

COMMISSION INVESTIGATING
THE DEATH OF VICTORIA SNELGROVE

Appointed by Boston Police Commissioner Kathleen M. O'Toole

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Acknowledgements

The members of this Commission sought to understand what happened outside of Fenway Park on October 20-21, 2004, and to place those events into a larger context. We took on this task with the explicit agreement that the Boston Police Department would provide us with all available information and that we would have the Department's complete cooperation. The Department kept its promise. We also made clear that, although appointed by Police Commissioner Kathleen M. O'Toole, we would be independent and that our conclusions would be our own.

We want to acknowledge Commissioner O'Toole, who took the rare step of opening up the Department to outside review, without a hint of defensiveness. She could not have been more cooperative or supportive. We hope that the results of our effort justify her willingness to do so.

We also want to thank the members of the Boston Police Department for their cooperation, in particular, the Internal Affairs Division and the Homicide Unit, for their intensive efforts. One measure of a police department is how it reacts when things go wrong and, under that standard, the Boston Police Department did well. We are also grateful to Suffolk County District Attorney Daniel F. Conley, who permitted us access to information in the midst of a criminal investigation.

We are appreciative, as well, for the contribution of a number of public interest organizations and interested persons who offered their views. We found their presentations thoughtful and useful, even though we did not adopt all of their suggestions.

I want to personally thank the other members of the Commission for their tremendous public service. They each made a unique contribution to what was a complicated and, at times, difficult task. Since the Commission members served without compensation, this public service is even more noteworthy. For that reason, I should also thank our employers for supporting this effort.

I want to particularly thank my law firm, Bingham McCutchen, which provided extraordinary support, consistent with its longstanding commitment to pro bono work. In addition to the fact that my partner Janice Howe and I were both on the Commission, Bingham McCutchen also provided all the logistical support, even including the meals during our day long meetings.

We also had the indispensable help of three others from Bingham McCutchen. Timothy H. Madden, an associate, acted as the equivalent of chief of staff, doing research, summarizing thousands of pages of interviews and documents, and drafting sections of our report. He brought not only his considerable skill as an attorney, but his pre-law school experience as a police officer. Heather Shapourian is a paralegal with enormous energy and insight. She did the many things that made our work easier and better organized. I want to recognize my assistant Gayle Corning. She demonstrated here what I selfishly expect every day - an ability to juggle too many tasks and still turn out a first rate product.

Finally, we should not forget a person who was always in our thoughts. Victoria Snelgrove was from East Bridgewater, Massachusetts, where she lived with her parents. Ms. Snelgrove also had a brother, Michael. Torie, as she was known, was a 21 year old student at Emerson College. She was preparing for a career in broadcast journalism. By all accounts, Torie was a wonderful and caring person. We would have liked to have known her in life. Sadly, we did not have that opportunity. But, we hope that the lessons learned as a result of this tragic death will guide law enforcement agencies, so that similar tragedies will not occur.

Donald K. Stern
Boston, Massachusetts

I. INTRODUCTION AND SUMMARY OF FINDINGS

Victoria Snelgrove died after being struck by a less-lethal projectile fired by a Boston police officer. This was a deep loss suffered by her family and all who knew her. The violent and untimely death of a young woman, simply out celebrating the Red Sox victory over the Yankees, is a parent's worst nightmare and a city's heartache.

Police Commissioner Kathleen M. O'Toole promptly responded by publicly apologizing and acknowledging the Department's responsibility. She also announced three separate investigations. The first, undertaken by homicide detectives and overseen by the Suffolk County District Attorney's office, focused on possible criminal charges. Secondly, the Police Department's Internal Affairs Division examined certain issues relating to the planning that night and the use of the FN303 less-lethal weapon.

The Commissioner also took an additional and unusual step. She appointed an outside Commission to examine independently some of these same issues, in order to ensure that any lessons learned from this tragedy would benefit the Department and other police departments throughout the country.

The Commission met on five occasions: December 6, 2004, January 4, 2005, February 18, 2005, March 17, 2005 and April 26, 2005. In addition, members of the Commission have met and conferred in smaller groups on an ongoing basis.

The Commission has also reviewed Internal Affairs Division and/or Homicide Unit interview transcripts of 50 police witnesses and 33 civilian witnesses, many of whom were interviewed multiple times; reviewed videotape obtained from the Department and independently from local media outlets; met with and questioned representatives of the Department on multiple occasions; met with representatives of the Suffolk County District Attorney's Office; met with a representative of the Snelgrove family; met with a representative of another individual who was injured on Lansdowne Street; met with citizen groups; met with representatives of FNH USA, Inc. (the manufacturer of the FN303) and reviewed materials provided by them; visited the Lansdowne Street scene; reviewed numerous police reports filed by officers on duty the night in question; reviewed the many media reports on the incident; and reviewed volumes of documents provided by the Department, including the Department's policies, procedures and plans relevant to this incident.

Our conclusions do not offer comfort for those who believe Victoria Snelgrove's death was a regrettable accident that could not have been prevented. Nor will those who paint the police as generally prone to excessive force, and point to Ms. Snelgrove's death as evidence, likely appreciate the complex causes of this tragedy.

As set forth below, we find that inadequate planning and training, combined with a breakdown of command discipline, set up a situation ripe to produce an unintended result. Our major findings are:

Before the Fatal Shot

1. The Red Sox victory over the Yankees in the American League Championship Series (“ALCS”) resulted in large crowds gathering in the area surrounding Fenway Park. The crowds were exuberant but mostly peaceful, enjoying this special moment in Boston sports history. A small minority seemed intent on public disorder and violence, in some cases throwing objects at the police, starting fights, destroying public and private property and lighting small fires. In Kenmore Square and on Boylston Street, the Department acted with restraint and discipline, and controlled the crowds. Although the police units in these areas were called upon to deploy less-lethal weapons, there were no reported injuries. In contrast, on Lansdowne Street, where Victoria Snelgrove was standing, very little went right: one person died and two others were injured in the face by shots from one particular type of less-lethal weapon, known as the FN303.

2. There was intelligence that crowds would flow to Fenway Park and common sense suggested that win or lose, Red Sox fans would go to what one police officer described as “Baseball Mecca.” Yet, the Department seemed caught off guard that Lansdowne Street would be a problem area. This meant that other areas -- the Northeastern University area and Kenmore Square -- had the Public Order Platoons (“POP”), which were better prepared to deal with disorderly crowds. The police initially made the decision to “give Lansdowne Street” to the revelers, because it is somewhat contained and was considered more manageable than the other nearby areas. But, the police failed to close a garage on that street until after some motorists tried to leave the garage, became trapped in an unruly crowd, and had to be rescued by the police. As things developed, officers on Lansdowne Street found themselves outnumbered and outflanked.

3. There were many factors that contributed to what happened that night on Lansdowne Street. There was, of course, the criminal acts of the few, who threw objects and lit small fires. There is no question that at various times things were chaotic, with the narrow street, surrounding high structures (including the girders supporting the Fenway Park seating on the structure known as the Green Monster), large crowd, and noise level creating a real sense of disorder. Moreover, the police made some tactical mistakes that increased their vulnerability. All of this may have prompted police actions intended to prevent harm to the police and to the public, but which had tragic results.

The Fatal Shot

4. The fatal FN303 shot was fired by Officer Rochefort Milien. He should not have fired the FN303 when he did. Officer Milien failed to take sufficiently into account that he was shooting at a moving target in the midst of a crowd and that a missed shot could easily strike a by-stander. Moreover, it is not clear whether Officer Milien properly sighted the FN303 before firing at least one of the two shots fired in Ms. Snelgrove’s direction. (It is not known whether she was struck by the first or second shot). At the very least, the shots were taken in rapid succession, with little opportunity to sight the weapon properly.

5. This action was not taken in isolation. Although Officer Milien received training on how to fire the FN303, the Department had not properly trained him in the policy and

procedures for when to use the weapon. Moreover, he had little guidance as to how such weapons were to be used that night, and had earlier observed the most senior commander on the scene, Deputy Superintendent Robert O'Toole, repeatedly firing the FN303 indiscriminately.

Other Mistakes

6. Deputy Superintendent Robert O'Toole (who is not related to Police Commissioner Kathleen M. O'Toole) was the field commander; but he was also in charge of a zone, the Lansdowne Street area. What should have been his sole responsibility, to make tactical decisions in consultation with the Unified Command Center, became tangled with multiple roles and on-the-run tactics.

7. The confusion was significantly compounded by the fact that Deputy Superintendent O'Toole also acted as a line officer, in some instances taking the FN303, for which he was not trained or certified, out of the hands of other officers and firing at objects and people. This tripartite role -- operations chief, zone commander, and line officer -- created confusion in the field and undermined the chain of command.

8. Deputy Superintendent O'Toole contributed to the environment in which other officers under his direct command carelessly fired FN303 projectiles at persons in crowds.

9. Before Ms. Snelgrove was fatally struck, two other persons were hit in the face by projectiles fired from FN303s, began bleeding, and approached police seeking medical assistance. It does not appear that the police immediately understood that these injuries were the result of FN303 projectiles. If they had, it would have alerted the police that there was a problem with the use of the FN303. Information about these injuries was not reported back to the Unified Command Center.

The Planning

10. The problems did not begin that night. The tragic events of October 20-21, 2004, had their roots in the failure of the Department to adequately plan for the ALCS. Superintendent James Claiborne had responsibility for preparing the plan for the ALCS. The plan was seriously deficient. The lessons learned from the 2004 Super Bowl and the successful planning for the Democratic National Convention in July, 2004, were largely ignored. There was no shared understanding of the Rules of Engagement and the appropriate use of the FN303. In fact, the plan for the night of October 20-21 contained no Rules of Engagement at all and no mention of less-lethal weapons. Moreover, no specific instructions regarding the use of less-lethal weapons that might be deployed that night were given to officers at roll call. Superintendent Claiborne was not aware that the FN303 was being made available on Lansdowne Street for use by the Mobile Field Force, and did not make the decisions to deploy and fire the weapon.

The FN303

11. The Police Department's decision in early 2004 to purchase an array of less-lethal weapons (including the FN303) provided the Department with additional options for the appropriate use of force in different situations. The decision to purchase, however, was made and implemented without a full appreciation of the risks. The Department conducted only a

minimal investigation concerning the FN303 performance and safety before purchasing the weapons, although admittedly such efforts were (and still are) hampered by the general lack of data on less-lethal weapons and the lack of national standards.

12. There was some training, albeit uneven, of Department personnel on the use of the FN303, at least from a technical weapons perspective. Certain Boston police officers were instructed in the firing and care of the weapon. However, this training was incomplete and there was no validation (testing) to determine if the lessons taught had been understood.

13. What was noticeably absent in the training was any awareness of the limitations of less-lethal weapons, in particular the FN303, and how such weapons might be appropriately used in crowd control. The FN303 was put on the streets without making sure that those who would authorize its use, and those who would actually use it, fully understood when and how the weapon should be used.

14. The risk of a tragic outcome that evening was also enhanced by several other factors. The FN303 appeared to have been viewed by the Department to be not simply "less-lethal," but really non-lethal. The officers on Lansdowne Street did not appear to appreciate that a person could be seriously injured or killed by the FN303. While the manufacturer stated that the FN303 should not be aimed at the head or neck and warned that such impact could cause injury or death, the consequences of hitting those areas, even by mistake, did not seem to be understood by those firing the weapon that evening. The fact that the rounds are advertised by the manufacturer as never causing a "perforation of the skin," which proved to be inaccurate, may have contributed to this misunderstanding.

15. The manufacturer has left to each individual police department purchasing the FN303 the training on when to use it. In Boston, that training did not occur.

16. We have not conducted an independent study of the effectiveness and safety of the FN303, although we believe such a study should be conducted (as we set out in Appendix B). The manufacturer has stated that the FN303 is accurate, even from long range, and safe, if used properly.

17. Reports from police departments, including the Boston Police Department's own reports, support the weapon's claimed accuracy. As for safety, there appears to have been no reported serious injuries and no deaths, until the events on October 20-21, 2004. We note, however, that the FN303 has been rarely used by police departments outside of training. Moreover, we are unaware of any definitive independent study addressing this question of safety, particularly the risk of penetration. The outcomes here -- three shots to the head, one resulting in death and two resulting in penetration -- seem inconsistent with the manufacturer's representations that the projectiles will not penetrate the skin.

18. We do not urge that police departments stop using the FN303 under all circumstances. At the same time, we see some reasons to proceed with care. As a result, our recommendations point to the need for a more thorough investigation by police departments, a national effort to test and certify such weapons, clearer policies regarding use, and more

complete training. This is particularly the case with respect to crowd control situations where special care should be taken with any use of such weapons.

19. As for Boston, although we are skeptical that mechanical failure will prove to have been the problem, its FN303s will remain under a cloud until specific independent tests (of the sort we suggest) are conducted. Quite apart from the other steps we recommend (such as the adoption of clear policies and adequate training), the Boston Police Department should not use this weapon until the tests are completed.

II. EVENTS OF OCTOBER 21-21, 2004

A. Introduction

On October 20, 2004, the Boston Red Sox and New York Yankees played the seventh and deciding game of the American League Championship Series (“ALCS”), with the winner advancing to Major League Baseball’s World Series. Despite the fact that the game was being played in New York, given the intense rivalry between the Red Sox and the Yankees and recent experience with the crowds that had gathered to celebrate the New England Patriots’ Super Bowl victories, if the Red Sox were to win the game, the Boston Police Department expected crowds to gather in the areas surrounding Northeastern University, Fenway Park and Kenmore Square.¹

Accordingly, the Department deployed two Public Order Platoons (“POPs”), one in the East Fens near Northeastern, consisting of approximately 40-50 officers, and one in the area of Kenmore Square, consisting of approximately 80 officers, all dressed in full riot gear (*i.e.*, helmets, full body pads, batons). Each POP, which are used in crowd and riot control situations, was supported by two officers, called grenadiers, specially trained in the use of less-lethal and chemical munitions.

The Department also deployed three squads of approximately eight to ten motorcycle officers (the “Mobile Field Forces”), which were positioned along Brookline Avenue across from Fenway Park. In addition, the Department had a squad of eight mounted units, five canine units, scattered “intelligence units,” and numerous district officers. Supporting the Boston Police were approximately 60 State Troopers, 40 officers from Northeastern University, 33 officers from Boston University, and 24 officers from Boston College.

B. Before and During the Game

1. The Crowd

Before the game, which began at approximately 8:00 p.m., the area around Fenway Park was a hub of activity. The bars in the area were filling and some had lines out their doors. As the game progressed, and it became clear that the Red Sox would likely win, fans began to filter into the streets surrounding Fenway Park. Toward the end of the game, crowds began to form along Brookline Avenue, some watching the game from the sidewalks on televisions inside local bars. At this point, the crowd remained orderly, and traffic continued to flow on Brookline Avenue and Lansdowne Street.

