

A Review of the September 2005 Shooting Incident Involving the Federal Bureau of Investigation and Filiberto Ojeda Ríos



Office of the Inspector General
August 2006

TABLE OF CONTENTS

TABLE OF CONTENTS	i
INDEX OF FIGURES AND TABLES.....	vii
EXECUTIVE SUMMARY	ix
I. Background	ix
II. The Methodology of the OIG Investigation.....	x
III. Planning the Operation	xi
A. Historical Background Regarding Ojeda and the Macheteros	xi
B. The FBI Locates Ojeda in Hormigueros.....	xiii
C. Deployment of the Hostage Rescue Team	xiii
D. The Surveillance and Arrest Plans.....	xiv
E. The Role of the Police of Puerto Rico.....	xv
IV. Chronology of Events in the Operation	xvi
A. Events on September 22	xvi
B. Overnight Events on September 22-23	xvi
C. Plan for a Pre-dawn Arrest Operation on September 24	xvii
D. The Compromise of the Sniper-Observers.....	xvii
E. Transportation to the Target	xviii
F. The Assault on the Ojeda Residence.....	xix
G. Events Following the Exchange of Gunfire.....	xxiv
H. Ojeda Struck by a Shot from the Perimeter	xxvi
I. The Decision Not to Enter the House on September 23..	xxviii
J. Notification of the Puerto Rico Department of Justice	xxix
K. Entry of the House on September 24.....	xxx
V. Findings of the Puerto Rico Institute of Forensic Sciences.....	xxxii
A. Findings on the Scene	xxxii
B. Autopsy	xxxii
C. Bullet and Shell Casing Examinations.....	xxxii
D. Trajectory Analysis.....	xxxiii
E. Shooting Reconstruction	xxxiv
F. Blood Patterns	xxxiv
VI. Compliance with the Deadly Force Policy.....	xxxiv
A. Assessment of the Initial Exchange of Gunfire.....	xxxv
B. Assessment of the Perimeter Shots.....	xxxvi
VII. Assessment of the Decision to Conduct an Emergency Daylight Assault.....	xxxvii
A. Foreseeable Risks from a Daylight Assault	xxxviii
B. The Surround and Call-out Option.....	xxxix
C. The Extract and Withdraw Option	xl
D. Modification of the Approach Route.....	xl
E. Conducting the Assault on El Grito de Lares	xl
VIII. Assessment of the FBI’s Decisions Regarding Entry	xli
A. FBI Entry Decisions in Puerto Rico before 8:05 p.m.	xli

	B.	Entry Decisions Made at FBI Headquarters	xlii
IX.		The FBI's Preparation for and Conduct of Negotiations	xliv
X.		Miscellaneous Issues	xlvi
	A.	The FBI's Communications with the Commonwealth of Puerto Rico	xlvi
	B.	Prior Opportunities to Apprehend Ojeda.....	xlvi
XI.		Recommendations	xlvii
	A.	Recommendations Regarding Compliance with the DOJ Deadly Force Policy and Related Issues	xlvii
	B.	Recommendations Regarding the Decision to Conduct an Emergency Daylight Assault.....	xlvii
	C.	Recommendations Regarding the FBI's Entry Decisions .	xlviii
	D.	Recommendations Regarding the FBI's Preparations for and Conduct of Negotiations	xlix
XII.		Conclusion.....	xlix
CHAPTER ONE: INTRODUCTION			1
	I.	Background	1
	II.	Methodology of the OIG Review.....	3
	III.	Organization of the OIG Report.....	7
CHAPTER TWO: PLANNING THE OJEDA ARREST OPERATION			9
	I.	Historical Background Regarding Ojeda and the Macheteros	9
	A.	Filiberto Ojeda Rios and the Macheteros	9
	B.	The 1985 Arrest of Ojeda	10
	C.	Ojeda Becomes a Fugitive	13
	D.	Later Activities of the Macheteros.....	13
	II.	The FBI Locates Ojeda in Hormigueros	14
	III.	The Request for the Assistance of the Hostage Rescue Team.....	17
	IV.	Background on the Hostage Rescue Team and the Critical Incident Response Group	17
	V.	The HRT Advance Team Reconnaissance and Assessment	18
	VI.	Information Regarding the Neighbors.....	19
	VII.	The Operations Plans	20
	A.	The Surveillance Plan.....	20
	B.	The Arrest Plan	22
	C.	Consideration of the Surround and Call-Out Option.....	23
	D.	Discussions Regarding El Grito de Lares	24
	E.	Preparations for Medical Emergencies	25
	F.	Chain of Command	25
	G.	Communications Links	25
	H.	Helicopters.....	25
VIII.		Establishment and Organization of the HRT Tactical Operations Center and the San Juan FBI Command Post in Aguadilla	26
IX.		The Role of the Police of Puerto Rico in the Arrest Operation.....	26

CHAPTER THREE: CHRONOLOGY OF EVENTS IN THE SURVEILLANCE AND ARREST OPERATION	29
I. Surveillance on September 21-22	29
II. Issuance of the Search Warrant.....	30
III. Surveillance on September 22-23	30
IV. Deliberations Regarding a Course of Action on September 23	34
V. The Plan for a Pre-dawn Arrest Operation on September 24.....	35
VI. The Compromise of the Sniper-Observers	37
VII. Deliberations Regarding a Post-Compromise Course of Action ...	39
VIII. Preparations for the Daylight Assault	40
IX. Transportation to the Target.....	42
X. The Assault on Site 1	44
A. Features and Layout of Site 1.....	44
B. The Exchange of Gunfire.....	48
XI. The Evacuation of the Wounded Agent	53
XII. The Standoff.....	53
A. The Surrender of Elma Beatríz Rosado Barbosa	53
B. Communications between the FBI and Ojeda	54
XIII. Activation of the Strategic Information and Operations Center at FBI Headquarters.....	57
XIV. Crowds Assemble at Several Locations in Puerto Rico.....	58
XV. The Decision to Send Relief HRT Teams from Quantico.....	59
XVI. Ojeda Struck by a Shot from the Perimeter.....	60
A. Brian's Position.....	60
B. The Shots	62
XVII. The Limited Breach of the Residence	64
XVIII. Decisions Immediately After the Limited Breach.....	65
XIX. FBI Headquarters Assumes Control of the Law Enforcement Clear	66
XX. Counterterrorism Division Rejects a Nighttime Entry.....	68
A. Reasons for the Decision.....	68
B. Communication of the Final Decision.....	69
C. HRT Agents' Response to the Decision.....	72
XXI. Notification of the Puerto Rico Department of Justice	73
XXII. Approval of a Modified Fragmentary Order for a September 24 Daytime Clear	74
XXIII. Execution of the Daytime Clear	75
CHAPTER FOUR: FINDINGS OF THE PUERTO RICO INSTITUTE OF FORENSIC SCIENCES.....	80
I. Findings on the Scene	81
II. Autopsy.....	82
III. Bullet and Shell Casing Examinations	82
IV. Trajectory Analysis	85
V. Shooting Reconstruction	87
VI. Blood Patterns.....	87

CHAPTER FIVE: OIG ANALYSIS OF WHETHER THE OJEDA SHOOTING WAS IN COMPLIANCE WITH THE DEPARTMENT OF JUSTICE DEADLY FORCE POLICY	89
I. The Department of Justice Deadly Force Policy.....	89
II. Assessment of the FBI’s Use of Deadly Force During the Initial Exchange of Gunfire.....	90
A. Rounds Fired Through the Wooden Gate into the Hallway .	93
B. Rounds Fired Toward the Kitchen Window	93
C. The Infeasibility of Providing a Warning.....	94
D. The Exercise of Fire Discipline	94
E. The Three Shots Through the Front Door	95
III. Assessment of the Perimeter Shots	99
IV. Lack of “Standard Load” of Ammunition	103
V. Conclusions Regarding FBI Use of Force.....	104
CHAPTER SIX: OIG ASSESSMENT OF THE DECISION TO CONDUCT AN EMERGENCY DAYLIGHT ASSAULT	107
I. The Circumstances of the Reported Compromise	107
II. The Emergency Daylight Assault	109
III. The Surround and Call-out Strategy.....	113
IV. Whether the FBI Gave Adequate Consideration to Extracting the Sniper-Observers and Withdrawing	116
V. Modification of the Approach Route	118
VI. The Decision to Conduct the Assault on El Grito de Lares	119
VII. Conclusions Regarding the Decision to Conduct an Emergency Daylight Assault.....	120
CHAPTER SEVEN: OIG ASSESSMENT OF THE FBI’S DECISIONS REGARDING ENTRY OF THE RESIDENCE	123
I. Assessment of FBI Entry Decisions in Puerto Rico from Approximately 6:08 p.m. to 8:05 p.m.....	124
II. Differing Accounts Regarding the Chain of Command from 6:08 until 8:05 p.m.	125
III. Whether the FBI Ignored Bloodstains on the Front Doorstep....	126
IV. Assessment of FBI Entry Decisions at FBI Headquarters	127
A. Decision to Require Counterterrorism Division Approval of any Plan to Enter the Residence.....	128
B. Decision Not to Enter the Residence the Night of September 23	133
C. The Informational Consequences of CTD Assuming Control of the Entry Decision	134
V. The Tension Between the FBI’s Aggressive Strategy Before the Gunfire Exchange and its Cautious Strategy after Ojeda Was Wounded.....	136
VI. Consequences for the Outcome	137
VII. Conclusions Regarding the FBI’s Entry Decisions	138

