7</sup> is the standard by which an officer's actions in these situations must be judged; and, the Fourth Amendment standard requires that an officer's use of force must be objectively reasonable to be lawful. Specifically, Rehnquist wrote “that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.”<sup>8</sup> He went on to explain that “[a]s in other Fourth Amendment contexts, however, the ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”<sup>9</sup>

The FCPD's use of force policy mirrors the Graham v. Connor pronouncements. FCPD General Order (hereinafter “G.O.”) 540.0 II. provides 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 officer against their

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<sup>5</sup> 490 U.S. 386 (1989).

<sup>6</sup> *Id.* at 397.

<sup>7</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>8</sup> *Supra*, note 4 at 395 (*emphasis* in original).

<sup>9</sup> *Id.* at 397 (citations omitted).

responsibility to protect public safety as well as the individual's civil liberties. Force shall not be used unless it is reasonably necessary in light of the circumstances confronting the officer.”

When PFC#1 deployed Lobo to stop TG's flight, PFC#1 was aware that TG had been involved in a hit-and-run which caused significant damage, had gotten out of his vehicle and made threatening comments to the occupants of the vehicle he struck, and was running through a residential neighborhood after midnight and knocking on front doors of residences. His behavior was irrational and potentially dangerous to the occupants of the neighborhood and to the pursuing officers. PFC#1 issued two separate verbal commands to TG before deploying Lobo, advising TG that he would be bitten by the dog unless he stopped running. When TG continued running, PFC#1 deployed Lobo.

Consistent with FCPD G.O. 540.6 I. A. 1., 2., and 3., FCPD G.O. 530.1, which governs “Canine Operations,” allows for the use of a patrol service dog in situations “in which the use of non-deadly physical force is reasonably necessary to [p]revent escape from lawful custody, to effect an arrest or an investigative stop of a person reasonably suspected of committing a criminal offense, or to prevent any person from being injured.”<sup>10</sup> Among the factors for a canine handler to consider before utilizing a patrol service dog for apprehension are “[t]he severity of the alleged crime,” “[w]hether the suspect poses an immediate threat to the safety of law enforcement personnel or others . . .,” “[t]he degree to which the suspect resists arrest or detention,” and “[a]ny attempt by the suspect to evade arrest by flight or concealment.”<sup>11</sup> Additionally, FCPD G.O. 530.1 V. B. 1. f. provides that “felonies . . . such as . . . fleeing after driving while intoxicated would justify the use of the patrol dog for apprehension.”

Finally, PFC#1 provided two verbal warnings to TG before deploying Lobo with the bite command. Whenever feasible, a verbal warning prior to the deployment of a patrol service dog to apprehend someone must be given. In fact, a decision from the Fourth Circuit of the United States Court of Appeals as early as 1991 held that the “failure to give a warning before releasing a police dog is objectively unreasonable in an excessive force context.”<sup>12</sup> Based on the circumstances known to PFC#1 at the time he deployed Lobo, the policy provisions contained in

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<sup>10</sup> FCPD G.O. 530.1 V. B. 1. c. (1).

<sup>11</sup> FCPD G.O. 530.1 V. B. 1. e. (1) through (4).

<sup>12</sup> Vathekan v. Prince George's County, 154 F.3d 173, at 179 (4<sup>th</sup> Cir. 1998), citing Kopf v. Wing, 942 F.2d 265, at 266, 268 (4<sup>th</sup> Cir. 1991).

the FCPD's "Canine Operations" General Order, and the issuance of multiple commands prior to PFC#1 deploying Lobo, the deployment by PFC#1 of Lobo to apprehend TG was objectively reasonable, meaning it was both lawful and within FCPD policy.

## II. PFC#1's Use of Strikes

The FCPD appropriately analyzed PFC#1's individual use of hand strikes against TG separately and concluded that his use of force subsequent to Lobo's deployment was objectively reasonable as well. After Lobo took TG to the ground, TG began to punch the dog. When PFC#1 approached, TG spit in his face and continued fighting with Lobo. He resisted PFC's efforts to control him, and yelled, "just fucking kill me, just fucking shoot me, just fucking kill me." PFC#1 continued to struggle with TG until PFC#2 arrived and the two were able to control TG. They were only able to handcuff TG when additional officers arrived. During the struggle to get control of TG, PFC#1 struck TG with a closed fist once in the head and multiple times to his back. During the fight, TG continued yelling for PFC#1 to shoot and kill him.

TG was clearly engaged in active (if not aggressive) resistance when PFC#1 used hand strikes against him. FCPD policy describes 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>13</sup> and 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."<sup>14</sup> FCPD G.O. 540 II. 2. defines "less-lethal force" 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," and explicitly lists "[e]mpty-hand tactics, such as strikes" as an option to use in that situation.

Similar to the use of his patrol service dog, the hand strikes utilized by PFC#1 were designed not only to overcome resistance but to accomplish an investigative stop or arrest; to prevent TG from escaping; and to defend himself from injury and assault.<sup>15</sup> Consequently,

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<sup>13</sup> FCPD G.O. 540.4 I. A. 2.

<sup>14</sup> FCPD G.O. 540.4 I. A. 3.

<sup>15</sup> FCPD G.O. 540.6 I. A. 1., 2., and 3.



PFC#1's hand strikes during the later stages of TG's arrest were lawful and within policy for the same reasons the deployment of Lobo to initiate the arrest were lawful and within policy.

## **RECOMMENDATIONS**

It has previously been noted in this report that PFC#1 issued multiple warnings before releasing his patrol service dog, and that the Fourth Circuit Court of Appeals considers whether warnings were provided when it conducts an excessive force inquiry relating to the release of a canine.<sup>16</sup> However, current FCPD policy only mandates verbal warnings prior to releasing a patrol service dog before using one in conjunction with the search of a building to investigate a suspected burglary.<sup>17</sup> Specifically, FCPD G.O. 530.1 V. A. 1. a. and c. require that “[p]rior to any canine search of a building, an announcement must be given indicating the intent to release a police service dog to search the building and apprehend anyone therein;” and that such warning “may only be dispensed with in the unusual event that there is a reasonable belief that specific officer safety issues would be created by the giving of a warning.” The policy does not include a statement mandating a warning prior to deploying a patrol service dog under circumstances such as those confronted in the incident under review. I recommend that G.O. 530.1 be revised to require a warning before releasing a patrol service dog anytime the dog is being released for the purpose of apprehending an individual. The requirement should include the caveat that a warning is required only when it is feasible, and that no warning is required if there is a reasonable belief that officer safety may be compromised by providing a warning.

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<sup>16</sup> The Fourth Circuit Court of Appeals has ruled multiple cases that, when feasible, a verbal warning should be given before releasing a PSD with a command to bite. See, for example, Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991) and Vathekan v. Prince Georges County, Maryland, 154 F.3d 173 (4th Cir. 1998).

<sup>17</sup> For this reason, the administrative investigation into this incident correctly noted that PFC#1 complied with relevant *caselaw*, not that he complied with relevant policy. (*emphasis added*).

## **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. 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 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. 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.