2. The Police: Fenway Park/Lansdowne Street

Deputy Superintendent Robert O’Toole, who was the on-scene operations commander for this event, arrived in the Fenway Park area at approximately 4:00 p.m. on October 20th. With Deputy Superintendent O’Toole was Officer James Moore, who functioned as Deputy Superintendent O’Toole’s assistant for the evening. About mid-way through the game, Officer

¹ For a map of the Fenway area, see Appendix A.

Thomas Gallagher arrived in the area driving the “equipment truck” -- a vehicle equipped with less-lethal and chemical munitions. Officer Gallagher was ultimately directed by Deputy Superintendent O’Toole to stage the equipment truck on Brookline Avenue across from the foot of Lansdowne Street. Shortly after the equipment truck was in place, the Mobile Field Forces were directed by Deputy Superintendent O’Toole to position themselves and their motorcycles on each side of the truck, spread out along Brookline Avenue.

C. The Scene on Brookline Avenue and Lansdowne Street Immediately Following the Game

The game ended at approximately 12:00 a.m. on October 21, 2004, with the Red Sox victorious. Immediately, the bars in the Fenway Park area emptied, as did the dormitories from the surrounding colleges and universities. Brookline Avenue was described as wall-to-wall people within minutes of the game being over.² Initially, the police took no action against the crowd, which was, for the most part, in a celebratory mood. There was no vehicular traffic immediately adjacent to Fenway Park, as Brookline Avenue and Lansdowne Street had been shut down before the end of the game. The crowd was very loud and police were having difficulty hearing their radios, despite the fact they were wearing earpieces. The area became so congested that the motorcycle officers were effectively rendered immobile. Police resources were devoted to guarding the motorcycles from the crowd.

The first significant interaction between police and the crowd near Lansdowne Street appears to have been with a group of fans who had climbed onto the roof of the “Player’s Club,” a brick structure attached to Fenway Park adjacent to the intersection of Brookline Avenue and Lansdowne Street. Police were able to clear the group of 200 or more that had gathered in that area using flashlights, hand signals, verbal warnings and by displaying an FN303 (which Officer Gallagher was armed with while standing atop the equipment truck, but which was not discharged).

D. Officer Milien is Issued an FN303

After dealing with the crowd on the roof of the Player’s Club, Deputy Superintendent O’Toole began to view the crowd as more than merely celebratory. Indeed, police in the area were vastly outnumbered and some in the crowd were throwing objects (bottles, toilet paper rolls, and other objects) in the direction of the police. O’Toole also learned that some on Lansdowne Street had uprooted street signs and were throwing hubcaps as if they were Frisbees.

In response, Deputy Superintendent O’Toole ordered Officer Gallagher not to use the MK-46’s (which can dispense high volumes of OC, known as pepper spray), and instead to deploy the FN303s from the equipment truck, which was equipped with four such weapons. At this point, Deputy Superintendent O’Toole asked Sergeant Edward Meade, who was in charge of one of the Mobile Field Force squads, whether any of his officers was a grenadier. Sgt. Meade

² Police estimate the capacity of the bars in the area surrounding Fenway Park to be between 8,000 and 12,000 people. Estimates of the total crowd vary widely, from approximately 40,000 to as many as 80,000 people.

did not know, so he went down the line of officers, asking each if he was a grenadier. Officer Rochefort Milien volunteered that he was a grenadier, and reported to the equipment truck with Sgt. Meade.

At the equipment truck, Officer Milien, who was certified in the use of the FN303, was handed an FN303 and was told by Deputy Superintendent O'Toole to "use it as needed." Milien understood this to mean that he should use the weapon at his discretion, consistent with his training.

E. The FN303 is Discharged on Brookline Avenue

After issuing the FN303 to Officer Milien, Deputy Superintendent O'Toole became aware that there was a fire in the street on Brookline Avenue, in the area of the bridge over the Massachusetts Turnpike, and that the fire had become a focal point for the crowd. O'Toole took the FN303 from Milien, despite not being certified on the weapon himself, and proceeded up Brookline Avenue. Assisted by State Police units, Deputy Superintendent O'Toole stomped out the fire.

In addition to extinguishing the fire, Deputy Superintendent O'Toole and the State Police units also addressed a crowd of about fifty people that had gathered on the roof of the Cask & Flagon, a bar at the corner of Brookline Avenue and Lansdowne Street. Because some on the roof ignored police commands to climb down, and because those who remained appeared to be disrobing and inciting the crowd below, O'Toole discharged two FN303 rounds, intentionally missing those on the roof and instead hitting the billboard behind them. In response to these shots, about half of those still on the roof climbed down. In any event, four or five individuals remained on the roof and continued to disrobe. Deputy Superintendent O'Toole then discharged at least one round at one of those individuals, striking him in the chest or stomach area, from a distance of approximately 150 feet.

Deputy O'Toole then returned to the equipment truck and returned the FN303 to Officer Milien, who believes there were seven to nine rounds remaining in the fifteen round magazine when the weapon was given back to him. That means that Deputy Superintendent O'Toole discharged the weapon between six and eight times.

F. Officer Silta and Deputy O'Toole are Issued FN303s

Following the discharges described above, Officer Samil Silta was called over to the equipment truck by Deputy Superintendent O'Toole and was also issued an FN303. It is unclear whether anyone asked Officer Silta if he was trained on the FN303. However, O'Toole instructed him to "take this and use this if you have to." Unlike Officer Milien, Officer Silta was not certified on the use of the FN303. Deputy Superintendent O'Toole also armed himself with an FN303 from the equipment truck. At this point, O'Toole, Officer Silta and Officer Milien remained at the equipment truck for a period of between fifteen and twenty minutes, each armed with an FN303.

G. Police Efforts to Clear Lansdowne Street

1. Police Assist Vehicles in Danger and Clear the Open-Air Garage

At about the same time as the FN303s were being issued at the equipment truck, a motorist had exited a parking garage on Lansdowne Street and was inching through the crowd towards Brookline Avenue, reminiscent of the incident that followed the Super Bowl ten months earlier in which a pedestrian was killed. Intelligence officers nearby recognized the danger to the motorist and the pedestrians in the area and ordered the driver out of the car. The driver refused, continuing to drive the car slowly through the crowd while the crowd began to rock and climb onto the car.³

Meanwhile, Deputy Superintendent O'Toole had learned that this car had exited the garage and was attempting to maneuver through the crowd toward Brookline Avenue. In response, Deputy Superintendent O'Toole ordered Sgt. George Survillo to take his mounted units onto Lansdowne Street to rescue the vehicle's occupants and move the vehicle to the side of the road. At some point shortly after they arrived on Lansdowne Street, the mounted units requested that foot officers respond to assist and secure the vehicle. Accordingly, Deputy Superintendent O'Toole ordered Sgt. Meade to take his Mobile Field Force squad down Lansdowne Street to assist the mounted units. Deputy Superintendent O'Toole, Officer Silta and Officer Milien, each armed with an FN303, also proceeded through the crowd and down Lansdowne Street at this time. The occupants were removed from the car before anyone was injured.

Once on Lansdowne Street, the foot officers assisted the mounted units with securing the vehicle that had left the garage, cleared a crowd that had gathered on the open-air parking garage across the street from Fenway Park, and assisted a second vehicle in distress near the intersection of Brookline Avenue and Lansdowne Street. The police also ordered the garage closed. The mounted units, supported by some of the foot officers in the area, then formed a line across Lansdowne Street, so they could begin to push the crowd toward Ipswich Street.

2. Discharges at the Green Monster

During this time, Lansdowne Street has been described as a "sea of people" and "wall to wall from right to left." Some in the crowd continued to throw objects, sometimes in the direction of the police. In addition, a group of fans had climbed the girders that support the seats above the Green Monster, Fenway Park's left field wall. There is no clear evidence that any of the thrown objects were coming from those who had climbed the girders, however Deputy Superintendent O'Toole, Officer Silta and Officer Milien proceeded to remove the trespassers from the girders.

³ Sergeant Detective Daley described the "densely packed" crowd as "angry" and reported that some in the crowd were on the roof of the car, had smashed its windshield and were "rocking the car and banging on the outside."

With Deputy Superintendent O'Toole in the lead, followed by Officers Milien and Silta, the three officers approached the Green Monster. Initially, the officers used hand signals and verbal warnings, telling those on the Green Monster girders to climb down. But, within a few seconds, when those efforts failed, the officers discharged multiple FN303 rounds at the individuals on the girders and continued firing at them even while they scrambled to get down.⁴

Deputy Superintendent O'Toole discharged the first rounds as he reached the sidewalk, with Officers Milien and Silta following suit from behind the Deputy. Once the firing began, multiple rounds were discharged in a rapid-fire manner. It is likely that two dozen or more projectiles were fired at those on the support structure.

Almost without exception, Deputy Superintendent O'Toole has been described as discharging the FN303 from his hip area in such a fashion that it does not appear that he was sighting the weapon to aim at specific targets, contrary to the manner in which the FN303 is intended to be discharged.⁵ Indeed, accounts describe the manner in which O'Toole was holding the FN303 as "down low, almost like he was holding a guitar" and his method of discharging the weapon as "like a spray and pray type of thing."⁶ It is unknown whether Officers Milien and Silta appropriately sighted their weapons while discharging at those who had climbed the Green Monster.

The FN303 discharges at those on the Green Monster's girders did cause people to climb down. In the process, one person (Paul Gately) was struck in the upper lip area, a second person (Kapila Bhamidipati) was struck in the forehead, and at least one other person was struck while trying to climb down. The two facial injuries resulted in considerable bleeding. It is not clear who among O'Toole, Milien and Silta shot these rounds.

Many accounts (including some by police officers) suggest that the firing of the FN303 at those on the Green Monster girders may have angered and further incited the crowd, making the police the focus of attention.

⁴ Accounts of the incident vary with respect to whether the police gave any warnings before firing their weapons or, if they did, whether those who had climbed the Green Monster were given sufficient time to climb down in response to police commands to do so. Surprisingly, the police did not use bullhorns or other devices, although it is hard to know in hindsight if this would have been effective because of the noise level. In any event, if warnings were given, it is doubtful those on the girders were given sufficient time to come down.

⁵ This conclusion is bolstered by the fact, described later, that when Deputy Superintendent O'Toole handed the FN303 to Officer Richard Stanton after the discharges at the Green Monster, the sights were not up.

⁶ In contrast, Deputy Superintendent O'Toole's account of the discharges paints a picture of more disciplined use of the FN303. According to O'Toole, he discharged the weapon at two individuals who were climbing up the Green Monster, striking them both, and causing both to climb down.

3. Deputy Superintendent O'Toole Discharges FN303 As the Green Monster Cleared

As the Green Monster was cleared, Deputy Superintendent O'Toole focused his attention on a small fire in the middle of Lansdowne Street, behind the line of mounted units, which were trying to push the crowd toward Ipswich Street. This fire became the focus of the crowd, with some dancing around and through the fire. O'Toole ordered those around the fire to leave the area. Some complied, but an unidentified white male with no shirt ignored the commands. O'Toole then aimed the FN303 at the man, from a distance of 8 to 12 feet, and while facing Ipswich Street, discharged at least one FN303 round and struck the man in the chest or stomach area. After being struck, he ran away.

Following this FN303 discharge, Deputy Superintendent O'Toole tried to hand the weapon to Officer Steven Gil, saying "Stevie, are you certified with this?" Officer Gil responded that he was not, and refused to take the weapon. O'Toole then handed the weapon to Officer Richard Stanton, who also was not certified on the FN303 and relayed that fact to O'Toole. Deputy Superintendent O'Toole responded, "just pull the trigger" as he handed Officer Stanton the weapon. When the weapon was handed to Officer Stanton, the sights were not up. Officer Stanton did not discharge the FN303 that night.

4. Officer Silta Discharges FN303 As the Green Monster Cleared

As the Green Monster was being cleared, Officers Gil and Stanton were in the area underneath the girders, directing people toward Brookline Avenue. While doing so, each was independently approached by Paul Gately, who told them that he had been shot in the upper lip and needed medical assistance. Both officers directed him toward Brookline Avenue, where they believed there would be an ambulance. Mr. Gately then approached Officer Silta in a manner Officer Silta says he viewed as threatening. Officer Silta discharged one FN303 round, striking him in the leg. Officer Silta stated that because Mr. Gately continued to advance, he then rapidly discharged multiple rounds, at close range, striking Mr. Gately as many as 12 times in the torso. Mr. Gately's version of events is quite different and is supported by other witnesses. Mr. Gately said that he was walking toward the officer, with his hands at his side and blood on his face and shirt, to get medical help, when he was shot numerous times in the torso. Officer Silta also discharged his weapon at Kathryn Gately, Paul's sister, who was also approaching in a manner the officer claimed was threatening. It is unclear whether Ms. Gately was hit. Both individuals then left the area moving toward Brookline Avenue, to seek medical attention for Mr. Gately.

H. The Fatal Shot

After the discharges on Lansdowne Street, the crowd ignored police orders to disperse and continued to throw objects at the police. At that time, the police divided the crowd on Lansdowne Street into two groups, those between the mounted units and Ipswich Street and those behind the mounted units toward Brookline Avenue. There was a gap of about twenty-five to fifty feet between those two crowds. There were also people gathered on the sidewalks on both sides of the street. Deputy Superintendent O'Toole made the decision that the officers should leave Lansdowne Street, and told Sgt. Survillo that he wanted to turn the mounted units

and move the crowd toward Brookline Avenue. O'Toole then relayed this command to each officer using hand signals. Officers Stanton, Silta and Milien were armed with FN303s and were behind the line of mounted units, facing Brookline Avenue and acting as grenadiers, addressing the crowd as necessary. The mounted units were still facing Ipswich Street. O'Toole was on the Brookline Avenue side of the grenadiers, and other Mobile Field Force officers were filling in the line with the mounted units.

Officer Christopher McNeil, who was in line supporting the mounted units, commented to Milien that "it seems like every time I turn around something's coming in the air" and told Milien that the bottles and rocks were coming from over his left shoulder.⁷ Officer Milien acknowledged the statement. Out of the corner of his eye, Officer McNeil then observed Officer Milien, who was behind him and to his right (Officer McNeil was facing Ipswich Street), start to make his way toward the area from where he had indicated the projectiles were being thrown. Officer McNeil next saw Officer Milien raise the FN303 and saw that Officer Milien was facing the direction where Victoria Snelgrove was later found.⁸ Officer McNeil did not see or hear the discharges.

At the same time, Officer Stanton heard two or three FN303 discharges. Officer Stanton turned and saw Officer Milien, who was the only officer in the vicinity with an FN303, holding the weapon at the "low ready" (*i.e.*, with the butt of the weapon at the shoulder and with the muzzle and the sights dipped down below the chin so he could look out over the weapon), about 15 feet from where Ms. Snelgrove was discovered, with the weapon pointed in her direction.