CHAPTER EIGHT: ASSESSMENT OF THE PREPARATION FOR AND CONDUCT OF NEGOTIATIONS.....	141
I. The FBI's Preparation for Negotiations in a Barricaded Subject Scenario.....	141
II. The FBI's Conduct of Negotiations and Rejection of Ojeda's Demand for a Reporter	144
III. Impact of Negotiations on the Outcome	145
IV. Conclusions Regarding the Conduct of Negotiations	146
CHAPTER NINE: MISCELLANEOUS ISSUES.....	149
I. The FBI's Communications with Commonwealth of Puerto Rico Government Officials Before and During the Ojeda Arrest Operation.....	149
A. FBI's communications with the Commonwealth of Puerto Rico before the arrest operation	149
B. The FBI's Communications with the Commonwealth of Puerto Rico after the Emergency Assault Failed.....	151
II. Whether the FBI Bypassed Prior Opportunities to Apprehend Ojeda Safely	153
III. The Landing Zone Error	154
A. Causes of the Error.....	155
B. Consequences of the Failure to Locate the Landing Zone.	157
CHAPTER 10: RECOMMENDATIONS	159
CHAPTER 11: CONCLUSIONS.....	169

[BLANK]

INDEX OF FIGURES AND TABLES

Figure 1: Major Events in the Macheteros/Ojeda Investigation	11-12
Figure 2: Map of Puerto Rico	15
Figure 3: Aerial View of Sites 1 and 2	16
Figure 4: Aerial View of Ojeda Residence (Site 1)	21
Figure 5: Ojeda Operation Timeline	31-32
Figure 6: Select Features on Front (White) Side of Residence (Foliage Removed)	45
Figure 7: 3-D Diagram of Interior of the Residence	46
Figure 8: View of the Front of the Residence (Before Foliage Removed)	47
Figure 9: View of Residence from Approximate Position of Shooter	61
Figure 10: Doorway Bloodstain Before the Body was Removed	78
Figure 11: Doorway Bloodstain After the Body was Removed	79
Table 1: Comparison of Shell Casing Evidence as Described by Forensic Laboratory with Agent Statements	84
Figure 12: Trajectory of Shots Through Front Door	96
Figure 13: Ceiling Impact from Shots Through Front Door	97

[BLANK]

EXECUTIVE SUMMARY

I. Background

On September 23, 2005, agents from the Federal Bureau of Investigation (FBI) attempted to arrest long-time fugitive Filiberto Ojeda Ríos (Ojeda) at a residence on a rural hillside near Hormigueros, Puerto Rico. Ojeda was one of the founders and leaders of the Ejército Popular Boricua, also known as the “Macheteros” (Cane-Cutters), an organization that claimed credit for various violent crimes during the late 1970s and 1980s in pursuit of independence for Puerto Rico.

A team of FBI agents attempted to enter the residence to arrest Ojeda at 4:28 p.m. The operation resulted in a brief but intense exchange of gunfire between Ojeda and the FBI. Three agents were shot and one was seriously wounded; Ojeda was not hit. The agents did not enter the house or complete the arrest. The gunfight was followed by a standoff during which Ojeda’s wife surrendered and FBI agents engaged in a dialog with Ojeda. At 6:08 p.m., an FBI agent saw Ojeda through a window and fired three shots at him. Several agents heard Ojeda cry out and fall. The FBI did not enter the house until shortly after noon the next day, at which time the agents found Ojeda on the floor, dead from a single bullet wound that punctured his lung.

Journalists, elected officials, and activists in Puerto Rico criticized the FBI for using excessive force to capture Ojeda, for conducting the operation on El Grito de Lares (a holiday of great significance to the Puerto Rican independence movement), and for waiting 18 hours after Ojeda was shot before entering the house, thereby allowing Ojeda to bleed to death.

On September 26, FBI Director Robert Mueller requested that the Office of the Inspector General (OIG) conduct an investigation to determine the facts and circumstances of the Ojeda shooting incident and to make recommendations regarding what actions, if any, the FBI should take in connection with it. The FBI and the United States Attorney General also received written requests from several United States Representatives and other elected officials for an independent investigation of the circumstances of Ojeda’s death.

The OIG initiated this investigation after receiving Director Mueller’s request. In August 2006, we completed a 172-page report detailing our findings and recommendations. This Executive Summary summarizes the full report.

II. The Methodology of the OIG Investigation

The OIG's objective in conducting this review was to investigate the facts relating to the incident, and: (1) to determine whether the FBI agents involved in the operation complied with the Department of Justice's Deadly Force Policy; (2) to assess the FBI's decision to conduct an emergency daylight assault of the Ojeda residence in light of other potential options for apprehending Ojeda; (3) to assess the FBI's planning for and conduct of negotiations with Ojeda during the standoff; (4) to determine the reasons the FBI waited 18 hours after the shooting to enter the residence; and (5) to evaluate communications between the FBI, the Commonwealth of Puerto Rico, and the public regarding the operation. As the investigation proceeded, the OIG identified several additional issues that are addressed in this report, including anonymous allegations that the FBI had bypassed numerous opportunities to arrest Ojeda under circumstances less likely to result in violence.

The OIG investigation was conducted by a team of attorneys and OIG Special Agents. In the course of the investigation, the OIG interviewed over 60 individuals, including personnel from the FBI Counterterrorism Division in Washington, D.C., and agents from the FBI's Critical Incident Response Group (CIRG) in Quantico, Virginia. These interviews included all of the agents who discharged their weapons or otherwise participated in the assault on Ojeda's residence, as well as other CIRG agents who planned, participated in, or had knowledge of the operation. We also interviewed personnel from the San Juan Division of the FBI (San Juan FBI) and the U.S. Attorney's Office for the District of Puerto Rico who were involved in the Ojeda matter. OIG investigators interviewed officials from the Department of Justice of the Commonwealth of Puerto Rico and the Police of Puerto Rico (POPR). We also spoke with several persons living in the area near the Ojeda residence.

The OIG reviewed thousands of pages of documents generated by the FBI and the U.S. Attorney's Office relating to the Ojeda matter, including draft and final Operations Plans and Orders, investigative files, court filings, photographs, logs, intelligence reports, text messages, and relevant FBI policies, procedures, and training manuals.

In addition, the OIG reviewed relevant forensic reports prepared by the Instituto de Ciencias Forenses (the Puerto Rico Institute of Forensic Sciences) related to the Ojeda incident. These reports included the autopsy report, bullet and shell casing analyses, trajectory analysis, shooting reconstruction, and blood pattern analysis. We also conducted three lengthy interviews of Dr. Pio R. Rechani López, the Executive Director of the Institute, and other scientists involved in preparing the forensic reports. The OIG acknowledges the cooperation of Puerto Rico Attorney General Roberto J. Sánchez Ramos and Dr. Rechani in making the forensic reports and scientists available to us.

The OIG also consulted with the U.S. Department of Defense Armed Forces Institute of Pathology, Office of the Armed Forces Medical Examiner (OAFME), regarding how long Ojeda survived after being shot. The OAFME provided a written report on this issue and responded to questions from the OIG.