Officer Milien saw in the crowd a white male wearing a yellow or beige t-shirt who had previously thrown bottles in his direction, which had exploded beside him and had struck a horse.⁹ Officer Milien says he had his FN303 "at eye level...trying to...concentrate on the target." According to Officer Milien, the male target was "crouching" behind others and moving from side to side in between throwing objects. When Officer Milien believed he had a clear shot, he fired two rounds in rapid succession. Video evidence suggests that Officer Milien brought the weapon up to eye level and discharged it very quickly, likely not giving him enough time to properly sight the weapon on his intended target. Officer Milien does not know whether he hit his intended target, but does not believe that he discharged in Ms. Snelgrove's direction; he believes his shots were parallel to the curb or slightly toward the middle of the street, as opposed to toward the right sidewalk (as you face Brookline Avenue), where Ms. Snelgrove was standing.

Civilian accounts place Ms. Snelgrove on the sidewalk, leaning against the railing near the open-air parking garage facing the Green Monster support girders, with crowds all around. She was waiting for the area to clear so she could get her car out of the garage and drive home.

⁷ As you faced Brookline Avenue, this would be to the right.

⁸ Civilian witnesses describe the crowd on Lansdowne Street near where Ms. Snelgrove was standing before she was struck as subdued, with people having conversations, walking and going home.

⁹ It is unclear how long before Officer Milien fired at this target that the person last threw any projectile toward police.

We conclude that one of the rounds fired by Officer Milien struck Victoria Snelgrove in the eye, killing her.

I. The Period Following the Fatal Shot

Following the fatal shot, Deputy Superintendent O'Toole saw people trying to get his attention, waving and pointing down. The Deputy responded to the area the crowd was indicating, and found Ms. Snelgrove lying on the ground, bleeding. Ms. Snelgrove was lying on her back, on the sidewalk, with her head near the curb and her feet towards the open-air garage. O'Toole believes he felt a pulse, and immediately called for an ambulance. Sgt. Meade also responded to assist Ms. Snelgrove, helping to roll her onto her side as they waited for the ambulance to respond. Police claim to have not immediately understood that Ms. Snelgrove was injured by a projectile discharged by police. As a result, the police did not establish a crime scene and secure the weapons at the earliest opportunity.

Meanwhile, Officer Milien remained in his position until the crowd retreated toward Brookline Avenue. As the street began to clear, he heard someone yell that there was a person down, and observed Ms. Snelgrove on the ground, to his right, near the ramp to the open-air garage. He then saw Deputy Superintendent O'Toole next to Ms. Snelgrove, talking on his police radio. Milien then continued to try to push the crowd toward Brookline Avenue.

An ambulance responded and tended to Ms. Snelgrove. Lansdowne Street was then cleared. After Lansdowne Street was cleared, Officers Milien, Silta and Stanton returned their FN303s to Officer Gallagher, on the equipment truck, who believes he reloaded between sixty and seventy-five rounds into empty magazines while still on the scene.

Ms. Snelgrove was taken to Brigham & Women's Hospital. She died at 12:50 p.m. on October 21, 2005.

J. In Contrast: The POP Grenadiers' Use of the FN303

As noted below, in contrast to the indiscriminate manner in which the FN303s were discharged by the officers on Lansdowne Street,¹⁰ the other uses of less-lethal and chemical munitions the night of October 20-21, 2004, by grenadiers assigned to the two POP's on duty, were in a much more controlled, disciplined and effective manner.¹¹

¹⁰ As noted earlier in this report, the only officer who discharged the FN303 on Lansdowne Street who was trained on the weapon was Officer Milien. In contrast, each of the POP grenadiers armed with FN303s and other less-lethal and chemical munitions were trained in the use of each of those weapon systems.

¹¹ In addition to the FN303 discharges on Lansdowne Street, the only other reported FN303 discharges were by Officer Ridlon, on Boylston Street. Other less-lethal and chemical munitions were, however, also discharged by POP grenadiers.

1. The Use of Less-Lethal and Chemical Munitions on Boylston Street

The POP assigned to the Northeastern University area was commanded by Deputy Superintendent Paul Fitzgerald, Captain Frank Armstrong and Lieutenant Kelley McCormick, and consisted of approximately 40 to 50 officers (broken down into two platoons, and/or four squads). Initially, the officers assigned to this POP were lined up across the sidewalk on Hemenway Street, 10 feet apart, facing alternating directions -- one facing the dorms, the next facing the street. Immediately upon the conclusion of the game, these officers saw a mass exodus from the dorms in the area, with everyone rushing toward Fenway Park.

A short time after the game ended, Deputy Superintendent Fitzgerald received a radio transmission and a phone call from Deputy Superintendent Patrick Crossen (who was in the Unified Command Center) (“UCC”), asking if he could spare his POP to assist in other areas. In response, Captain Armstrong and Lieutenant McCormick moved the entire POP toward Fenway Park. The platoon went to the back of Fenway Park, to the Lansdowne and Ipswich Street area, then continued up Van Ness Street to Yawkey Way, and up Yawkey Way (which was blocked off, but which the POP was permitted to enter). On Yawkey Way, the officers rested for a few minutes. It is estimated that the POP arrived at Yawkey Way around 12:45 a.m.

Once on Yawkey Way, Captain Armstrong and Deputy Superintendent O’Toole agreed that the POP would be used to assist with clearing Brookline Avenue, forcing the crowd away from Kenmore Square. Accordingly, the POP officers were positioned in a line across Brookline Avenue (again facing alternating directions, one officer facing Kenmore Square, the next facing Park Drive), in the vicinity of the Boston Beer Works. The officers were instructed to let people out of the area, but not back into the area (*i.e.*, nobody was permitted to go back past the officers toward Kenmore Square).

At the same time, Lieutenant Paul O’Connor was in command of between 3 and 5 district officers in the vicinity of Boylston Street and Yawkey Way, and requested assistance. In response, Captain Armstrong took half of his POP and moved them to Boylston Street to assist Lieutenant O’Connor, leaving half on Brookline Avenue (in the formation described above, with assistance from State Police motorcycle units in the area). Lieutenant McCormick and Captain Armstrong also responded to Boylston Street. The grenadiers, Officers John Ridlon and Patrick McKenna, remained on Brookline Avenue in support of the POP officers who remained at that location. This occurred between approximately 12:45 and 1:15 a.m.

Boylston Street was more crowded than Brookline Avenue and the crowd was more active. There were approximately 50 cars stuck in the crowd, many of which were occupied by families and others who were not in the area to celebrate the Red Sox victory. These cars were in the midst of the crowd and were drawing the crowd’s attention. People were jumping on the cars, and a private ambulance was unable to pass through the crowd. Captain Armstrong wanted to get his POP officers behind the crowd, so they could push them outbound (*i.e.*, away from Fenway Park). Captain Armstrong did not have a bullhorn, but he read the “unlawful assembly” order to disperse. The POP officers were instructed to line up (again facing alternate directions) in a position that had the effect of dividing the crowd, with the police in the middle. The police then became the focal point of the crowd and started to get rocks and bottles thrown at them, although likely from a very small percentage of the crowd. At this point, Captain Armstrong

called for the grenadiers to respond to Boylston Street, from their positions on Brookline Avenue. Officers Ridlon and McKenna responded to Boylston Street, and took up a position behind the line of POP officers, which were now in a position behind the majority of the crowd and preparing to push the crowd down Boylston Street away from Fenway Park.

Captain Armstrong continued to order the crowd to disperse and added that if people failed to disperse, police would use less-lethal or chemical munitions. Because the crowd did not comply with his orders to disperse, Captain Armstrong authorized the grenadiers to deploy "Stingers Handballs," or "Stinger Grenades." Commonly called sting ball grenades, they look like round rubber hand-held grenade-type munitions that produce an incredibly loud sound, light, and small rubberized pellets, the desired effect being to scare the crowd and cause them to disperse. The sting ball grenades were deployed by the grenadiers on either side of Boylston Street, and they had their desired effect, causing more than half of the crowd to disperse and causing the rest to move back at least 100 yards.

Those who remained, however, continued to throw bottles and rocks at the police. At this juncture, Captain Armstrong authorized the use of the FN303 at the grenadiers' discretion, and reiterated that the weapon is target specific and that they should be able to articulate who they targeted and why they discharged the weapon, if they did so. Only Officer Ridlon was armed with an FN303; Officer McKenna was not.

In response to the continued attacks from the crowd, and in an effort to break up a fight in the area, Officer McKenna deployed a third sting ball grenade (this one also contained OC, or pepper spray) and Officer Ridlon discharged approximately six FN303 rounds, from a distance of approximately 50 yards, at specific targets who were assaulting a female in the crowd on Boylston Street near Yawkey Way. Officer Ridlon is unsure whether the rounds struck his intended targets, but in response to the discharges, the targeted individuals fled the area. Officer McKenna, who did not have an FN303 with him at the time, discharged one direct impact blunt trauma round from a 40 mm launcher in the direction of an unidentified male who had his arm cocked as if he were about to throw a rock or bottle at the officers. As a result, the male fled the area. At some point, probably after Victoria Snelgrove was struck, the UCC ordered the POP commanders to cease the use of all less-lethal and chemical munitions, unless specifically authorized by the UCC. This command was relayed to the grenadiers on Boylston Street, and no further less-lethal or chemical munitions were deployed.

Ultimately, the Boylston Street area was cleared with the assistance of additional POP officers (who responded from their posts on Brookline Avenue) and midnight shift officers, who helped to block off the side streets, which the crowd had been using to avoid being pushed out of the area. After Boylston Street was cleared, Captain Armstrong, Lieutenant McCormick and the POP officers (all four squads were together by this point) boarded an MBTA bus the police were using that night to transport officers, and responded to a car fire further up Boylston Street and to deal with a group vandalizing vehicles in the area of Massachusetts Avenue and Symphony Road. The POP officers then marched in formation back to the Northeastern University area, continuing to push the crowd and clear the area as they went.

No injuries were reported as a result of the of POP grenadiers' use of less-lethal and chemical munitions on Boylston Street.

2. The Use of Less-Lethal and Chemical Munitions in Kenmore Square

Meanwhile, in Kenmore Square, the entire crowd was cleared without discharging the FN303 at all. Instead, the POP grenadiers assigned to that area deployed one triple chaser smoke grenade and four smoke rounds from a 40 mm launcher, which effectively cleared the entire area.

The Kenmore Square POP was commanded by Lieutenant Steven Meade. The grenadiers assigned to that platoon were Detective John O'Connor and Officer John McNulty, both of whom were armed with the FN303 and other less-lethal and chemical munitions.

Around the 7th inning (approximately 11:00 p.m. on October 20th), the Kenmore Square POP team marched from the Ipswich Street and Lansdowne Street area, where they had been staging, up Lansdowne Street past the bars, as a show of force. From Lansdowne Street, the POP made its way up Brookline Avenue and into Kenmore Square. When the POP first arrived in Kenmore Square, the area was quiet, and traffic was flowing. At game's end, however, the area quickly filled with people from the bars and dormitories in the area.

The first movement the Kenmore Square POP team made was to form a line across Brookline Avenue, to prevent the crowd from going toward Fenway Park. From there, the POP officers moved further into Kenmore Square, down Commonwealth Avenue toward Beacon Street, where they positioned themselves in a funnel-type formation with the goal of permitting people to leave Kenmore Square, but not enter the area. After being in that position for a short time, the POP officers were alerted to fires and acts of vandalism occurring in the opposite end of Kenmore Square, near Brookline Avenue. The POP, along with the fire department representatives assigned to the platoon, made its way through the crowd toward the fires, with rocks and bottles being thrown towards them the entire time. Ultimately, the officers and firemen made it through the crowd and extinguished the fires.

During this time, the police witnessed many acts of vandalism in and around Kenmore Square, including street signs being ripped out of the ground and thrown into the crowd and towards police, garbage cans being thrown through business signs, and other small fires being set.

The officers also became aware of a group vandalizing a bank and possibly attempting to vandalize the ATM at that location. Lieutenant Meade used a bullhorn and told the crowd at the bank to disperse or the police would use a chemical agent. Lieutenant Meade repeated this warning several times. When those vandalizing the bank continued to ignore the commands to disperse, Lieutenant Meade authorized Officer McNulty to deploy one triple chaser smoke grenade near that crowd. Officer McNulty then tossed one such device about 15 feet from the area where the crowd was congregating. The device exploded, causing smoke to fill the area and, as a result, causing the crowd to flee. About half of the crowd moved toward the Newbury Street Extension, the other half up Commonwealth Avenue.¹²

¹² Around the same time, Detective O'Connor aimed his FN303 at an individual who had climbed and vandalized the bank sign and who was throwing objects at the police. This individual eventually

At that point, the Kenmore Square POP team was split in two, half pushing the crowd up Commonwealth Avenue and the other half pushing the crowd up Beacon Street. Within a short time, Kenmore Square was clear.

Detective O'Connor accompanied the portion of the POP that pushed the crowd up Commonwealth Avenue. During that time, Lieutenant Meade authorized Detective O'Connor to deploy the necessary less-lethal or chemical munitions to clear a crowd that was vandalizing a car and a Citizens Bank on Commonwealth Avenue. In response, Detective O'Connor discharged one "scat shell" round from his 40 mm launcher. Detective O'Connor did so not by aiming the "scat shell" directly at anyone, but by ricocheting the projectile off the ground, about 20 yards in front of the crowd. This round was effective in causing the majority of the crowd to disperse, however some of the more active vandals remained, and continued to vandalize cars and throw objects at the police.

Lieutenant Meade authorized Detective O'Connor to discharge a second "scat shell" round, which he deployed in the same manner as the first round. The second round caused the remaining crowd to retreat onto Blanford Street, but the crowd continued to throw objects at the police and continued to vandalize cars that were in their path. For that reason, Lieutenant Meade authorized Detective O'Connor to deploy a third 40 mm round, this time a "scat shell" smoke round. Detective O'Connor deployed the smoke round toward the crowd on Blanford Street, and the crowd finally dispersed. Detective O'Connor also fired a fourth 40 mm round at the crowd that remained on Commonwealth Avenue, which had also continued to throw objects at the police. This fourth round caused the remainder of the crowd to disperse.¹³

After clearing the area, the entire POP reassembled in Kenmore Square. At approximately 2:00 a.m., the POP left the Square and marched down Brookline Avenue and Lansdowne Street, back to their initial staging point in the area of Ipswich Street.