In addition, the OIG recruited three experts in tactical police operations to provide expert input and guidance on the FBI's tactical decisions in the Ojeda operation and the agents' compliance with the Department of Justice Deadly Force Policy: (1) Ronald M. McCarthy, a former Field Supervisor for the Los Angeles Police Department Tactical Unit who previously served on the U.S. Department of Justice Waco review committee and who has testified before the United States Congress as an expert in police special operations; (2) Michael S. Foreman, the former Chief of the Sheriff's Office for Orange County, Florida, who has 24 years of experience in the field of special weapons and tactics as a team leader and SWAT commander; and (3) Gary Van Horn, the Assistant Director in the Office of Law Enforcement and Security at the U.S. Department of the Interior, who has over 30 years of law enforcement experience.

During the course of its review, the OIG was unable to interview some witnesses and obtain some potentially relevant written materials. The attorney for Ojeda's widow declined our request to interview her as well as our request for access to the Ojeda residence. The Department of Justice of the Commonwealth of Puerto Rico declined our request for access to statements collected from approximately 40 witnesses, including individuals living in the neighborhood near the Ojeda residence, as well as an expert report prepared for the Commonwealth regarding the survivability of Ojeda's wound. A Commission of the Puerto Rico Bar Association conducted an investigation of the Ojeda incident, but the Bar Association did not respond to written and telephonic requests from the OIG for information collected in that investigation. We believe, however, that although this information might have been useful to the OIG's investigation, our findings and conclusions were not materially affected by our inability to obtain access to it.

III. Planning the Operation

In this section of the Executive Summary, the OIG summarizes historical information regarding Ojeda and the Macheteros, and then describes the FBI's planning for the Ojeda arrest operation.

A. Historical Background Regarding Ojeda and the Macheteros

Ojeda was born in Puerto Rico in 1933. In the mid-1970s Ojeda helped to organize the Macheteros. The publicly stated goal of the Macheteros is to

obtain the independence of Puerto Rico by armed struggle against the United States government. The FBI considers the Macheteros to be a terrorist organization. Ojeda was the leader of and spokesman for the Macheteros.

The Macheteros have claimed responsibility for various acts of violence in Puerto Rico, such as the murder of a police officer in Naguabo, Puerto Rico, in August 1978 and the killing of U.S. Navy sailors in Puerto Rico in 1979 and 1982.

The Macheteros have also claimed responsibility for numerous bombings in Puerto Rico. On October 17, 1979, the Macheteros conducted eight bomb attacks against various federal facilities across Puerto Rico. In January 1981, the organization used bombs to destroy nine U.S. fighter aircraft at the Muñiz Air National Guard Base in Carolina, Puerto Rico. Later the same year, the Macheteros bombed three separate buildings of the Puerto Rico Electric Company. In 1983, the Macheteros fired a Light Anti-Tank Weapon (commonly called a LAW rocket) into the U.S. Federal Building in Hato Rey, Puerto Rico, damaging the offices of the U.S. Department of Agriculture and the FBI. In January 1985, the Macheteros fired a LAW rocket into a building in Old San Juan that housed the U.S. Marshals Service and other federal agencies.

The Macheteros also conducted robberies to finance their activities, including the theft of \$7.1 million from a Wells Fargo facility in West Hartford, Connecticut on September 12, 1983. The Wells Fargo robbery was one of the largest bank robberies in U.S. history.

On August 30, 1985, the FBI conducted a large-scale operation in Puerto Rico to arrest Ojeda and other alleged members of the Macheteros in connection with the Wells Fargo robbery. According to contemporaneous FBI accounts, Ojeda did not respond to loud announcements from the agents of their presence and intent to execute a warrant at his residence. When the FBI entered Ojeda's residence, Ojeda fired several shots down a stairway at the arrest team. One of the shots ricocheted and struck an agent, permanently blinding him in one eye. Ojeda fired more shots and threatened to shoot anyone who attempted to climb the stairs. After a dialog with the agents, Ojeda allowed his wife to surrender to the FBI. A few minutes later, Ojeda appeared at the base of the stairs holding a pistol in his left hand and an Uzi shoulder weapon in his right hand. The agents instructed him in Spanish and English to drop his weapons. According to the agents, Ojeda then raised the pistol. One of the agents fired at Ojeda. The shot struck Ojeda's pistol and knocked it from his hand. Ojeda dropped the Uzi and was subdued by the agents.

Ojeda represented himself in his 1989 trial in Puerto Rico on the charge of assaulting the FBI agents during the arrest operation, arguing self defense. He was acquitted by a jury.

Ojeda was released on bond pending trial in Connecticut on charges relating to the Wells Fargo robbery. On September 23, 1990, Ojeda cut off his electronic monitoring device and announced that he had gone back underground to continue the struggle against the government of the United States. Ojeda thereby violated the conditions of his release and became a federal fugitive. The United States District Court in Connecticut issued an arrest warrant the next day, charging Ojeda with bond default. In July 1992, Ojeda was tried in absentia in Connecticut and found guilty on 14 counts related to the Wells Fargo robbery, fined \$600,000, and sentenced to 55 years in prison.

After becoming a fugitive in 1990, Ojeda periodically gave interviews to the media in Puerto Rico, and his recorded speeches were played at pro-independence rallies. According to media accounts and FBI files, in these statements Ojeda reiterated that the Macheteros remained active as an organization and he continued to advocate an “armed struggle” for independence. In 2003, Ojeda issued a letter condemning an FBI “wanted” advertisement that included a photograph of his wife. Ojeda described the Macheteros as “indestructible” and urged supporters to send him the names of FBI agents in Puerto Rico for future publication.

B. The FBI Locates Ojeda in Hormigueros

The Ojeda arrest operation was the culmination of a major investigative effort by the San Juan FBI that was led by Special Agent in Charge (SAC) Luis Fraticelli. In early September 2005, the San Juan FBI determined that Ojeda and his wife were likely living in a house located on a rural hillside in Hormigueros, on the west side of Puerto Rico. At this point, the San Juan FBI had not seen Ojeda at the house. The San Juan FBI was concerned that the remote location and rugged terrain would make it difficult to confirm Ojeda’s presence using conventional surveillance techniques.

C. Deployment of the Hostage Rescue Team

On September 13, 2005, FBI Headquarters approved a request from SAC Fraticelli for the deployment of the FBI’s Hostage Rescue Team (HRT) to conduct a tactical assessment for the purpose of arresting Ojeda. Based in Quantico, Virginia, the HRT is a full-time, national level tactical team that, among other missions, deploys in support of FBI field division operations. HRT is a component of the Tactical Support Branch in the FBI’s Critical Incident Response Group (CIRG), which also includes the Operations and Training Unit and the Tactical Helicopter Unit. The Operations and Training Unit supports HRT by providing operations management, planning and oversight during HRT deployments. The Tactical Helicopter Unit provides aviation support.

The San Juan FBI sought the assistance of highly specialized HRT “sniper-observers” to conduct covert surveillance to determine whether Ojeda was present and to gather intelligence relevant to an arrest.¹ In addition, SAC Fraticelli said he sought HRT’s expertise in conducting the arrest because he was concerned that Ojeda would likely “shoot it out” with the FBI again and that Ojeda might use grenades or explosives.

D. The Surveillance and Arrest Plans

Agents from the HRT and the Operations and Training Unit prepared plans for a two-phase operation: a surveillance phase followed by an arrest phase. During the surveillance phase, a team of HRT sniper-observers would conduct covert surveillance of the residence, with emphasis on confirming Ojeda’s presence. The sniper-observers would also collect other information relevant to a potential arrest operation, such as identifying the location and composition of “breach points” where the arresting agents could enter the residence.

The plan also called for a Quick Reaction Force to be made up of agents from HRT and the San Juan FBI in vehicles stationed at a location a short drive from Ojeda’s residence. The function of the Quick Reaction Force would be to extract the sniper-observers in the event of compromise and to be prepared for arrest contingencies.

The FBI planners did not make detailed plans for the arrest phase in advance of the operation because they expected that the specific tactics would depend in large part on the results of the surveillance phase. HRT’s preference and primary focus was to make the arrest outside of the residence, such as in a vehicle stop while Ojeda was leaving or approaching the residence.

The FBI plan did not address a scenario in which the FBI would surround the residence and call for Ojeda to surrender, even as a least preferred course of action. SAC Fraticelli told the OIG that he wanted to avoid a standoff or “barricaded subject scenario” because he was concerned that Macheteros sympathizers would assemble near the scene in large numbers and that it would be difficult to control the situation.

In preparing for the operation, the HRT Commander and Deputy Commander decided not to include negotiators from the CIRG Crisis Negotiation Unit (CNU) in Quantico as part of the team. However, SAC

¹ Within the FBI, a “sniper-observer” is an agent highly trained in marksmanship, field skills, and observation. Deployed sniper-observer teams are responsible for collecting and relaying intelligence about a target, responding to imminent threats, and supporting tactical assaults.

Fratlicelli made arrangements for two trained negotiators from the San Juan FBI to be available during the operation.

Consistent with FBI crisis management guidelines, the plan for the Ojeda operation provided that SAC Fraticelli was at the top of the Tactical Chain of Command, followed by an Assistant Special Agent in Charge (ASAC) from the San Juan FBI, the HRT Deputy Commander, and the HRT Squad Supervisor.

In planning the arrest operation, the FBI took into account the annual celebration of El Grito de Lares on September 23. San Juan FBI investigators believed that Ojeda might leave his residence and attend the celebration in the city of Lares, thereby presenting an opportunity for a safe arrest away from the residence.

On September 19, HRT set up a Tactical Operations Center (TOC) at a location approximately 25 miles from Ojeda's residence. In general, the TOC was staffed throughout the operation by the HRT Deputy Commander and other CIRG personnel. The agents in the field communicated with the TOC by radio and cell phone. The San Juan FBI set up a Command Post on a different floor in the same building. In addition, the San Juan FBI Command Post was staffed by SAC Fraticelli, two ASACs, and various agents from the San Juan FBI.

As part of its surveillance plan, the FBI assigned color designations to the four sides of Ojeda's house in order to facilitate communications. Facing the house, the front side was designated "White," the left side was designated "Green," the right side was designated "Red," and the rear side of the house was designated "Black."

E. The Role of the Police of Puerto Rico

The POPR was aware that the FBI had been attempting to locate Ojeda, and had provided some assistance to the FBI in this effort. However, the FBI did not give advance notice to the POPR that the FBI had located Ojeda in Hormigueros and was planning to arrest him there. SAC Fraticelli stated that he did not provide advance notice to the POPR because he wanted to keep the operation secret and limit the possibility of leaks. The POPR did not receive notice of the arrest operation until after the FBI began the attempt to arrest Ojeda and the exchange of gunfire, which we describe below, at which time POPR officers responded to the scene and established an outer security perimeter.

IV. Chronology of Events in the Operation

In this section of the Executive Summary, the OIG sets forth a detailed chronology of events in the implementation of the Ojeda surveillance and arrest operation.

A. Events on September 22

A team of FBI sniper-observers initiated surveillance of the Ojeda residence before dawn on Thursday, September 22. During daylight hours, the sniper-observers withdrew to a position under cover of vegetation a short distance from the residence.

Later that day, the United States District Court for the District of Puerto Rico issued a search warrant for the residence. The warrant authorized the FBI to execute the search at any hour of the day or night for evidence of violations of several criminal statutes. The original arrest warrant issued in 1990 for Ojeda's failure to appear at trial for the Wells Fargo robbery remained outstanding.

B. Overnight Events on September 22-23

The sniper-observers resumed surveillance of the residence after dark on September 22. As one of the sniper-observers moved along a fence around the residence, two dogs began barking excitedly. Lights came on inside the residence and at a neighboring residence. The sniper-observer saw a woman on the porch and heard her talking to a man who was in the yard inside the fence, with a flashlight. The man walked close to where the sniper-observer was hiding, but apparently did not see him. The sniper-observer described the man as elderly, with white hair and a medium build, which met the description of Ojeda provided by the San Juan FBI. The sniper-observer stated that he could not see the man's face clearly, but based on the San Juan FBI description and other information, he concluded the man was Ojeda. This information was relayed back to the TOC at 11:43 p.m. on September 22.

SAC Fraticelli and the HRT Deputy Commander considered whether to order an immediate operation to arrest Ojeda on the morning of September 23. They ultimately concluded that the available information regarding the house was inadequate to assure a successful breach of the front door without killing or injuring the occupants.

The FBI was hopeful that Ojeda would depart the residence by car later that morning to attend the El Grito de Lares celebration, and that he could be apprehended by the Quick Reaction Force at that time. Fraticelli and the HRT Deputy Commander doubled the size of the Quick Reaction Force team on duty between 6:00 a.m. and approximately 10:00 a.m. on September 23, using all

available agents from HRT together with SWAT Team agents from the San Juan FBI. In addition, numerous agents from the San Juan FBI were assigned to maintain surveillance coverage at all potential vehicle exit routes near the residence. However, the FBI did not observe Ojeda again that morning.

C. Plan for a Pre-dawn Arrest Operation on September 24

Based on information about the residence provided by the sniper-observers and advice from the HRT Deputy Commander, Fraticelli decided on a deliberate assault of the residence to arrest Ojeda in the pre-dawn hours of September 24, when Ojeda was expected to be sleeping. At approximately 10:00 a.m. on September 23, all of the HRT agents serving on the Quick Reaction Force returned to their base to rest and prepare for the assault the next morning. Agents from the San Juan FBI SWAT Team assumed Quick Reaction Force responsibilities.

The HRT and Operations and Training Unit agents prepared a plan for the assault. The plan called for the sniper-observers to approach the house late on September 23 to confirm Ojeda's presence. Early on September 24, the assault units would be delivered by vehicle to a location near the residence, and they would advance toward the house surreptitiously on foot. The assault units would approach the White side of the house, proceed through the front yard, and advance up onto the porch. One group would breach the residence at a door near the Red/White corner, and another group would breach the house at the large window on the Green side. Because the FBI had a "no-knock" search warrant, HRT did not plan to announce itself before breaching. Once inside, the agents would conduct a rapid room-to-room maneuver, called a "clear," until they captured Ojeda and secured the residence.

D. The Compromise of the Sniper-Observers

At approximately 2:30 p.m. on September 23, the sniper-observers were at their daytime position of cover, in the woods away from the house. One sniper-observer saw a vehicle stop near a trailhead leading toward their position. A second vehicle arrived several minutes later. The sniper-observer heard people talking but could not understand what they said because he does not speak Spanish. Other sniper-observers who were positioned further away from the road also told the OIG that they heard vehicles and voices, but they could not make out what was said. The first sniper-observer moved into position to observe what the speakers were doing, and he saw someone pointing at the ground and toward the trailhead.

The sniper-observers became concerned that the person gesturing toward the trailhead had detected evidence that the sniper-observers had used the trail and their presence had been detected. The sniper-observers' concern was heightened by the fact that the barking dog incident had occurred the

night before and by the belief that the local population included Macheteros sympathizers. The sniper-observers reported these events to the TOC by radio and recommended to the TOC that the Quick Reaction Force “get here ASAP and hit the house.” Several of the sniper-observers told the OIG that their primary concern was that Ojeda would receive warning of their presence and would escape and return underground.

Fratlicelli and the HRT Deputy Commander discussed a course of action in response to the reported compromise of the sniper-observers. The accounts of the deliberations differed somewhat between the participants. However, it is undisputed that, based on the recommendation of the HRT Deputy Commander, Fratlicelli decided to proceed immediately with the arrest plan that HRT had devised for the pre-dawn hours of September 24. The primary modification of the plan was to transport the arrest team by helicopter to a small banana field in front of the house and have the team “fast rope” to the ground. Fratlicelli told the OIG that he was concerned that the FBI would lose the advantage of surprise in this kind of daytime assault by helicopter, but that after consulting with the HRT Deputy Commander he became convinced that an immediate assault on the house was the best option.

E. Transportation to the Target

Fratlicelli made the final “go” decision for the emergency daylight assault at approximately 3:45 or 4:00 p.m. on September 23. Ten HRT assaulters boarded two helicopters. The agents were equipped with helmets, standard issue body armor bearing “FBI” identifiers, and HRT-issued .223 caliber M4 carbine shoulder weapons.