There were no further deployments of less-lethal or chemical munitions in Kenmore Square, and at no time did either grenadier discharge his FN303. No injuries were reported as a result of the POP grenadiers' use of less-lethal and chemical munitions in Kenmore Square.

acknowledged Det. O'Connor's presence with the FN303 and climbed down. When asked why he did not discharge the weapon, Det. O'Connor said that "from [his] vantage point...[he] knew that if [he] missed him, on the other side of him...all of the way up Brookline Avenue, because that's where the round would have potentially landed, there was thousands of people...and ...[if he missed,] the round may have gone right by him and it could have...potentially hurt someone else that it was unintended for." Similarly, when asked about the thought process he went through that night when determining whether it was appropriate to discharge the FN303, Officer McNulty responded "it's do I have a shot, first off. More often than not that night I didn't. Then it came up to the secondary. Okay, I've got a shot. Now do I have my back drop? Do I have somebody cut in front of him? Do I have somebody who's going to just turn at the last minute? I mean all that stuff is factoring through your mind."

¹³ According to Det. O'Connor, he chose to deploy the 40 mm launcher rather than the FN303 because the size of the crowd in the area made it difficult to engage a specific target.

III. THE PLANNING FOR GAME SEVEN

A. Introduction

Just as the single fatal shot that killed Victoria Snelgrove cannot be viewed in isolation, apart from the overall police actions on the night of October 20-21, the police actions that night cannot be understood apart from the planning process through which the Department prepared for the event. To what extent did the planning process prepare the Department for what it faced that night? What lessons had the Department drawn from earlier events, such as the Super Bowl celebration in February of that same year, and how had these lessons been incorporated in the plan for the ALCS? Addressing such questions is crucial if Ms. Snelgrove's death is to lead to improvements in the planning for sporting event celebrations in the future.

In keeping with the best professional practices, the City of Boston uses an *Incident Command System* to manage special events in the City, ranging from a small road race for charity to the Democratic National Convention. The Incident Command System provides all government employees involved with an incident a common language, a familiar command structure, and a set of operational protocols that allow them to function together effectively when dealing with situations out of the ordinary. It is used for small incidents handled by only a few government employees from a single agency as well as for very large events that require the coordination of hundreds of people from federal, state, and multiple local government agencies.¹⁴

Some specific incidents, such as hostage situations or natural disasters, are unanticipated, requiring the first responder to recognize the situation and to set the Incident Command System in motion. Other incidents, such as professional sporting events, political rallies, and conventions, are scheduled weeks or months in advance; their formal sponsors trigger the government's planning when they obtain approval to hold the event. In these latter instances, the planning process results in a formal *Operational Plan* that sets out how the Incident Command System is to be employed for that event.

For all crowd control situations in Boston, the Department is the lead agency, responsible for coordinating the planning process, producing the Operational Plan, and supplying the *Incident Commander* for the event itself. According to Department Rule 200, the Incident Commander is responsible for planning, command, tactical operations, logistical support, and finance/administration, but these responsibilities can be delegated, depending on the scope and scale of the incident. The Incident Command System requires both *Unity of Command* and an appropriate *Span of Control* for each supervisor in the chain of command. According to Rule 200, sections 1.2 and 1.6, this means that every person involved in an incident has only one supervisor, and that each supervisor is in command of a reasonable number of subordinates. For senior supervisors, Rule 200 warns against a Span of Control in which senior supervisors have more than seven subordinates reporting to them.

¹⁴ The Incident Command System is described and implemented by the Boston Police Department's Rule 200.

Superintendent James Claiborne was the Incident Commander for all ALCS games in October 2004. For the seventh game, on the night of October 20-21, Deputy Superintendent O'Toole was the "Operations Commander" or "Operations Chief," reporting directly to the Incident Commander and responsible for all tactical operations in the field.¹⁵ In essence, the Incident Commander is managing all of the government assets committed to the event, including media relations, communications, transportation, finance, and the direct police operations. The Operations Commander is responsible for that last item: direct police operations.

Even though the game itself was played in New York, the Department understood that any result would likely produce large crowds in the streets of Boston with a potential for disorder. The Operational Plan assigned a total of 334 Boston police personnel to the event, virtually the same as the 343 who had been assigned a few days earlier to Game 5, the last game to be played in Boston when the Yankees might have clinched the series. Of those 334 officers, 130 were assigned to the areas immediately surrounding Fenway Park.

B. The Planning Process

Planning for scheduled special events usually begins with a formal application from the event sponsor, who comes before a citywide events committee. The ALCS was no exception, with representatives of the Red Sox and Major League Baseball coming before the committee on three occasions. Superintendent Claiborne oversaw that process for the Department and he personally met with the head of security for Major League Baseball twice in addition to the formal meetings at the Department.

Officers assigned to the special events unit under Superintendent Claiborne then prepare a draft of the formal Operational Plan. That plan is circulated for comment, revised, and then finalized, although small revisions are inevitably made right up to the last minute as individual personnel and pieces of equipment must be substituted. Superintendent Claiborne, however, remained responsible for the final product.

Two aspects of the drafting process deserve particular emphasis here. First, officers in the special events unit prepare draft plans based on earlier plans for similar events. Rather than draft each plan from scratch, they revise an earlier plan to take account of new information, new decisions, and changed circumstances. Second, the plans themselves concentrate on the numbers of officers and units to be deployed and their locations, rather than on the strategies and tactics that the police will use.

These two aspects are relevant because, in the year between the 2003 and 2004 ALCS games, the Department had experienced two events that substantially increased its knowledge about, and capacity for, crowd control. In February 2004, when the New England Patriots won the Super Bowl, large crowds poured into the streets of Boston causing some substantial disorder and leading to the death of a pedestrian. A thorough review of that event, including the planning failures that had occurred, led to a series of recommendations for improving crowd control at

¹⁵ The Operational Plan does not actually specify the Operations Commander, but everyone involved clearly understood that Deputy Superintendent O'Toole was in that role.

future events. Then, in July 2004, when the Democratic Party held its national convention in Boston, the Department executed the most complex crowd control operation in its history, including new forms of incident command, operational command, and acquisition of new technology (including the FN303). The Department considered its crowd control strategies and tactics developed and implemented by them during the DNC a substantial success, resulting in minimal disorder and almost no arrests.

In short, as they planned for the 2004 ALCS, the challenge for Superintendent Claiborne and the special events unit was to incorporate the lessons learned both following the 2004 Super Bowl and in the preparation for the 2004 DNC. Apparently, brief references to these two experiences were made frequently during formal meetings and informal discussions among the Department's command staff. Indeed, many senior commanders had strong views about the lessons to be learned from these events. Yet, those views were not necessarily consistent with each other. The formal planning process that resulted in the Operational Plan for October 20-21, 2004, did little to help Superintendent Claiborne and the special events unit resolve the differences of opinion or agree on operational strategy.

As a result, the Department went into the night of October 20, 2004, with a formal Operational Plan that reflected little of the improved knowledge or capacity that the Department had acquired. Moreover, putting the written plan aside, we have little indication that even in command meetings and briefings, the planning process captured and distilled the lessons learned or resolved the different conclusions that various individual commanders drew from these recent events. The Department's senior commanders each individually had drawn a set of lessons from these experiences, but there had been little effort to make these explicit, to reconcile their inconsistencies, and to share them widely with those policing the crowds on the night of October 20-21.

C. Lessons from the 2004 Super Bowl and the DNC

The Operational Plan for the February 2004 Super Bowl called for the deployment of 164 police personnel. Superintendent Robert Dunford was the Incident Commander, but he was designated as such only a few days prior to the game. As was customary prior to the DNC, he commanded the police operation from the street, rather than from a headquarters command post.

What happened the night of the Super Bowl bears an uncanny resemblance to the situation faced by the Department eight months later in October 2004. According to Superintendent Dowd's investigation report of March 10:

When the game ended at 10:30 PM the buildings emptied and within minutes the street was full of people celebrating the Patriots victory. *Officers were shocked at how fast the street filled up.*

Most of the crowd was celebratory and restrained, but -- as would happen again in October -- there were exceptions. Again, according to Superintendent Dowd's investigation:

Some in the crowd became confrontational toward the police.... Fires were being lit in the street. Objects were being thrown at police and fire personnel from above. It was difficult if not impossible for the officers to see and to hear, even short distances, because of the

crowd.... [T]he crowd on Symphony Rd. became more violent, tipping several cars over and vandalizing many more.

The same pattern was replicated at other locations. A plate glass window of an H&R Block store was broken. The police seem to have been particularly concerned that young women were exposing their breasts, provoking parts of the crowd to further recklessness. On several occasions, however, when the police moved forward and ordered the crowds to move on or disperse, the crowds complied.

Shortly after midnight, in the tragic incident for which the public would remember that evening, a motorist trapped in the midst of the crowds struck and killed a pedestrian. The motorist was apparently trying to leave an area where the crowd had already flipped some cars. When officers first noticed the motorist, he was driving in reverse toward them. They yelled at him, and several officers dove out of harm's way. Then, as Superintendent Dowd recounts:

As ... officers approached the car, ordering it to stop and the driver to get out, it accelerated forward rapidly and continued down Symphony Rd. The car struck several people, killing one and seriously injuring others.

In reporting his findings, Superintendent Dowd underscored the fact that Department's own experience with these post-event celebrations eliminated any excuse for lack of preparation:

The inability of the Department's planners to anticipate either the extent of the crowds... or the behavior exhibited by the crowds is inexcusable.... The crowd behavior after the 2003 Red Sox/Oakland playoff series resulted in accusations that the Boston Police Department was caught off guard.... and the same crowd tactics, flipping cars and lighting fires, were seen in 2002. This information was either ignored or forgotten.... Officers and Supervisors believe that the Super Bowl event was not an aberration.

In his recommendations, Superintendent Dowd emphasized that the problem was not chiefly about the numbers of officers deployed. In addition to deploying the appropriate number of officers, the Department needed to undertake contingency planning and clearly define expectations and rules of engagement. Superior officers in these situations need to make tough decisions, and the Department must "let them know ahead of time what the guidelines are for those decisions."

Specifically, Superintendent Dowd recommended:

- "Celebratory rioting ... needs a specific set of tactics and policies....the Department also needs to pre-plan to physically take the high ground (rooftops, etc.) in crowd control situation."
- "Roles need to be clearly defined for command personnel.... Lines of Command and Communication need to be established and adhered to."
- "Rules of Engagement need to be established and communicated to Commanders and Supervisors."

Although Superintendent Dunford disagreed with some of Superintendent Dowd's findings, they were in agreement on these points. In his own After Action Report, Superintendent Dunford observed that "there was no pre-event assessment or planning for different scenarios." He recommended:

a pre-event assessment be conducted in which possible scenarios and strategies to deal with each scenario are formulated. In addition... [the assessment] should examine the strengths, weaknesses, opportunities, and threats (SWOT) of each strategy. Each Operational Plan should also include a Situation and Concept of Operations statement. Pre-event assessment and strategizing may have allowed the Department to anticipate a possible scenario as which occurred.

The Department incorporated these lessons into its planning for the DNC. Superintendent Dunford led that planning process and he conducted, on a much larger scale, the kinds of pre-event planning and scenario development that he and Superintendent Dowd had recommended for post-event sports celebrations.

Indeed, within a few days of the death of Victoria Snelgrove, the Department demonstrated that it knew how to build an Operational Plan of this kind. The plan for Game Four of the World Series, on October 27, 2004, borrowed heavily from the plan for the DNC, including a section entitled "Rules of Engagement." These rules included extensive instructions on the use of less-lethal weapons systems, requiring supervisors to give a warning to the crowd when practical and consider the impact on the surrounding area and people present. These were not new rules, but were drawn from the rules issued for the DNC, as the table of comparison below makes clear. In both cases, on site commanders were permitted to use a variety of less-lethal weapons including bean bag rounds, pepper balls, and OC spray, but only the Police Commissioner or the Incident Commander could authorize the use of CS gas or "extended impact weapons systems," which include the FN303. This restriction was not created as response to the death of Victoria Snelgrove, but merely restated the restriction that had been in place for the DNC.

The Operational Plan for the night of October 20-21 contained no Rules of Engagement at all and no mention of less-lethal weapons systems.

**Rules of Engagement for
Game 4 of the World Series**

**Rules of Engagement for
Democratic National Convention**

<p>The department's response to issues of disorder must be proactive, immediate, interdictive but not disproportional to the disorder.</p> <p>The On Site Commander and/or Zone Commander on scene may deploy and engage law violators with OC Spray, Bean Bag rounds, and Pepper Ball Less Lethal Weapons Systems, and hand launched Less Lethal Weapons Systems. Only the Police Commissioner or designee (Unified Commander) can authorize the deployment of extended range impact weapons systems and/or CS gas. Said authorization must be in writing. Once deployment is authorized the On Site Commander and/or Zone Commander may engage law violators at his discretion. Nothing shall prohibit the On Site Commander on his own authority from utilizing extended range impact weapons and/or CS gas in order to protect the safety of his officers, citizens from serious or life threatening attack.</p> <p>Authorization to utilize Oleoresin Capsicum Spray (OC), the Pepper Ball Less Lethal Weapon System, the Bean Bag System, and mechanical force is vested in the On Site Commander and/or Zone Commander or when under immediate threat the supervisor on scene. Before utilizing any Less Lethal Force option, tactical consideration should be given to the following:</p> <ul style="list-style-type: none"> • A warning to the protestors if practicable, • Wind direction or other obstructions to the effectiveness of the system utilized, • Officer safety, • Notification to impacted personnel, • The potential non-effectiveness of the system utilized, • Impact on the surrounding area and people present. 	<p>The department's response to problems must be proactive, immediate, interdictive but not disproportional to the problem.</p> <p>The Tactical Commander on scene may deploy and engage law violators with OC Spray, Bean Bag and Pepper Ball Less Lethal Weapons Systems, and hand launched Less Lethal Weapons Systems. Only the Police Commissioner or her designee can authorize the deployment of extended impact weapons system and CS gas. Said authorization must be in writing. Once deployment is authorized, the Tactical Commander on his/her own volition may engage law violators at his/her discretion. Nothing shall prohibit a Tactical Commander on his/her own volition from utilizing extended impact weapons systems and/or CS gas in order to protect the safety of his/her officers, citizens, and/or participants to the convention.</p> <p>Authorization to utilize Oleoresin Capsicum Spray (OC), the Pepper Ball System, the Bean Bag System, and mechanical force is vested in the Zone Commander and/or the supervisor on the scene. Before utilizing any Less Lethal Force, tactical considerations should be given to the following:</p> <ul style="list-style-type: none"> • A warning to the protestors if practicable, • Wind direction or other obstructions to the effectiveness of the system utilized, • Officer safety, • Notification to impacted personnel, • The potential non-effectiveness of the system utilized, • Impact on the surrounding area and people present.
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D. Practical Consequences of Poor Planning on October 20-21

Consistent with the recommendations following the 2004 Super Bowl, the Operational Plan for the ALCS based the Incident Commander at a command center at Police Headquarters. During the Super Bowl, the Incident Commander had been on the street in the midst of the disturbances. The recommendation to move the Incident Commander to a command center in headquarters was designed to get the Commander out of the fray and into a position where he or

she could see the bigger picture. This was possible, in part, because of the greater use of television surveillance equipment acquired for the DNC. The Operations Chief for all the games of the ALCS, in contrast, was based in the field, not at a Tactical Operations Center (“TOC”), as had been done at the DNC. In hindsight, some have questioned whether the Operations Chief should have been removed from the street to a TOC, but we do not see any obvious flaw in this portion of the plan.