The San Juan FBI SWAT units were at that time stationed in Quick Reaction Force vehicles a few minutes away from the house. The TOC instructed two of the agents to link up with HRT assaulters when they were dropped by helicopter at the banana field and to assist in the assault. The remainder of the Quick Reaction Force was assigned to address any threat posed by any persons at or near a neighboring residence, including those who had been seen or heard near the location of the sniper-observers. Numerous other agents from the San Juan FBI, including two negotiators and an ASAC who was also a negotiator, were summoned to assist at the scene. The HRT sniper-observers moved to various locations around the house and awaited the helicopters.

The HRT helicopters departed for the scene at approximately 4:00 p.m. As the HRT helicopters were approaching the GPS coordinates the pilots had been given for the Ojeda residence, they passed over an open area that ended approximately 1/10 of a mile south of the target coordinates. The pilots could not see the target residence. One pilot sought assistance from the sniper-observers on the radio but did not hear anything. The lead pilot did not want

to fly over the target residence, so shortly after passing over the edge of the open area he made a clockwise turn back toward it. The second helicopter made a similar turn. The assaulters completed a rope drop into the open area, which was on a steep slope.

On the ground, the 10 HRT assaulters realized that they were not at the planned banana field landing zone. They moved quickly up a steep hill to a road, where they encountered an agent from the San Juan FBI at a vehicle surveillance point in an SUV. The assaulters got into the SUV or climbed on its running boards and rear bumper, and the agent drove them quickly to the Ojeda residence.

F. The Assault on the Ojeda Residence

At 4:28 p.m., the SUV carrying the 10 HRT assaulters approached the residence. As the SUV approached, two sniper-observers moved closer to the house, and they were detected by dogs inside the fence, which began barking loudly. Another sniper-observer moved forward to open the closed driveway gate to the residence, but the vehicle crashed through the gate toward the house without stopping. The SUV came to a stop in the front yard, near a low cement wall.

A break in the wall lead to cinder block steps running up a short but steep embankment to an open balcony porch along the White (front) side of the house. The front door was at the top of the steps, and there was another doorway covered by a wooden gate near the Red/White corner of the house. Between the front door and the gated doorway there was a kitchen window with slatted panes.

Figure A shows the front of the house much as the agents would have seen it when they approached, with many features of the residence obscured by vegetation. Figure B is a photograph taken after the foliage was removed, with several important features of the residence labeled. Figure C is a three-dimensional rendering of the interior of the residence, with important features labeled.

When the SUV was approaching the residence, a sniper-observer who was already positioned near the house threw a non-lethal “flash-bang” grenade toward the Green/Black corner of the house as a diversionary tactic. Several HRT assaulters told the OIG that they thought they heard small arms semi-automatic gunfire from the house even before the SUV stopped. Other assaulters told us they perceived small arms fire coming from the kitchen

FIGURE A

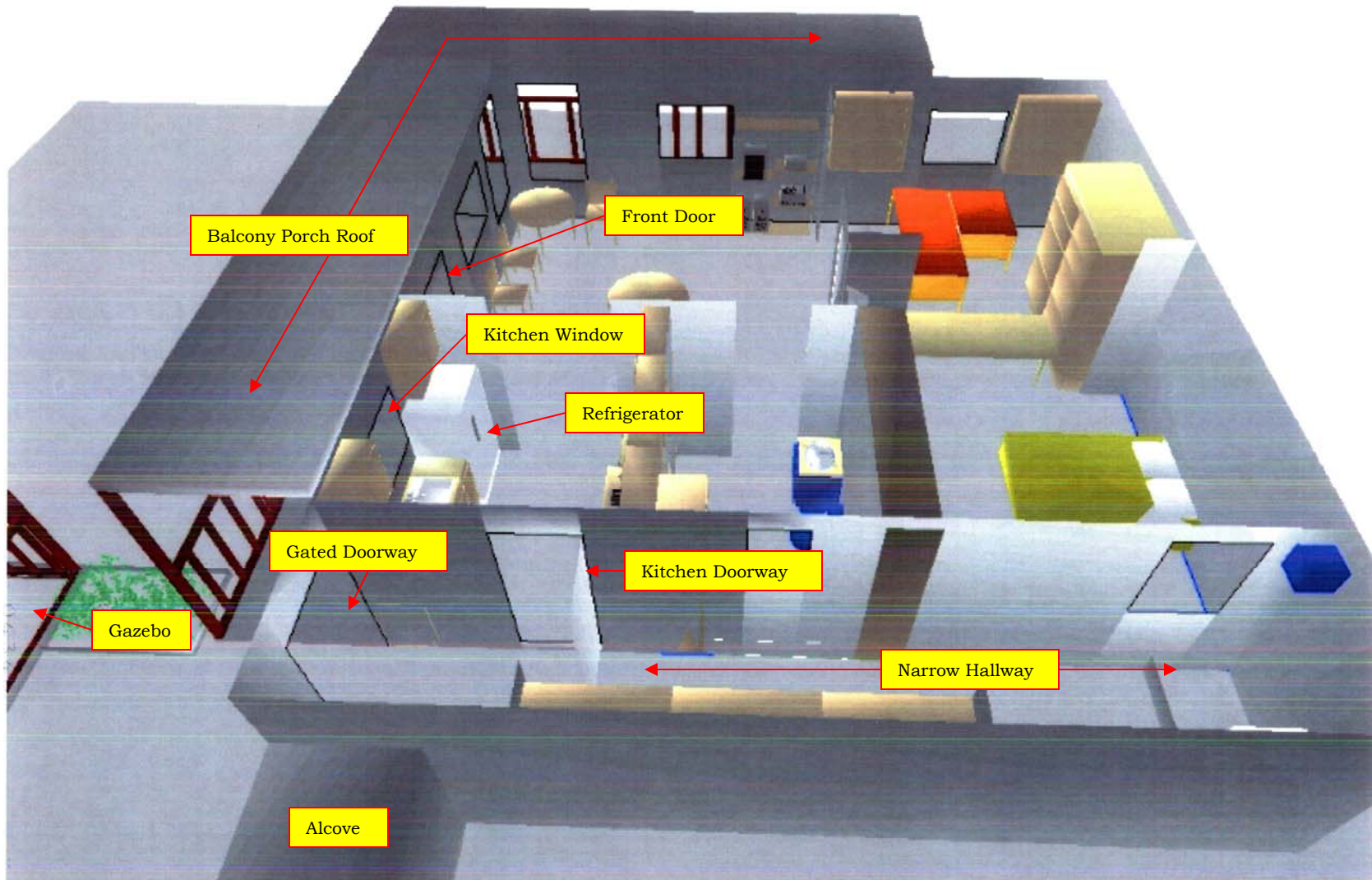
View of the Front of the Residence (Before Foliage Removed)



FIGURE B
Selected Features on Front (White) Side of Residence (Foliage Removed)



FIGURE C
3-D Diagram of Interior of the Residence



window as they left the SUV and approached the front of the house.² The agents moved through the gap in the low cement wall up the cinder block steps. A dog that had been frightened by the flash bang came running toward the steps and an agent shot it to prevent an attack.

Several of the agents reached the porch, and two agents moved to a gated doorway into the house near the Red/White corner. (See the “gated doorway” labeled in Figure B.) The remaining assaulters took various positions on the steps and the embankment to each side of them but did not proceed forward because of the gunfire from the house.

As one of the agents began preparing to open the locked wooden gate in front of the doorway near the Red/White corner, he saw that someone had “goose-necked” a pistol from a door on the left interior side of the hallway. (See the “kitchen door” labeled on Figure C.) The agent said he heard several shots and felt impacts on his ballistic vest. He sought cover on the porch beneath the kitchen window and soon realized that he had been wounded in the abdomen. Another agent near the gated doorway also saw a handgun being fired from the kitchen door behind the gate. The agent returned semi-automatic fire into the hallway with his M4 carbine, firing a full magazine of approximately 28 rounds.

While the wounded agent was seeking cover beneath the kitchen window, a gun was fired from inside the kitchen window. One shot struck the wounded agent’s helmet from behind, but did not penetrate it. Another agent was struck twice in the ballistic vest as he moved down the porch to attempt to assist the wounded agent, but the other agent was not wounded. Several HRT agents told the OIG that they saw or heard a burst of automatic gunfire coming from inside the kitchen window. At some point during the gunfight, an agent located on the embankment below the porch was struck in the battery pack of his helmet, but he was unhurt.

Eight different HRT agents reported that they returned fire at the kitchen window from various positions on the front porch or the embankment below it. Collectively, the agents estimated that they fired approximately 80 rounds at the kitchen window. Several agents told the OIG that near the end of the gunfire exchange they perceived that several shots were fired from inside the

² According to several media accounts, Ojeda’s wife, Rosado, claimed that the FBI agents fired first. However, Rosado declined to be interviewed for this investigation. As we explain in this report, we concluded, based on the evidence and the testimony, that Ojeda fired at the agents first.

house through the front door, making holes in the door and shattering the wood.³

Many of the agents reported that during the exchange of gunfire they perceived that at least two different weapons were being fired from inside the residence, possibly by two different subjects. Several factors were cited as the basis for this belief: 1) several agents reported that they heard both automatic and semi-automatic fire from inside the residence, leading them to believe that two different guns were being fired; 2) agents reported that early in the exchange shots were fired both out the kitchen window and out the kitchen door toward the gated doorway, leading some agents to believe that there might be two different subjects; and 3) as noted above, several agents misperceived semi-automatic fire coming through the front door of the residence at a moment simultaneous or nearly simultaneous with the bursts of automatic gunfire coming from the kitchen window.

The exchange of gunfire concluded at 4:30 p.m., about two minutes after it began. One FBI agent was wounded. Ojeda was unhurt and the FBI had not entered the house or made the arrest.

G. Events Following the Exchange of Gunfire

After the firing subsided, the wounded agent was evacuated from the porch and the other agents withdrew off the porch and the embankment to positions offering better cover. The wounded agent was driven to a hospital and later airlifted to San Juan, where he underwent emergency surgery.

At approximately 4:48 p.m., a few minutes after the agent was evacuated from the scene, someone inside the residence yelled in Spanish, “someone is coming out.” The front door of the residence opened and Ojeda’s wife, Elma Beatriz Rosado Barbosa (Rosado) emerged with her hands empty and extended in front of her. An agent placed her face down on the ground and handcuffed her. Rosado refused to speak to the San Juan FBI agents who attempted to question her about conditions inside the house, including how many people and weapons were in the residence, whether there were explosives, and if anyone was injured. She was driven to the Metropolitan Detention center in Guaynabo, and was released the next day without being charged.

After the unsuccessful attempt to talk to Rosado, a San Juan FBI SWAT agent began talking to Ojeda in Spanish. From behind the low cement wall below the residence, the agent yelled for Ojeda to exit the residence with his

³ As explained below, the Puerto Rico Institute of Forensic Science determined that these holes were made by shots originating from outside into the residence. The OIG was unable to determine which agent fired these rounds.

hands raised. Ojeda asked who everybody was, to which agent responded, “the FBI.” Ojeda responded that the agents were criminals, imperialists, colonialists, and the mafia. The agent repeated that it was the FBI and asked Ojeda whether he was injured. Ojeda stated that he wanted to talk to the press. The agent told Ojeda that the press was not coming. Ojeda refused to tell the agent whether anyone else was in the house and said that he would only talk to a particular reporter, Jesus Dávila.⁴ The agent told him that Dávila was not coming and again asked Ojeda whether he was injured. Ojeda responded, “I’m here.”

Ojeda continued to refuse to surrender and began speaking in revolutionary slogans that, according to the San Juan SWAT agent, sounded like a rehearsed speech. The agent continued to attempt to communicate with Ojeda, but Ojeda eventually said words to the effect of, “you know what I want, shut up.”

A negotiator from the San Juan FBI arrived at the scene and attempted to open a dialog with Ojeda, but Ojeda repeated his demand for Dávila several times. The negotiator contacted SAC Fraticelli by cell phone to report the conversation. Fraticelli refused the request to bring Dávila, telling the negotiator no one would be brought to the scene because it was too dangerous.

The negotiator did not tell Ojeda of Fraticelli’s decision but continued calling out to Ojeda. At some point, Ojeda responded, “I am not going to negotiate with any of you until you bring the journalist Jesus Dávila. Then we can talk about my surrender.” It is not clear that Ojeda’s use of the word “surrender” ever reached Fraticelli, who told the OIG that he did not recall hearing that Ojeda had discussed surrender. However, Ojeda’s statement was relayed to HRT agents in the TOC.

The San Juan FBI negotiator continued to call out to Ojeda, but Ojeda did not respond further. Based on the TOC log and the agent’s statements, the negotiator’s communications with Ojeda took place between approximately 5:30 and 6:00 p.m.

Reports of the incident at Ojeda’s residence were broadcast on local radio shortly after the exchange of gunfire between Ojeda and the HRT. Citizens, including members of the press, soon gathered on a road near the scene. Agents from the U.S. Bureau of Alcohol, Tobacco and Firearms, as well as officers from POPR, arrived to provide outer perimeter security.

⁴ Dávila is a journalist for El Diario La Prensa, a Spanish language newspaper that covers events in Puerto Rico.

H. Ojeda Struck by a Shot from the Perimeter

Following the evacuation of the wounded agent at approximately 4:40 p.m., HRT agent Brian moved to a position on a hillside to the right of the residence, behind a retaining wall.⁵ Figure D is a photograph taken from Brian's approximate position. From this location Brian was able to keep watch over both locations from which shots had previously been fired at the FBI: the kitchen window and the gated doorway. Brian told the OIG he could see the side of a light-colored refrigerator inside the left half of the kitchen window. The refrigerator took up about half of his field of view inside the window. The other half was in darkness. Agent Brian told the OIG that while in his position on hillside behind the retaining wall, he saw the refrigerator door open and the refrigerator light go on. Brian said he saw an individual crouched down with a gun in his left hand pointing out the window. He could not see the individual's eyes or tell where he was looking. Brian stated that the individual clearly had the weapon pointed in the direction of Brian and other FBI agents, but he was unsure whether the individual was sighting the gun at anyone in particular. No other agent reported being in a position to see what Brian saw in the window.

Brian told the OIG that at that moment he realized that the individual was armed and that Brian was visible to him. Brian was aware that another agent had been wounded earlier by a shot from inside the house and that Brian himself had been struck (but not wounded) by at least one shot from inside the house during the original gunfight. Brian said he was also aware the individual had previously fired his weapon from the window he was currently positioned at and had shot Brian from that window. Brian stated that he concluded that the individual posed an imminent threat to himself and other agents.

Brian said he took his weapon off the "safe" setting, sighted the weapon where he believed the person's center mass to be, and fired three rounds in rapid succession in single-fire mode. Brian estimated that about three seconds elapsed between the time he saw the refrigerator light come on and the time he fired his weapon. Brian told the OIG he did not see the refrigerator light after he took the shots and that it was possible that the individual was closing the door of the refrigerator at the time Brian took the shots. The shots were fired at approximately 6:08 p.m.

Several agents told the OIG that immediately after hearing three shots from the perimeter, they heard Ojeda scream "ay, ay, ay" and a noise like someone falling down. One agent stated that he heard a moan after the

⁵ "Brian" is a pseudonym. Brian was a member of the arrest team, not a sniper-observer.

FIGURE D

View of Residence from Approximate Position of Shooter



screams. No witnesses reported hearing any other sounds from Ojeda. Several agents told the OIG that they heard Brian state over the radio that he thought he had hit the subject.

I. The Decision Not to Enter the House on September 23

After the three shots were fired from the perimeter, the FBI began making preparations to enter the Ojeda residence. The agents at the scene wanted to enter the residence immediately. However, SAC Fraticelli and the HRT Deputy Commander moved cautiously because of concern that Ojeda might not have been disabled and the possibility that there was a second gunman inside the house.

At 6:34 p.m., the San Juan FBI contacted the power company to arrange to cut off electricity to the residence, in order to provide a tactical advantage to the HRT agents, who were equipped with night vision goggles.⁶ At 6:49 p.m. an HRT agent detonated an explosive charge that had been placed on the locked wooden gate at the doorway near the Red/White corner of the residence. HRT agents also detonated flash bangs at other locations to create a diversion. An agent opened the wooden gate. There was no reaction from anyone inside the house. The agents looked into the hallway behind the gate but did not see anyone. They did not enter the house during this “limited breach.”