In at least three other respects, however, the Operational Plan and the planning process for Game 7 of the ALCS were clearly flawed. First, the plan failed to describe the role of the Operations Chief, instead permitting one commander to play two roles at once. Second, the planning process failed to build a common understanding of how the Department would escalate the forcefulness of its tactics and in response to what triggers. Third, the plan and the process failed to structure and control the use of the FN303.

1. The Role of the Operations Chief

Although there was no TOC, there was an Operations Chief for the event: Deputy Superintendent O'Toole. In that role, O'Toole had overall command of all of the tactical operations for the event. He described himself in that role in his statements to investigators; Superintendent Claiborne described him as playing that role in his statement; and the officers described him similarly. In contrast, the Operational Plan describes Deputy Superintendent O'Toole as one of two zone commanders. He is listed as in charge of the Fenway Park/Kenmore Square area while Deputy Superintendent Paul Fitzgerald is described as in charge of the Fenway/Brighton Neighborhoods. When asked about this ambiguity, officers in the special events unit confirmed that O'Toole was playing two roles that night.¹⁶ Moreover, they believed that this was O'Toole's preference. These roles became especially problematic when the crowd

¹⁶ The double role that Deputy Superintendent O'Toole played seems to have initially confused the Department investigators as well as our Commission, as this exchange between Superintendent Claiborne and the Department investigators illustrates:

A. I think there's a little confusion as to what the operations chief is compared to other people. There was always an operations chief on the venue and the other deputies and captains, like division heads, answers to the operations chief on scene, so he manages the scene from the street.

Q. He [O'Toole] manages the zone that he's assigned do you mean?

A. No. He manages -- the operations chief has that whole show and then it will be POP commanders under him, and there might be zone commanders under him but he coordinates the various commanders.

Q. I don't think I understand. He's the operations sections chief?

A. Yup.

Q. But he's assigned Fenway Park and Kenmore Square?

A. Right.

Q. And is he still in charge of Deputy Fitzgerald and the East Fens?

A. Do you have a copy of the operations plan?....

Q. Can I just interject for a second? I think the confusion we're getting into here is that the operations chief or field commander out in the street -

A. Well, I think we need to change the term somewhere down the line.

Q. What I'm really trying to get at is that we had the operations chief in a certain isolated area where he couldn't view or have instant access to someone who was viewing all the areas involved and it obviously created a problem

became very dense on Lansdowne Street. Indeed, there were additional police personnel nearby, including at least part of a POP unit, which O'Toole could have called to assist on Lansdowne Street. He never did, because, he claims, he was unaware that they were around the corner and available.

In our view, the failure of the plan to describe Deputy Superintendent O'Toole's role as the Operational Chief was the first step in a process that continued throughout the night, steadily eroding the integrity of the Unity of Command, the Chain of Command, and O'Toole's Span of Control. This continued to a point where the Operations Chief, by his own account, found himself with an FN303 in his hand, personally making an assault on revelers climbing the girders of the Green Monster, without ascertaining if other officers immediately around him were also firing their weapons or striking anyone.¹⁷

2. Escalation of Police Response

The Department apparently never implemented Superintendent Dowd's recommendation to develop a "specific set of tactics and policies" for the disorderly celebrations that follow sporting events, nor Superintendent Dunford's recommendation that it conduct pre-event assessments "in which possible scenarios and strategies to deal with each scenario are formulated." This is particularly unfortunate, because the discussion of those policies or scenarios might have revealed differences in the strategies that various commanders believed best suited to such situations.

A key decision in any crowd control situation is when to deploy police officers in full riot gear. In the language of the Department's Incident Management System, this is known as the decision to escalate the incident from *level one* (district personnel responding to a small or medium-sized group displaying little or no violence), through *level two* (addition of Emergency Deployment Team based on "escalation of size of the crowd, their behavior and the violence and disruption being caused") and up to *level three* (activation of the Public Order Platoons "in cases of extreme violence and disruption or the potential for such a situation to develop"). The Incident Command System also defines a *level four* in the anticipation of full-scale rioting and imminent loss of control. Escalation too quickly can provoke the crowd to greater disorder by making the

¹⁷ Deputy Superintendent O'Toole described firing an FN303 at two specific individuals climbing the Green Monster. He was then asked if he was aware of other officers firing at people on the Green Monster:

A. It was my belief that there may have been other FN rounds being fired, only because of the reactions of the people on the upper ... girders.... People were on there and they were reacting, in my opinion, to the possibility of an FN or some device being used. They appeared to be dodging something, whatever that might be.... I didn't see them get hit if that's what you're asking.

Q. Correct. A flinch like they got impacted by something. You did not see that?

A. No. I mean, I saw them moving. I did not directly myself see anybody get hit.

Q. Did you see anybody bleeding or with facial injuries on the girders or subsequent to the firing on the ground on the sidewalk?

A. Okay, the first part is I did not see anybody bleeding. The second part, firing -

Q. When the firing was over and everybody was coming down.

A. No, I did not.

police a target of the crowd's anger, but escalation too slowly can encourage a crowd to believe that authorities will tolerate disorder and destruction.

By discussing different scenarios in advance, commanders can learn how quickly or slowly their colleagues would escalate the display and use of force and how their colleagues would respond to scuffles, minor property damage, more serious destruction, bottle-throwing, and the like. With the expansion of the Department's less-lethal weapons arsenal in 2004, such discussions would have been particularly valuable, as experience with the new weapons including the FN303 was very thin. Indeed, Superintendent Claiborne was not trained on the weapon and had been outside the Department's senior command when it was investigated and purchased.¹⁸

The Operational Plan for October 20-21 made no mention of the level of response at which the police would begin. The statements by Claiborne and O'Toole to investigators after the event are somewhat confusing on this point, but it appears to us that O'Toole was under instructions to begin at level one or two, with officers in soft uniforms. As O'Toole told investigators:

The decision was made again through the UCC [Unified Command Center] that we would start with - there were district officers assigned that night also to certain locations and we weren't going to put them out in riot - their helmets and stuff right away. Even deploying the POP platoons. We held back on putting them out....

Claiborne explained the reason for such a policy in his statement to investigators.

A. We always start with a minimal level of force and then we'll accelerate as conditions require.... And I think it works for us to start in our normal business attire the way people are accustomed to seeing a Boston Police Officer and then we change what we're doing in response to what the other things in the environment are doing....

Q. And do you know whose decision it was to start out in soft clothes and not be geared up?

A. It was my decision. Based upon our experience at the DNC where if you come in geared up for a fight you most certainly will encounter a fight, whereas if you come in with soft clothes, your regular everyday uniform, it's just regular everyday business but, you know, based upon the Commissioner's experiences, Superintendent Dunford's experiences going to Northern Ireland and other places, what they have learned and they

¹⁸ As Superintendent Claiborne explained in response to questions from investigators:

Q. Have you been familiarized with the FN303?

A. No. It was purchased in my absence - well, I shouldn't say my absence - while I was assigned to District 7 between 2000 and 2004.

Q. And some people in the department are certified and they can also train and some people are just qualified to use it and then other people have gone to a course where they were just familiarized where they were shown the operation of it. Were you one of the ones who was familiarized or -

A. No.

Q. No, okay.

have experienced in crowd control is that when officers come dressed in tactical equipment, it incites the crowds and they almost always ended up with a major foray, and I guess what they have come to surmise is that the way the police officers are attired has a lot to do with how people react to the police officers.

Yet well before the game ended in New York, and well before the crowds appeared on the streets, Deputy Superintendent O'Toole apparently made the decision to escalate up to level three -- not in response to a crowd or violence, but in anticipation of a destructive crowd that would appear. As O'Toole explained, the Red Sox were winning by a large margin by the middle of the game:

Knowing then that that could create a celebration or people coming to the street we deployed the POP platoons in their full - the troops call them turtle gear, you know, their helmets and everything. My guys [the motorcycle officers] were already in their helmets, so for all intents and purposes when we deployed before the 7th inning or so of the game, we were already in what would be considered a level 3 crowd control situation where we had already implemented the tactical response platoons, mobile operations, and then that gives us the authority then to put out that type of equipment.

The result of this early escalation to level 3 was precisely the reaction that Claiborne later said that he had anticipated: although most of the revelers remained respectful of the police, parts of the crowd started looking for a fight with the police.

We acknowledge that it is difficult to assess whether an escalation to level 3 was appropriate. But, we firmly believe that such a decision should be discussed in advance in the kind of scenario discussions that Superintendent Dunford had recommended. We are aware that some senior, experienced commanders within the Department do not believe that such scenarios are very helpful or that planning can be much better than it was here. Indeed, we agree that no plan can anticipate every situation or set down rules for the exercise of judgment in the field. Nevertheless, police leaders across the country have embraced the use of scenarios and SWOT (strengths, weaknesses, opportunities and threats) analysis as a basic component of preparation for crowd control events. The value of these planning processes lies less in the specific plan that emerges than in the opportunity to build a common approach to anticipated problems among a department's senior commanders.

3. Controlling the Use of the FN303

The Department has promulgated rules on lethal force, less-lethal force, and non-lethal force. For lethal and non-lethal force, the rules specify the purpose for which force can be used. Such provisions do not appear as part of the rule on less-lethal force. Still, it is unlikely that less-lethal force can be used more freely than non-lethal force, and for non-lethal force, “[t]he policy of the Boston Police Department is to use only that amount of force that is reasonably necessary to overcome resistance in making an arrest or subduing an attacker.” (Rule 304).

The rule on lethal force (which does not apply to such weapons as the FN303) goes further, permitting officers to “fire only when reasonably certain that there is no substantial risk to bystanders” and prohibiting them from using firearms as “a signaling device.”

The use of the FN303 on the night of October 20-21 seems to fall outside of these policies. Deputy Superintendent O'Toole initially fired the FN303 as a signaling device to encourage revelers to come down to ground level. None of the five people whom he claims to have specifically targeted during the course of the evening and/or hit with FN303 rounds were actively assaulting anyone, nor was it O'Toole's intention to arrest them.

When investigators asked Deputy Superintendent O'Toole about his use of the FN303 in light of these rules, he frequently cited Rule 200, which describes the Incident Command System. It is O'Toole's understanding that by raising the Department's response to level 3, the use of less-lethal weapons of all kinds became permissible, limited only by the judgment and discretion of those to whom the weapons were given.

Provisions within the Operational Plan for the deployment and use of the FN303 could have removed the uncertainty about the rules governing its use. To the extent that Deputy Superintendent O'Toole believed that his officers were in danger or civilians were threatened with imminent harm, no rule would have prevented him from deploying the FN303; but a set of guidelines like those in place for the DNC, or later for the World Series, might have kept these particular weapons out of the hands of the Mobile Field Force, one of whose members fired the round that killed Victoria Snelgrove. In addition, a set of guidelines would have made clear the circumstances when the FN303 could be appropriately used.

IV. THE FN303 LESS-LETHAL WEAPON

A. Description of the FN303

The two most critical attributes of a successful less-lethal weapon are effectiveness and safety. To be effective, a less-lethal weapon must produce some type of sensory stimulus on a target that will induce the person to stop unlawful or non-compliant behavior or significantly reduce their ability to continue such behavior. In general, the more “energetic” this stimulus, for example physical impact, the more effective it becomes in stopping aggressive behavior, even from determined and physically robust individuals. Not unexpectedly, the more “energetic” the stimulus, the higher the risk to the health and safety of targeted individuals.

These two properties always exist in a significant state of tension. A less-lethal weapon that will be completely effective for all subjects in all use-of-force situations may produce an unacceptable public health and safety risk. Likewise, a less-lethal weapon that is completely safe for all subjects in all use-of-force situations would probably not have an acceptable level of effectiveness in many, if not most, use-of-force situations. This is the reason that law enforcement agencies often include in their armories several less-lethal weapon options producing varying degrees of “force.”

The effectiveness and safety of the FN303, and indeed any weapon that launches a projectile, is dependent on the characteristics of both the launcher, which could be considered the “gun” component, and the projectiles, or “rounds.” In many cases, the characteristics of the two in combination are integral to the performance of the system. Both safety and effectiveness of impact projectiles, as well as other projected less-lethal materials or objects, depends to a great extent on where on the body the impact occurs (dictated by the accuracy of the weapon), the energy of the impact (dictated by the mass of the projectile and its velocity), and exactly how the projectile interacts with the human body (dictated by the size, shape and material properties of the projectile components). The characteristics of both the launcher and the projectiles can influence the accuracy of the weapon.

The FN303 less-lethal weapon is designed and manufactured by FN Herstal S.A. and sold in the United States by FNH USA, Inc. It is a projectile impact weapon that uses compressed air to fire a 0.68 inch diameter or 68 caliber (approximately 12 gage) blunt nose projectile, weighing 8.5 grams (about one third of an ounce), at a maximum muzzle velocity of 300 feet per second. The FN303 weapon uses primarily the pain induced from the blunt trauma impact of the projectile to produce a desired effect. The impact force is greater than that from a paint ball type weapon, but much less than that from a typical “bean bag” fired from a shot gun or a baton round (sometimes called a rubber or plastic bullet) fired from a large diameter launcher such as that used to propel gas grenades containing smoke or riot control agents.

There are several types of FN303 projectiles. Each has the same amount of bismuth metal powder in a plastic nose cone, which give the projectile weight and mass. The differences between the projectiles are the “payloads.” One contains only a glycol base liquid, another a latex based polymeric paint (marker), another a fluorescent pink pigment in a glycol base (washable marker), and one contains oleoresin capsicum (OC) or pepper oil in a glycol base. The FN303 projectiles are claimed by the manufacturer to be designed in such a manner that the

plastic nose cone that encapsulates the bismuth metal powder, the material that provides most of the mass and thus most of the blunt trauma effect, will break on impact with a human target. This breaking on impact is reported by the manufacturer to eliminate any risk of penetration injury.

B. Acquisition of the FN303 by the Boston Police Department

The FN303 weapons used by the Department on the night of the seventh game of the ALCS had been acquired by the Department as a less-lethal weapon for use in crowd control and other scenarios where force may have to be used, but deadly force is not appropriate.¹⁹ They were acquired in part because they can provide a long standoff distance in their deployment and are reported to be much more accurate than most similar weapons on the market. Use of the weapon on the firing range by various members of the Department confirmed its reported accuracy. The risk of serious injury from impacts below the shoulders was reported by the manufacturer to be very low. Thus, the accuracy of the weapon will influence not only its effectiveness, but more importantly its safety.

It has been noted by the manufacturer that numerous law enforcement agencies and major universities have acquired the FN303, but little specific information has been provided to the Commission on any outcomes of the use of the weapon. It was also noted that the United States military has acquired the FN303.