The events in Puerto Rico were being monitored by the HRT Commander in Quantico, Virginia. The HRT Commander told the OIG that shortly after hearing about the limited breach of the gated doorway, he ordered the HRT Deputy Commander in Puerto Rico not to enter the residence that night. The HRT Deputy Commander did not recall receiving such an order, however.⁷ Both the Deputy Commander and SAC Fraticelli told the OIG that the FBI continued to make plans for entering the residence that night. By 7:41 p.m., a team of HRT agents at the scene was equipped and ready to enter the residence.

By this time, however, senior officials in the Counterterrorism Division of the FBI in Washington, D.C. had become concerned about how events were unfolding in Puerto Rico. Willie Hulon, the Assistant Director for the Counterterrorism Division, had already received telephone reports from SAC Fraticelli regarding events at the scene. Hulon related these conversations to his superior, Gary Bald, the Executive Assistant Director for the National

⁶ The power to the residence was not cut off until 8:09 p.m.

⁷ We could not reconcile the versions of events provided by the HRT Commander and Deputy Commander. We note that the HRT Commander in Quantico was not part of the formal chain of command at that point, and we found no evidence that the Commander’s order was a factor in deliberations regarding the entry decision in Puerto between 6:08 and 8:05 p.m.

Security Branch. On the basis of Hulon's description of Fraticelli's demeanor during these telephone conversations and SAC Fraticelli's repeated inquiries regarding the status of his request that FBI Headquarters send another SAC familiar with Puerto Rico to assist in the operation, Bald became concerned that Fraticelli needed assistance in managing the situation. Bald felt his concern was confirmed when he received the impression from Hulon that agents at the scene were acting inconsistently with Hulon's recommendation that they hold the perimeter. Bald believed that there was confusion regarding who was in command of the scene and that HRT was making decisions independent of Fraticelli. On the basis of these concerns, Bald instructed Hulon sometime shortly before 8:00 p.m. that any entry of the residence would have to be approved by Hulon.

At 8:05 p.m., Hulon called Fraticelli and told him that there would be no entry of the residence without Hulon's approval. During this call, Fraticelli and the HRT Deputy Commander recommended that a nighttime entry be conducted to take advantage of the darkness. Hulon instructed them to submit a written entry plan to FBI Headquarters for consideration.

A short time after the 8:05 call, Hulon and Bald discussed the comparative merits of entering the house that night or the next day, and they decided the entry should be postponed until the next morning. Therefore, before the agents in Puerto Rico had completed a written plan for a nighttime entry, Hulon told Fraticelli that Headquarters had decided against a nighttime entry and that a new HRT team was being sent from Quantico to conduct the entry the next day. Late in the evening, however, Fraticelli called Hulon's deputy, John Lewis, to make a final appeal for approval of a nighttime entry. Fraticelli stressed the security concerns created by crowds of Macheteros sympathizers assembled near the scene, and the possibility that Ojeda might still be alive and in need of medical attention. Fraticelli told us that Lewis called back approximately 15 or 20 minutes later and told him that Hulon had rejected the proposal.

At 11:33 p.m., the agents at the scene were told that there would be no entry of the residence that night. Many of the HRT agents at the scene told the OIG that they strongly disagreed with the decision.

J. Notification of the Puerto Rico Department of Justice

During the course of the operation, the FBI provided periodic updates to the United States Attorney's Office (USAO) for Puerto Rico. Between approximately 6:45 p.m. and 7:15 p.m., the Criminal Chief for the United States Attorney's Office (USAO) contacted Roberto J. Sánchez Ramos, the Attorney General for the Commonwealth of Puerto Rico, and Pedro G. Goyco Amador, the Chief Prosecuting Attorney for the Commonwealth, to notify them of the shooting and to request that local prosecutors be sent to the scene.

Sánchez told the OIG that this was the first notification that the Puerto Rico Department of Justice received from the FBI regarding an operation to apprehend Ojeda. Sánchez and Goyco both told the OIG that they inferred from the USAO's request that Ojeda was seriously injured or dead. When the local prosecutors arrived at the scene, at approximately 8:36 p.m., the FBI did not permit them to approach the house, and at some point the FBI informed them that there would be no entry that evening.

K. Entry of the House on September 24

The relief team of HRT agents from Quantico arrived in Puerto Rico at approximately 5:00 the next morning, September 24. Agents in the TOC drafted a written plan for a daytime entry and faxed it to FBI Headquarters. Hulon and Lewis reviewed the draft and recommended minor changes by telephone. At 9:29 a.m., Hulon called Fraticelli and told him the revised plan was approved.

The daytime entry was not conducted until three hours after the plan was approved. The entry plan called for inserting a POPR dog into the residence to determine the location or activity of any occupants. The POPR dog did not arrive until about 11:54 a.m., and stayed only briefly because the handler received instructions from POPR Superintendent Pedro A. Toledo Dávila not to participate in the operation. Toledo told the OIG that he denied the FBI permission to use POPR's dog because he understood that the FBI feared there might be explosives in the residence and Toledo did not want to put POPR's dog handler at risk. Hulon approved Fraticelli's request for permission to conduct the entry without a dog at 12:22 p.m.

The HRT entry team walked up the road adjacent to the Red side of the residence. At approximately 12:34 p.m., three diversionary flash-bang grenades were thrown as the team climbed over a retaining wall, entered the residence through the breached wooden gate, and then advanced through the kitchen door into the kitchen. The agents discovered Ojeda's body near the front door, face down with a loaded and cocked Browning Hi-Power 9-mm handgun on the floor nearby. Blood from the body had flowed under the door, forming a single narrow stream down the face of the doorstep and creating a bloodstain on the floor of the exterior balcony porch.

Ojeda was dressed in a camouflaged cap, a sleeveless body armor vest, camouflaged overalls, and black combat boots. An FBI emergency medical technician was unable to get a pulse from the body and observed that rigor mortis had set in. After searching the house for any additional occupants, the entry team reported at 12:37 p.m. that the residence was secure and there appeared to be a single dead subject.

The entry team did not immediately turn Ojeda's body over because of concern that a grenade could be under Ojeda's torso or in his left hand, which was under his body and not visible. A winch was attached to Ojeda's vest and the body was pulled out over the front door step onto the porch. Ojeda's hand fell free and no explosive device was found. The process of pulling the body out the door caused a substantial amount of accumulated blood to be pushed over the doorstep and increased the amount of blood visible on the face of the doorstep.

The FBI's bomb technicians turned their attention to two items in the house identified as possible explosive threats. A case with protruding wires was removed and opened using the winch. It contained a trumpet.⁸ A large rucksack found in the bedroom was inspected visually, and no explosive hazards were observed.

At approximately 2:44 p.m., the San Juan medical examiner pronounced Ojeda dead. The scene was turned over to investigators from the Puerto Rico Institute of Forensic Sciences for processing. These investigators removed Ojeda's body from the residence at approximately 5:00 p.m. A search of the residence was concluded at 9:30 p.m. According to the Evidence Recovery Log, the FBI seized over 100 items from the residence, including a substantial amount of computer equipment, books, and other documents.

V. Findings of the Puerto Rico Institute of Forensic Sciences

In this section of the Executive Summary, the OIG summarizes the findings of the Puerto Rico Institute of Forensic Sciences relevant to this investigation. The Institute assumed the lead role in processing the scene and conducting the forensic analyses relevant to the Ojeda matter. The Institute's findings were based entirely on the physical evidence; the Institute was not aware of the contents of the agents' statements to the OIG.

One reason that the FBI deferred to the Institute for the forensic analysis was to avoid allegations that the FBI had manipulated the scene. Dr. Pio R. Rechani López, Executive Director of the Institute, told the OIG that the Institute found no evidence that the FBI had manipulated or tampered with the scene.

⁸ At least one Puerto Rico newspaper reported a rumor that the FBI took the trumpet from the scene as a "trophy." This is not accurate. Investigators from the Puerto Rico Institute of Forensic Sciences took custody of the trumpet when they processed the scene. Dr. Rechani told the OIG that the item will be returned to Ojeda's family when it is no longer needed for the Commonwealth's investigation of the Ojeda shooting incident.