The history of the acquisition of the FN303 for the Department can be summarized as follows:

- Before 2003: Deputy Superintendent (then Lieutenant) O'Toole and Sgt. Flynn attended a Community Research Associates symposium and fired the FN303.
- November 15, 2003: Sgt. Flynn attended a symposium for riot control experts and took an 8-hour FN303 course that qualified him as an Instructor/Armorer.
- November, 2003: After the symposium and training, Sgt. Flynn briefed Deputy Superintendent Charles Cellucci and Lt. O'Toole.
- Sgt. Flynn instructed Officer Thomas Gallagher to acquire an FN303 for testing and evaluation.
- December, 2003: the Department received the FN303 and 100 pink marking rounds; an additional 300- 400 rounds requested.

¹⁹ At the outset, the Department was considering the FN303 for use by the Entry Team. The upcoming Democratic National Convention provided a funding source to purchase the weapon. It also seemed to expand the intended uses to include crowd control situations.

- Sgt. Flynn and Officer Gallagher tested the weapon at the range and presented the results of testing to Superintendent Dunford, Deputy Superintendent Cellucci and Lt. O'Toole. All were satisfied with the weapon.
- Deputy Superintendent Cellucci made the decision to purchase the FN303 for the Department.
- February 18, 2004: Purchase requisitions submitted.
- April-May, 2004: Lt. O'Toole learned that the Federal Protective Service had purchased FN303s for crowd control.
- June 2004: Weapons received.

C. Training on the FN303

Twenty Boston Police officers were trained on the FN303 weapon by the manufacturer, FNH USA, Inc., as “Instructors/Armorers.”²⁰ The stated purpose of the eight-hour “Instructor/Armorer” training provided by the company was two-fold: (1) to certify officers to use, care for and clean the FN303, and (2) to certify those officers to train *other* officers to use, care for and clean the FN303. Accordingly, the “Instructor/Armor” training included instruction on:

- the “specifications and capabilities of the FN303,”
- the “major components of the FN303,”
- the “equipment associated with the FN303,”
- how to “[d]isassemble, clean and reassemble the FN303,”
- the performance of malfunction drills,
- the performance of operational checks before and after discharges,
- how to troubleshoot problems,
- how to refill the air bottle,
- how to “select the proper...projectiles,” and
- the appropriate target areas.

Trainees were also required to complete a “live-fire qualification course with a minimum score of 90%” and “perform scheduled component part replacement” on the FN303.²¹

Accordingly, the company-provided training did instruct officers on how to use the FN303, how to care for the weapon, how to clean it and, although to a lesser degree, the

²⁰ One officer was trained by the company in Nashville Tennessee on November 15, 2003; two officers were trained by the company in Stratham, New Hampshire on November 23, 2003; and seventeen officers (including Officers Milien, McKenna and Ridlon) were trained by the company at the Boston Police Range on April 7, 2004.

²¹ FN303 Less Lethal Launcher Instructor/Armorer Training Manual, FN Herstal SA, “Enabling Learning Objectives,” at 4.

appropriate target areas. One area, however, where the training appears to be inadequate is *when* to discharge the weapon (*i.e.*, instruction on where in the use-of-force continuum the FN303 is intended to fit). The issue of when to discharge the weapon is inextricably intertwined with where to target. Yet, despite the company's warnings that subjects should not be targeted in the area of the head, neck, or above the shoulders and that impacts in those areas could cause death or serious injury,²² the company only dedicates one page of its forty-nine page Instructor/Armorer manual to the critical issue of the circumstances under which it is appropriate to use the FN303. Moreover, on that one page, the company's over-riding message is to "[a]lways follow your agency's use-of-force policy as it relates to the FN303 Launcher." Beyond that admonition, the company makes no effort to guide officers *when* to use the weapon, and there is no indication that any of the Department's officers who were trained on the FN303 received any further instruction with respect to where in the use-of-force continuum the Department viewed the FN303.

In addition to the twenty officers trained as "Instructors/Armorers," two additional officers were trained on the FN303 as "Operators" only, bringing the total number of FN303-certified officers in the Department to twenty-two.²³ This six-hour Operator training was conducted internally, by Sgt. Frank Flynn, pursuant to the "Instructor/Armorer" training he received from the company, described above. Sergeant Flynn's two-page training curriculum largely parroted the training he had received from the company and, significantly, does not appear to have touched in any way on the critical issue of where the FN303 fits within the Department's use-of-force policies. Sgt. Gallagher, a full time instructor at the Department's firing range, prepared a more thorough lesson plan which was never adopted or used.

D. FN303 Performance: Brookline Avenue and Lansdowne Street

1. Condition

There is no evidence at this time that the four FN303 weapons on the Department equipment truck were not in good working order. This is consistent with the fact that none of the officers who used the weapons suggested that the weapons they fired behaved erratically. The weapons had previously been used in training, and should have been cleaned and ready for deployment. The FN303s taken from the equipment truck were in individual cases. Any assessment of the condition of the weapons (including the rounds and gas canisters), however, is hampered by the lack of tracking and record keeping for the FN303, as discussed below.

²² FNH USA, Inc.'s training materials contain warnings that subjects should not be targeted in the area of the head, neck, or above the shoulders. There are also warnings affixed to each weapon indicating that "misuse may result in injury or death" and urging users to "[a]void aiming at face or head."

²³ This "Operator" training took place at the Boston Police Range in June, 2004, and included Det. John O'Connor. Other Department personnel, including Deputy Superintendent O'Toole, attended various courses during which they became familiarized, but not certified, with the capabilities of the FN303.

2. Testing²⁴

Weapon malfunctions the night of the incident seem unlikely, but fairly straightforward accuracy and precision testing can be done to address this possibility. There are, however, at least two considerations that should be taken into account. The first consideration is to assure that some level of independence is incorporated into the testing. This could be accomplished by using either an independent test laboratory or using certified shooters from another police department with appropriate test observers/witnesses.

The second consideration is the inability to assign a particular weapon to an officer who used it. The armorer who provided weapons from the equipment truck to officers on Lansdowne Street made no written record, such as serial numbers, of which officer was issued which weapon, nor did he make any record of which weapon was returned by which officer. Consequently, there is no way to correlate any weapon and its performance with an officer who used an FN303 on Lansdowne Street the night of the incident.

3. Zeroing

Zeroing is shooting a weapon from a pre-determined distance to insure the accuracy of the weapon. Once a shooter knows the weapon is accurate at that pre-determined distance, using the sights of that weapon, the shooter can determine whether the point of aim should be higher, lower or the same for his particular use when shooting at a variety of distances.

The manufacturer of the FN303 recommends that the weapons be zeroed at 30 meters, and this is how they are set at the factory. There is no report that clearly establishes when or if these weapons were ever zeroed by the Department, and at what range. The actual zero of the weapons in question can be established through testing, as noted above.

Although there may be some differences in performance of the weapons from officer to officer, when fired using the iron sights provided, the manufacturer reports that the point of impact will be somewhat higher than the point of aim under 30 meters. The maximum deviation is reported to be 5 inches at 15 meters (49 feet). At distances less than about 13 feet and longer than 49 feet, the point of impact should actually be below the point of aim if the iron sights are being used and the weapon has been properly sighted. This distance is longer than almost every shot reported by officers who used the weapons the night of October 20-21, as well as by witnesses. If officers were aiming at a particular individual's "center of mass" or their extremities, as reported by the officers, it is surprising that three people were hit in the head by projectiles. This is likely to be the result of how the weapon was fired by the officers, although it

²⁴ We had hoped that independent testing could have been completed before issuing our report. But, it is apparent that the testing will not be completed for several months. Our proposed protocol is attached as Appendix B. Although the outcome of the tests is certainly very relevant to an understanding of what occurred on Lansdowne Street, we decided not to wait before issuing our report. Even if it is later determined one or more FN303 weapons or the projectiles used that night were defective and led to errant shots, it would not change our conclusions as to the serious mistakes made regarding the poor planning, the inappropriate manner in which the weapon was used, and the lack of proper training.

is also possible that the weapon was not sighted properly or that the weapon did not operate properly.

4. Firing

Based on statements from officers, the weapons were fired at individuals perceived to be a threat or to pose a danger to themselves, other officers, or other persons. The purpose was to move them or otherwise change their threatening behavior. How effective, from the officer's perspective, were the weapons in achieving these objectives?

In at least one instance, merely displaying the weapons was sufficient to get some people to get off the roof of a structure that had the potential of collapsing from the crowd that had climbed on it. In another situation, shots were fired at a sign on top of a building, rather than individuals, in an effort to get the attention of the crowd and warn them to move from a potentially dangerous location. This caused some, but not everyone, to get off the roof.

Officers also reported firing weapons directly at selected individuals for a variety of reasons and at various distances. Some of the stated reasons were: to get them to stop throwing objects, to get them to stop disrobing (on top of a building), to stop people climbing girders under the Green Monster, to get them to come down from the girders, and to stop a perceived physical assault on officers. The details of these particular instances are reported elsewhere. Comments made by various officers show that differing results were achieved. All officers report that they fired at selected individuals and knew where they were aiming. In some cases, they report knowing where they hit their targets and in some cases they were not sure.

One officer reports firing at an individual, who was disrobing and inciting the crowd, from a distance of approximately 150 feet, and striking the person in the chest or stomach area thereby stopping the behavior. This suggests that the weapon was both very accurate and effective. This result is consistent with the manufacturer's claim of accuracy and a claim that a single shot can be effective. This officer also reported firing at other individuals in the range of 15 feet and stopping behavior with a single shot. In describing the benefits of the weapon, FN Herstal notes in its product description "[t]he 29 J [Joules] kinetic impact instantly stops the subject." Elsewhere, the company states, "[h]owever some people will take an impact of 30 Joules without flinching while others will strongly be disturbed by an impact of 10 Joules. The age, the constitution, the mental condition ... these are all internal factors acting upon the perception of pain of a subject taking into account that there are also many external factors such as being under the influence of drugs or alcohol, the clothes, the equipment...."

Another officer, Officer Silta, reported firing the FN303 at a person, later determined to be Paul Gately, who was bleeding and was approaching him in a manner that was perceived to be threatening, even though Mr. Gately contends he was simply seeking medical assistance. The officer reports firing a single round from a short distance, but Mr. Gately kept advancing, so Officer Silta fired at least an additional 8 or 9 rounds and perhaps as many as 12 rounds. Mr. Gately then turned away. He was judged by another nearby officer as being intoxicated. In this case, according to the officer, one round was not effective in stopping the advance. Because

multiple shots were fired in a short time, it is not possible to know if two or even three would have achieved the desired effect.²⁵

The lack of record keeping and the fact that the armorer refilled some empty or partially empty magazines at the equipment truck when the magazines were returned, makes it impossible to know how many FN303 rounds were fired on or around Lansdowne Street the night of the incident. The number could be as high as 60 or more.

With respect to the firing of FN303, we conclude that:

1. Inappropriate use of the FN303 as a signaling device. Deputy Superintendent O'Toole fired at persons on the roof in front of the billboard to signal them to come down. Given the risks, we do not believe such a use was appropriate.
2. Inappropriate targeting at persons on the girders behind the Green Monster. The situation did not justify the firing of impact projectiles. The FN303 is intended to stun a person through the force of the projectile. Shooting at a person sitting on a girder many feet off the ground, when that person has no weapon and is not an active threat, is inappropriate and potentially risky. In any event, as we discuss elsewhere in this report, such a scenario and how to respond should have been worked out in advance, to the extent possible, with clear Rules of Engagement and planning. Moreover, if warnings were given, they were inadequate.
3. Officer Silta's rapid fire of multiple shots at Paul Gately was not appropriate. Even accepting Officer Silta's version of events, up to twelve rapid fire shots at Paul Gately at close range, in these circumstances, cannot be justified. Moreover, Paul Gately and Kathryn Gately were shot at while standing in a crowd, raising the question as to whether there was a safe backdrop.
4. Extremely quick "targeting" and inappropriate firing with respect to the fatal shots. There is substantial potential for shooter error when speed, target, backstop and beyond all come together. The actions of Officer Milien and those standing by him -- before, during and after the fatal shot -- do not suggest that they perceived an immediate threat or danger. Officer Milien was the only one engaging (or even raising a weapon) at that moment, and there is no movement to arrest or in any way deal with the "target" being engaged. Office Milien should not have fired when he did.

E. Use and Performance of the Round: Brookline Avenue and Lansdowne Street

The Department has acquired washable marker and OC rounds for its FN303 weapons. The standard FN303 field kit appears to include three magazines of projectile rounds, two with

²⁵ With respect to multiple shots, it is worth noting an incident that occurred in early October of 2004. In this incident the Boston Police Department used an FN303 to prevent an apparently suicidal person from further injuring himself or threatening others with a knife. Multiple rounds had to be fired before the subject dropped his knife.

OC rounds and one with pink marker rounds. There is no indication that there was a decision or advance plan to use any particular round on the night of the incident. In fact, there is confusion as to how and why officers decided to use a given projectile type. It also appears that different officers used different types of rounds during the incident, for no apparent reason. Deputy Superintendent O'Toole is reported to have asked the armorer at the equipment truck to load the weapons with OC rounds, although no reason is given.

Accordingly, the officers on the scene appear not to have understood fully the functioning of the rounds. One officer, a certified FN303 user, states that he deliberately selected a magazine with OC rounds, rather than one with marker rounds, because he did not believe that the police would ever likely apprehend the individuals who were marked. He also stated that he wanted a round that would have a direct impact. He did not seem to understand that all FN303 projectiles have the same mass and nominal velocity so their impact forces are identical regardless of whether they are OC or marker rounds.

Another officer reported that he used an FN303 that was handed to him by a commanding officer and fired at people on the Green Monster girders, emptying the magazine that was filled with pink marker rounds. In response to a question about changing to a new magazine, the officer states that he chose the pink marker rounds based on a concern about contamination from OC rounds, because he did not have his gas mask. It seems highly unlikely, and indeed never mentioned in FN Herstal's training materials, that an officer would need to use a gas mask when deploying the FN303 OC rounds. This also indicates a lack of understanding by officers of the expected performance and effects of the rounds.

Addressing the safety of the rounds, the manufacturer states on its official web site that one of the benefits of the FN303 weapon is “[l]ow risk of permanent injuries, even at close range.” Elsewhere on this site it notes that “[t]he system has been conceived in such a way that it never exceeds the minimum energy levels causing a cranial traumatism or a perforation of the skin.”

One death and two injuries requiring hospitalization from impacts of the projectiles seem inconsistent with the claims of low risk of permanent injuries or skin penetration. The impacts causing these injuries, however, all occurred in the head area of the victims. That, of course, is outside the safe target areas. In its training materials FN Herstal provides these safety warnings: “[d]eath or serious injury may result from projectiles striking the head or neck.” and “[n]ever target above the shoulders.” These warnings are also emphasized in Department training handouts.

The warnings do not state that a projectile could penetrate the soft tissue of the eye, although the diameter of the FN303 projectile is small enough to allow it to enter the human eye socket. The round is designed to deliver impact energy in sufficient quantity to compel a subject to stop unlawful behavior. In order to do this, the round will have certain properties (speed, shape, density, hardness) that almost guarantee a serious or fatal injury if a vital area such as the eye is hit. FN literature makes this clear -- DEATH OR SERIOUS INJURY CAN RESULT FROM HITTING THE FACE.

The penetration injuries sustained by Paul Gately and Kapila Bhamidipati were from impacts to the head, which is a non-target zone. These injuries are nevertheless skin penetrations that, in the former, required multiple stitches and, in the latter, required the surgical removal of fragments of the projectile from the head. This clearly shows that skin penetrations can occur.²⁶

A number of the officers were clearly confused about the rounds available and their potential performance. This is, first and foremost, a training issue and potentially a very significant (but hard to quantify) issue as it relates to the death and injuries that occurred. The dual purpose rounds (impact and OC/paint) beg for the shooter to consider and use the device in a manner that takes full advantage of the secondary (*i.e.*, OC contamination) purpose. A lack of understanding of how the round works (believing, for example, that you need to hit high chest to make use of the “pepper”) might certainly cause an officer to use it inappropriately.

The critical issues for anyone using such a device (not just the FN303, but other impact projectile systems as well) involves understanding that such risks are present, and that users must be thoroughly trained to ensure they get this message (and tested to prove they have learned it). In addition, they have to field test the system enough to ensure that they can hit their target. There is scant evidence to suggest that this understanding, training, or testing (written or field) occurred in Boston.

F. Summary

- The failure of leadership and supervision on Lansdowne Street directly contributed to the action taken by officers, as it relates to the use of the FN303.
- The officers using the FN303 were not properly trained, especially with respect to when to use the weapon. While we know that certain officers were trained and fired the weapon at the range, it is unclear what specific information was covered during the training. There does not appear to be any documentation of classroom or range testing. In the absence of that information and the high percentage of injuries here, it is reasonable to conclude that improper training played a significant role.
- The information to date, which we recognize is limited and needs further development, suggests that the FN303 can be an effective tool for law enforcement, when used by properly trained officers in appropriate circumstances.
- The FN303 is safest and most effective when used with the single purpose “impact rounds.” The OC (pepper spray) round adds little to the weapon’s effectiveness and may lead to higher shots, increasing the risk of hitting the head or neck.

²⁶ Massachusetts does not have any state law generally governing the use of less-lethal weapons. (Effective July 15, 2004, G. L. c. 140, § 131J authorizes law enforcement to use electric current devices, subject to certain requirements.) A few states do have laws which provide guidance and oversight regarding less-lethal weapons. Interestingly, several states explicitly define less-lethal ammunition to include only projectiles designed to cause pain or discomfort without penetrating the body.

V. RECOMMENDATIONS

The use of less-lethal weapons by law enforcement offers some promising benefits. We want to raise cautionary flags not to discourage police departments from considering such weapons. There are instances where, when properly used, less-lethal weapons can reduce the likelihood of death or serious injury. But, we believe that those situations will be rare. More often the availability of less-lethal weapons provides law enforcement with additional tools to arrest a person, to disarm a person, or to handle public disorder situations.

However, there are risks. Less-lethal does not mean non-lethal. Indeed, these very terms provide mixed and, at times, confusing messages. Less-lethal weapons can cause serious injury and even death. Moreover, the introduction of certain less-lethal weapons can actually increase the frequency and severity of injuries, unless safeguards are in place. So, we urge caution and care, not wholesale rejection of less-lethal weapons.

The following recommendations are based upon the Commission's findings in its investigation of the circumstances surrounding the death of Victoria Snelgrove. We believe that these recommendations can foster good police practices and will assist the Department and other law enforcement agencies in preventing tragedies similar to the one that occurred in Boston on October 20–21, 2004.

1. Improve the Planning Process for Managing Large Events By Incorporating Scenario Training and Table-Top Exercises.

After the events of October 20-21, the Department quickly addressed some deficiencies in the planning process. The planning for the World Series celebrations reflected those improvements. Indeed, many of those improvements were foreshadowed by the after-action reports written following the 2004 Super Bowl, that highlighted problems which would be repeated following the ALCS.

There is no cookie cutter formula in planning for these events. And, that's the point. What is critically important is to work out beforehand as many contingencies as possible, make sure intelligence is getting to the right people, take steps to anticipate problems (such as greasing light poles, closing garages, or removing trash containers), do the necessary table-top exercises, get the right people in place, work out the rules of engagement, and communicate these rules to the field.

2. Clearly Delineate Roles of Commanders in Each Operational Plan.

The planning process should clearly delineate the roles of the Incident Commander, the Operations Commander, and the Zone Commander. Just as there can be problems when the person running the unified command center is also in the field, similar issues can arise when the field commander wears two hats and has the responsibility for a particular zone. The field commander can easily lose the bigger picture when he also has to make the tactical decisions with a much narrower focus.

3. In the Planning for Sporting Events, Obtain the Cooperation of Educational and Business Communities.

The planning process should include cooperation with local colleges and universities. After Victoria Snelgrove's death, the Department and the City undertook significant efforts to communicate with students, to make plain that illegal activity would not be tolerated and could result in serious consequences. Similarly, most universities actively sought to identify those responsible for such acts and took steps to punish them. These efforts are appropriate and should be continued. In addition, we commend the enhanced efforts by the academic community to provide alternative incentives for students to remain on campus during the World Series, and to discourage street activity.

Along the same lines, the owners and operators of establishments serving alcoholic beverages can play a constructive role. We strongly encourage the City to continue its efforts to get the assistance and cooperation of these establishments during such events and to initiate appropriate enforcement action in any incidents where such establishments serve alcoholic beverages to intoxicated persons or to underage persons.

4. Review Use-of-Force Policies.

The Department's use-of-force rules generally deal with lethal force (Rule 303), non-lethal force (Rule 304), and less-lethal force (Rule 303A). However, as new technology is adopted by a police department, careful attention must be afforded to where on the use-of-force continuum that technology falls. For example, the FN303 was certainly not considered lethal force; yet, the FN303 does not squarely fit in the category of weapons considered to fall under Rule 303A (which deals with bean bag rounds fired from a shotgun) or Rule 304 which deals with non-lethal force (such as OC spray and batons). We believe that a policy must be developed for each less-lethal weapon.

We suggest that the Department consider using the term "less-lethal" to describe all its weapons that are not intentionally meant to be lethal. This means dropping the term "non-lethal." In Rule 304 (Use of Non-Lethal Force) only incapacitating agents (carried by each officer, probably OC), batons and slapsticks are described. Although these could be argued as "non-lethal," some people claim that OC has caused deaths and certainly batons can produce deadly injuries when abused. Use of a single term would be a start to clarifying policy and procedures. The FN303 had apparently not yet been placed under either the less-lethal (303A) or the non-Lethal (304) use-of-force Rules and Procedures. The direct impact Def-Tec "exact" 40 mm rounds and the Pepper Ball weapon likewise do not appear to be covered by either existing Rule.

5. Develop Weapon Specific Use-of-Force Policies for Each Less-Lethal Weapon.

The best elements of a use-of-force policy are well known: a description of what conduct can justify its use; a statement of what other measures should be taken before use (such as warnings or the consideration of other less-lethal weapons); how officers should be trained; how weapons should be stored, secured and accounted for; and how investigations following an injury should be conducted.

We have intentionally refrained from recommending a specific use-of-force policy for the FN303 or any other less-lethal weapon currently in the Department's arsenal. We believe that this should be the subject of further study by the Department and have the benefit of public discussion and debate. We do not want to short circuit this healthy process.

Although there will be times when a police department will use less-lethal force as an alternative to lethal force, it is more likely that a police department will consider using less-lethal weapons in other situations where lethal force could not be justifiably used. Providing police officers with a range of options along a use-of-force continuum is appropriate and is consistent with the legal principle that only the amount of force needed to accomplish the lawful objective should be employed. Any use in a crowd control situation, however, should be even more carefully defined and limited.

Our overriding point is that a policy must be developed for each less-lethal weapon. It should not be up to the individual officer to decide what conduct should trigger the use of a particular weapon. The Department's current policies, much like the policies of many police departments, are not tailored to particular weapons.

6. Restrict Use of Less-Lethal Weapons to Certified Officers.

We believe that only selected officers, trained and certified in the technical and operational use of less-lethal weapons, should use them. It is not just a matter of technical proficiency. The proper use of less-lethal weapons involves a keen appreciation of the impact of such weapons. It can also involve the use of other police tactics, such as verbal engagement or negotiation, which might diffuse the situation without ever having to use less-lethal weapons.

We worry about certain less-lethal weapons being widely distributed and available within a department to those with incomplete training. The Department must make this decision with each less-lethal weapon and, indeed, appears to have done so for most weapons. Every officer is trained on the use of batons and OC and, apparently, selected officers are trained and certified on the use of the 12-gage sock round. The policy for the sock round falls under Rule 303A. It states that only patrol supervisors should be trained and authorized to use this weapon. This procedure, however, seems to be somewhat at odds with the notion that a supervisor at the scene of an incident should be directing the actions of the other officers, and not be distracted by firing a weapon. It should be re-examined.

7. Improve the Less-Lethal Weapons Procurement Process By Establishing a Detailed Written Protocol.

The Department decided to purchase the FN303 after conducting a minimal investigation and largely relied on information provided by the manufacturer. Without question, the Department was not alone in the law enforcement community in proceeding as it did. Nor can we say that further investigation would have altered the events outside Fenway Park.

Still, we believe that there are certain steps which police departments can and should take. It is simply not enough to rely on information provided by the manufacturer. Further, as noted below, we believe that information in this developing area of less-lethal weapons could be better shared.

Many of the steps that are part of appropriate due diligence were followed by the Department when it purchased the FN303, such as test firing the weapon and talking to several other departments which had experience with the weapon. But, a complete written protocol should be developed. This might include discussion with community organizations on what less-lethal weapons are under consideration and the reasons to acquire them, consultation with other major police departments and with national law enforcement bodies, requests for test results from the manufacturer, and thorough testing by the Department itself.

8. Designate a Lead Officer for Less-Lethal Weapon Procurement.

The Department should designate a particular person with lead responsibility in the acquisition and training of less-lethal weapons. This person should be given responsibility and resources to thoroughly review any new less-lethal weapon that may be considered for acquisition by the Department. In addition, this person should be expected to keep abreast of any changes in the police thinking regarding the advantages or disadvantages of new or existing less-lethal weapons.

There will be an increasing sales effort on the part of manufacturers to sell such weapons and many new weapons are likely to be introduced in the coming years. Every effort should be made to minimize over-reliance on information that comes from only a few sources.

9. Improve Training of Police Officers on Less-Lethal Weapons to Include Instruction on the Role and Use of Each Weapon.

It is not enough to train officers on the mechanics of firing a less-lethal weapon, as important as that is. There must be a thorough understanding of how the weapon can and should be used. Each weapon is different and has a different purpose. So, the training cannot be general but must be tailored to particular weapons.

Training an officer *how* to shoot is the easy part. Most of the training should focus on *when* to shoot and *where* to aim, which must be addressed together. The when/where involves decision making and is far from mechanical. It takes much more time, discussion, practical exercises, and training. In addition, officers should be tested in order to be certified.

10. Further Tests on the Department's FN303 Should Be Completed.

We have made a series of recommendations designed to guide a police department's decision to acquire a less-lethal weapon and adopt policies and to conduct training which would lead to appropriate use. However, we also recommend that the Department not reinstate the FN303s it purchased until the weapons have been tested. (Appendix B sets forth our proposed testing protocol.)

We have little basis to conclude that the FN303 is unsafe when used properly. That said, we are unaware of any definitive independent study addressing the question of safety, particularly the risk of penetration. And, because the outcomes here -- three shots to the head, one resulting in death and two resulting in other penetrations -- are troubling, there is at least a question as to whether the FN303s used by the Department were in proper working order. While

we are inclined to believe that the problem was not one of mechanical failure of the FN303s, we recommend that independent tests be conducted to erase any doubt.

11. Create National Standards for Certification of Less-Lethal Weapons.

There is no uniform testing of less-lethal weapons and no easy way for police departments to gather information about the safety, reliability, and effectiveness of such weapons. This problem will only get worse as the technology changes and more companies get into this business.

For example, FN Herstal provides information on the accuracy, range, and other descriptive characteristics of the FN303, but does not provide any information on the expected physiological outcome of the impact of their projectiles. FN Herstal claims that the projectiles will break on impact and will not penetrate the skin. This claim, and the misguided observation by one officer that when the projectiles are dropped on the floor they break easily, may have led to a perception by the Department that the projectiles are extremely safe and may have contributed to an attitude by the shooters that they could not cause any serious injury.

The fact that projectile penetrations occurred on impact to three victims' heads suggests that fragmentation either does not always occur on impact, or that penetration of the skin can occur in some cases even with fragmentation. Though the head is out of the safe target zone for the FN303, the non-eye penetration injuries of two victims suggest that penetration injuries might be possible for other parts of the body and lead to other types of injuries with varying degrees of severity. It is important to have some understanding of what these risks might be.

As a first step, the Department should press the National Institute of Justice, or some other national body, to collect and disseminate information on testing results, safety and effectiveness. But, we believe the better route is to go beyond just sharing information. We urge the federal government to establish minimal standards for the safety of less-lethal weapons and a formal testing and evaluation program that would provide national certification to weapons that met those standards. Manufacturers would submit their products for testing to an independent agency, such as the National Institute of Justice, and pay for the testing.

We recognize that this is a significant undertaking because there are many types of less-lethal weapons that produce different disorienting or disabling effects on the human body. Also, some weapons will only, and need only, operate at short ranges. Others are designed to meet a long range capability requirement, further increasing the number of standards that may have to be developed. The cost for such a program will be significant, but we believe the potential to save lives and reduce injuries to officers and civilians is also significant.

Despite the complexity and cost of addressing this recommendation, the Commission is aware that these standards and certifications deal with only half the requirements of an ideal less-lethal weapon. The other half is weapon effectiveness. Measures of effectiveness also need to be conducted for less-lethal weapons by independent organizations. Like health and safety risks, the necessary research and development will most likely have to be done by independent government agencies.

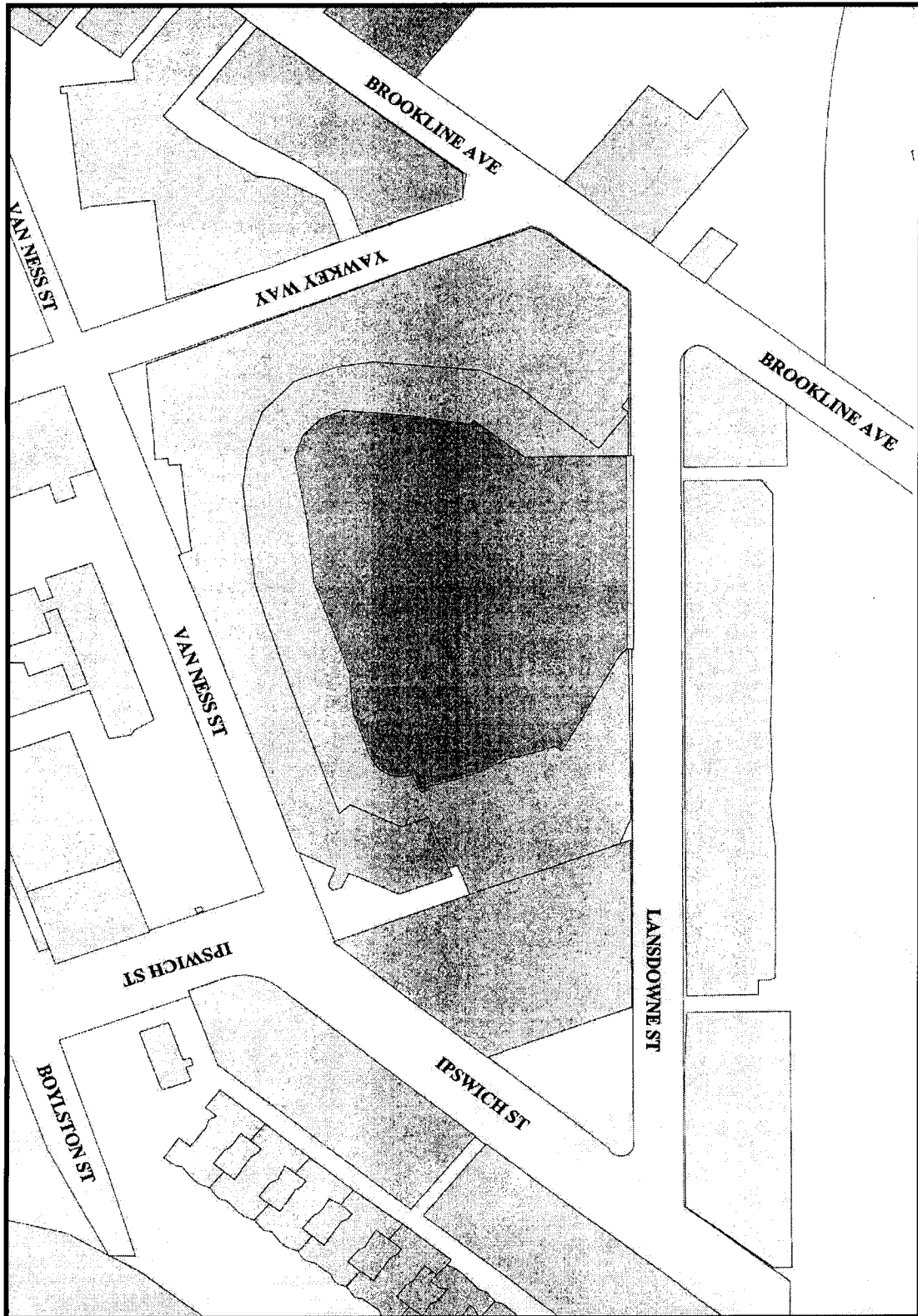
12. Establish a Police-Civilian Injury Board to Review Injuries to Officers and Civilians Resulting from Uses of Force.

The recommendation to create a police-civilian injury board flows from our own experience in the unique role to which Commissioner O'Toole appointed us. We were impressed from the start by the determination of this Commissioner to do everything in her power to prevent any recurrence of the tragedy that befell all of Boston when Victoria Snelgrove was killed. Few police chiefs in America would have asked a group of outsiders to monitor the Department's own investigations into this fatal use of less-lethal force. Fewer still would have allowed us the full access that we enjoyed as we pursued our inquiries.

The need for more routine monitoring of use-of-force by the Department was clear to us at several points in our inquiries. For example, the use of the FN303 by the Department only a few weeks before the ALCS games should have been a moment for officers certified in the use of that weapon throughout the department to learn lessons. But, there was no routine process by which the Department's experience with the growing array of less lethal weapons could be incorporated into the knowledge, training, and supervision of the officers using those weapons.

The Boston Police Department has relatively little external oversight for a department of its size. We commend the Commissioner's decision to move forward with some new form of review, which could well have a broader focus, not limited to use-of-force situations. While we do not want to suggest any particular model, we recommend that, at the very least, a body like ours -- without responsibility to separately investigate individual incidents but with the authority to review investigations, collect data, and examine patterns -- be established on a continuing basis. Boston needs a standing body that can monitor in real time use-of-force investigations and provide an outside perspective to the systemic problems revealed in the actual uses of force. Any such body should pay equal attention to injuries caused to officers and civilians. Less-lethal weapons are designed to minimize both of these kinds of injuries, and the Department should be monitoring their use with both of those goals in mind.

APPENDIX A: MAP OF FENWAY AREA



APPENDIX B: SUGGESTED TESTS FOR THE FN303

Introduction

Three possible reasons for testing the FN303 may be relevant to the Boston Police Department (BPD). One relates directly to the incident on the night of October 20 - 21, 2004 and the other concerns the more general question about performance of the weapon and could relate to future policies, procedures, training, or maintenance and handling of the weapon.

The first reason is to assist the BPD in understanding what role, if any, the performance of the FN303 weapons may have played in the injuries, one fatal, to persons struck in the head with less-lethal projectiles on Lansdowne Street. This requires accuracy and precision testing of the actual FN303 weapons deployed that night. A suggested test plan for such testing follows. The tests are simple and straightforward and could be done at almost any firing range. It seems appropriate that the testing be conducted with a mutually acceptable degree of independence. The suggested test plan includes some possible ways this could be achieved.

The second reason is to better understand the probability of the FN303 projectiles penetrating human skin.

The third reason is to determine if there are any problems after extended firing of the weapon.

1. Suggested Accuracy and Precision Test Plan

a. Specific Tasks

- i. Use an FNH Certified Instructor/Armorer, Instructor, or Operator as the person to fire the weapons.
- ii. Test fire all four weapons deployed on Lansdowne Street the night of Oct. 20 - 21, 2004.
- iii. Place the iron leaf sights in the "up" operational position and aim at the 0,0 mark on the target using these sights. Do not adjust the sights in any way from the "as-received" condition when they were secured.
- iv. Use weapon air canisters that are fully charged to the manufacturer's specifications. This should be their condition when they were deployed from the equipment truck the night of the incident.
- v. Shoulder-fire the weapons. No practice shots should be taken.
- vi. Fire ten (10) OC rounds from two of the weapons selected at random. Fire ten (10) marker rounds from the other two weapons.¹

¹ This will allow each weapon to fire ten rounds which is not excessive, but adequate to measure accuracy and precision. This also allows both OC and marker rounds to be fired. If there is significant difference

- vii. The distance from the test shooter to the targets should be thirty (30) feet.²
 - viii. Record the position of the impact for each of the ten rounds, for each target, as the horizontal (H or x) and longitudinal (L or y) distance in inches from the 0,0 of the targets. Report the mean and standard deviation of the results for each target.
 - ix. Use full magazines. The projectile rounds should be from the same batch or lot as those used on Lansdowne Street the night of the incident.
- b. Assuring Independence of the Testing - Some options to consider if tested at the BPD firing range
- i. Use an FNH 303 certified test shooter who is not a member of the BPD. Some possibilities for test shooters are representatives from nearby agencies, such as those who were trained with BPD officers on April 7, 2004.
 - ii. Have independent observers at the testing. This could be representatives from the Commission, plaintiffs' attorneys, FNH representatives, or a less-lethal instructor sworn officer from the Massachusetts State Police.
 - iii. Videotape the entire test.

2. Suggested FN303 Projectile Penetration Testing:

To better understand the probability of the FN303 projectiles penetrating human skin:

Conduct tests using the skin simulation system developed by Wayne State University as described in the Final Report for NIJ Grant # 2002IJCXK020, 9/30/02.³ Any FN303 weapon (launcher) could be used in the penetration tests. Select FN303 OC and marker projectiles that come from the same lots as they used on the night of October 20-21, 2004. If such projectiles are available it should not be necessary to use projectiles, rounds, which have been secured as evidence in the homicide investigation. Test data should be reported in the same format and analyzed in the same manner as that in the grant final report. As a second component of the impact evaluation, high-speed videos should be taken of each of the test projectiles impacting the simulation target material. These videos should show how the plastic nose cones of the projectiles break up on impact and how the major components of the projectiles, i.e., the nose cone plastic, the bismuth metal powder encapsulated by the plastic, and the OC resin solution, are distributed or dispersed. Any penetration of the plastic or bismuth powder is of particular interest as well as the dispersion pattern of the OC. The video data will also permit comparison

between performances of the weapons as a function of the type of round then further tests may have to be conducted.

² According to officer interviews most subjects were hit at this range or less.

³ This report has not yet been officially released by the National Institute of Justice.

of the FN303 performance with other commercial impact projectile data previously collected by the Wayne State University Ballistic Impact Research Laboratory.

3. FN303 Extended Use Testing

A question has been raised as to whether there is degradation of the weapon after extended firing, an issue that is relevant for continued use of the weapon. This question was raised by representatives of the Israeli Nation Police, as a result of their experience with the FN303. The manufacturer of the FN303 has provided assurances to us that the Israeli experience was the result of the failure of some outdated projectiles, what were actually training rounds, and that further evaluation did not suggest any problems. The manufacturer states that the Israeli Police armory appears to be completely satisfied.

Still, we urge the National Institute of Justice to thoroughly examine this issue and conduct any necessary test.

APPENDIX C: BIOGRAPHIES OF COMMISSION MEMBERS

Donald K. Stern

Mr. Stern is a partner in the Boston office of Bingham McCutchen LLP, concentrating his practice in government enforcement and white collar defense, including internal investigations for companies, boards of directors, and audit committees.

In addition to his experience in private practice, Mr. Stern served in several government positions. Most recently, he was the United States Attorney for the District of Massachusetts (1993-2001). He also served as Chief Legal Counsel to the Governor of Massachusetts and Chief of the Government Bureau in the Massachusetts Attorney General's office.

Mr. Stern is on the faculty at Harvard Law School, where he teaches the Government Lawyer course.

Dr. Raymond L. Downs, Ph.D

Dr. Downs recently retired as a senior program manager and Deputy Director of the Research and Technology Division of the National Institute of Justice's (NIJ) Office of Science and Technology. NIJ is the research and development arm of the U.S. Department of Justice. During his nine years with NIJ he was responsible for several major research and development programs designed to better meet the technology needs of the nation's law enforcement and corrections communities, particularly at the state and local level. R&D programs Mr. Downs initiated and managed include less-lethal weapons, "smart" guns, concealed weapon detection technologies, fleeing vehicle stopping technologies, personnel location and tracking technologies and school safety technologies. He represented NIJ on many federal inter-agency technology working groups and committees and was the NIJ less-lethal weapons expert on many international information exchanges.

Dr. Downs is a chemist who, before joining NIJ, spent most of his career as a materials scientist research and technical manager in advanced R&D for nuclear energy.

Robert P. Gittens

Mr. Gittens is Vice President Public Affairs at Northeastern University. He is responsible for overseeing the Office of Government Relations and Community Affairs for Northeastern University and maintaining the university's relationships with community representatives. Mr. Gittens is also leading the university's development and implementation of its urban focused mission.

Prior to joining the university in March of 2003, Mr. Gittens served as Massachusetts Cabinet Secretary for the Executive Office of Health and Human Services where he acted as chief policy advisor to the Governor on health care, social welfare and other life quality issues, while overseeing a secretariat of more than 24,000 employees and providing leadership for 15 diverse health and human service agencies.

Mr. Gittens has also served as the Commissioner for the Massachusetts Department of Youth Services, First Assistant District Attorney to the Suffolk County District Attorney's Office, as both a member and Chairman of the Massachusetts Parole Board, and as Deputy Chief Legal Counsel to the Office of the Governor's Legal Counsel.

Mr. Gittens is an alumnus of Northeastern University's School of Law and earned his B.A. in Political Science from Northeastern University as well.

Janice W. Howe

Ms. Howe is a partner in the Boston office of Bingham McCutchen LLP. She represents clients in product liability cases involving diet drugs ("fen phen" and Redux), medical devices, appliances and food products. In addition to Ms. Howe's product liability experience, she has represented corporate and individual clients in both criminal and civil, federal and state court, administrative and regulatory proceedings. Ms Howe has lectured on trial practice, mass torts, alternatives to class actions, investigative techniques, as well as use of expert testimony at trial.

Prior to joining Bingham McCutchen, Ms. Howe served as an Assistant District Attorney in Massachusetts for thirteen years, and tried homicide, rape, armed robbery, kidnapping, burglary, civil rights, arson and narcotics trafficking cases.

Steven Ijames

Major Steve Ijames is with the Springfield, Missouri Police Department, and has been a police officer for the past 27 years. Major Ijames has done extensive research on impact projectile use in public disorder, and developed the impact projectile instructor/trainer programs of the International Association of Chiefs of Police and the National Tactical Officers Association. He has provided such training throughout the United States and in 31 foreign countries, including such places as Bosnia, Somalia, Haiti, Northern Ireland, Yemen, and East Timor.

Hon. Patrick J. King (Ret.)

Judge King works as an arbitrator and mediator in Boston for JAMS, the nation's largest private provider of alternative dispute resolution services. Prior to joining JAMS in March 2003, he was an Associate Justice of the Massachusetts Trial Court for twenty-six years. Before his judicial career, Judge King worked as a trial attorney with the Boston office of Mintz, Levin, Cohn, Glovsky, Ferris & Popeo, managed a legal services office in Boston and worked as a trial attorney for the Civil Rights Division of the United States Department of Justice in Washington, D.C. Judge King is the former President of the Massachusetts Judges Conference, former Chairperson of the Massachusetts State Ballot Law Commission and currently serves as the Co-Chair of the Administration of Justice Section of the Boston Bar Association.

Christopher E. Stone

Christopher Stone is Daniel and Florence Guggenheim Professor of the Practice of Criminal Justice at Harvard University's John F. Kennedy School of Government. He serves on

the board of the Police Assessment Resource Center, supporting state and local police oversight nationally. He also chairs the board of the Altus Global Alliance, which unites justice-sector research organizations in Russia, India, Nigeria, Chile, Brazil, and the United States.

From 1994 to 2004, Mr. Stone served as director of the Vera Institute of Justice where his substantive work focused on institutional reform of police, prosecution, and public defense services in the United States and internationally. He is a graduate of Harvard College, the Institute of Criminology at the University of Cambridge, and the Yale Law School.