A. Findings on the Scene

The Institute's report of Findings on the Scene stated that a Browning 9 mm pistol was found on the floor of the residence near Ojeda's body. The pistol was loaded to capacity, with 13 unfired bullets inside its magazine and one in the chamber, indicating that it had been re-loaded. The pistol hammer was found cocked. The pistol had been modified to fire in both automatic and semi-automatic mode. Also found at the scene were 107 spent shell casings from .223 caliber bullets and 19 spent casings from 9 mm bullets.

B. Autopsy

According to the Autopsy Report, Ojeda died of a single gunshot wound that entered his body just below his right clavicle, perforated the right lung, and exited the middle of his back on the right side. There were no other wounds. The bullet was recovered from inside the "flak jacket" vest Ojeda was wearing.

The autopsy report did not specify a time of death. Dr. Francisco Cortés, the Forensic Pathologist who performed the autopsy, told the OIG that based on the size of the wound and reasonable assumptions about Ojeda's heart rate and blood pressure, he estimated that Ojeda expired from loss of blood approximately 15 to 30 minutes after being shot. He opined that Ojeda could have survived the wound if he had received immediate first aid and surgical care. Dr. Cortés noted that he does not treat live patients, so that his views on the survivability of Ojeda's wounds and his estimate of the length of time that Ojeda might have survived were based on his experience as a pathologist and on his review of the medical literature.

The OIG also consulted with the U.S. Department of Defense Armed Forces Institute of Pathology, Office of the Armed Forces Medical Examiner (OAFME), regarding how long Ojeda survived after being shot. Based on its review of the autopsy records and other pertinent materials, the OAFME concluded that the wound from the bullet was not immediately fatal, but that it was not possible to determine exactly how long Ojeda would have survived. When the OIG inquired whether Ojeda could have survived longer than two hours, the Medical Examiner responded that it was unlikely.

C. Bullet and Shell Casing Examinations

The Institute conducted microscopic comparisons of bullets and bullet fragments recovered from the scene with bullets fired from Ojeda's pistol and from the carbines discharged by the HRT agents during the operation. The Institute determined that the .223 caliber bullet recovered from inside Ojeda's vest was fired from an M4 carbine that the FBI had provided for comparison testing. According to the HRT, this was the carbine used by Brian. The

Institute determined that the 9 mm bullets recovered from the abdomen and helmet of the wounded agent were fired from Ojeda's Browning pistol.

Based on distinctive marks left on the casings by the various weapons' firing pins, the Institute was able to match all 107 of the .223 shell casings found at the scene to particular HRT weapons. The Institute provided sketches indicating the location where the .223 casings were found at the scene. With one exception, the OIG did not find any significant discrepancies between this forensic evidence and the statements of the agents to the OIG regarding the rounds they fired. The Institute determined that two rounds were fired from a weapon that the OIG determined was assigned to an HRT agent who did not initially report firing any rounds during the gunfight. Neither of these rounds struck Ojeda. When we sought to inquire about these rounds, the agent declined to provide a voluntary follow-up statement to the OIG.

The Institute determined that all 19 shell casings found inside the residence were from 9 mm bullets fired from Ojeda's pistol.

D. Trajectory Analysis

The Institute estimated the bullet trajectories for many of the 111 bullet holes and 76 bullet impacts found in the residence. The OIG found that the location of the holes and impacts as reflected in Institute sketches and crime scene photographs, together with the Institute's trajectory analysis, were consistent with the FBI agents' statements in many important respects. Most significantly, the Institute's analysis identified the trajectories of the three perimeter shots fired by agent Brian, including the shot that struck Ojeda. The forensic evidence also confirmed that Ojeda fired shots from two locations: from the narrow hallway toward the gated doorway, and from the kitchen window. The trajectory evidence was also consistent with the agents' descriptions of their locations during the gunfight, including the statements of three agents who reported firing into the kitchen window from positions on the balcony porch and other agents who reported that they fired from positions on the embankment below.

The OIG found only one set of trajectory estimates by the Forensic Institute that conflicted with the statements provided by the FBI agents. Several agents reported perceiving shots from inside the house coming through the front door. No agents reported firing shots at the door. The Institute found, however, that there were three holes in the front door from rounds fired from a location outside the door and from below (from down the cinder block steps), not from inside the house. The Institute also found three impacts in the living room ceiling that corresponded to the holes in the door and confirmed the upward trajectory. We sought voluntary follow-up interviews from several agents who we believe might have fired these shots, but they declined our

request. Consequently, we have been unable to determine which agent or agents fired these three rounds through the front door.

E. Shooting Reconstruction

The Institute concluded that the bullet that struck Ojeda was one of three shots that originated from a location near the retaining wall at the right side of the house at a distance of approximately 19 feet. The Institute found that the three bullets passed through the kitchen window, penetrated the left side of the refrigerator, and exited the front of the refrigerator. Two of the shots presented impacts or final penetrations within the residence, while the third (the round that struck Ojeda) did not. The third trajectory exited the refrigerator at a height of 49 inches, which the Institute found to coincide with the position of the bullet wound on Ojeda's body, assuming a crouched position.

F. Blood Patterns

The Institute found that Ojeda's flak vest prevented an immediate spatter of blood at the location where Ojeda was wounded. The Institute concluded that Ojeda took one or two steps toward the front door before falling to the floor, with his head near the door. Two large pools of blood formed, one near Ojeda's head coming from the wound near his shoulder, and the other near the bottom of his vest further away from the door.

The blood pattern report concluded that the front door was closed at the time the blood was flowing, but that the slope of the floor and the pattern of blood were consistent with slow movement toward the door, forming a stream on the doorstep. Institute personnel told the OIG that the bloodstain on the doorstep was greatly increased when Ojeda's body was turned over and pulled out the front door onto the porch in order to check for explosive devices. The much larger and more obvious stain appeared in photographs published in some local newspaper reports on Ojeda's death.

VI. Compliance with the Deadly Force Policy

In this Section, the OIG summarizes its analysis of whether the shots fired by the FBI agents during the Ojeda operation were in compliance with the Department of Justice Deadly Force Policy. The Deadly Force Policy states that a Department of Justice law enforcement officer may use deadly force

only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person If feasible and to do so would not increase the danger

to the officer or others, a verbal warning to submit to the authority of the officer shall be given prior to the use of deadly force.

The FBI's Manual of Investigative and Operational Guidelines (MIOG) sets forth a definition of the meaning of "imminent danger":

"Imminent" does not mean "immediate" or "instantaneous," but that an action is pending. Thus, a subject may pose an imminent danger even if he is not at that very moment pointing a weapon at the Agent. For example, imminent danger may exist if Agents have a probable cause to believe . . . [t]he subject possesses a weapon, or is attempting to gain access to a weapon, under circumstances indicating an intention to use it against Agents or others

The FBI's Instructional Outline for the Deadly Force Policy states that the Policy "shall not be construed to require Agents to assume unreasonable risks to themselves," and that "[a]llowance must be made for the fact that Agents are often forced to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving."

The FBI's MIOG also contains related policies regarding "fire discipline" which require that all use of firepower be preceded by the acquisition of a known hostile target.

The OIG divided its review of the agents' use of deadly force during the Ojeda operation into two parts: an assessment of the agents' conduct during the initial intense exchange of gunfire between 4:28 and 4:30 p.m., and an assessment of Agent Brian's conduct in firing three rounds from the perimeter at approximately 6:08 p.m., including the shot that struck Ojeda.

A. Assessment of the Initial Exchange of Gunfire

Ojeda fired 19 rounds during the initial gunfight, 8 of which struck FBI agents. One agent was wounded seriously in the abdomen. FBI agents fired approximately 104 rounds during the initial gunfight, none of which struck Ojeda.

Based on our review of the evidence, we concluded that Ojeda opened fire on the FBI agents as they attempted to enter the residence, before any agents discharged their weapons. We based this conclusion on several factors, including the statements of numerous agents at the scene. In addition, because of the elevated position of the residence's doors and windows, the heavy vegetation obscuring them, and the fact that the interior of the house was darkened, the agents would have had no clear target before Ojeda opened fire. In contrast, Ojeda's position afforded him a much clearer view of the agents as they approached in the daylight.

Ojeda's widow, Rosado, declined the OIG's request for an interview but alleged in statements to the media that the FBI fired first. We believe, however, that Rosado may have interpreted the explosion of a "flash-bang" grenade outside the house as gunfire initiated by the FBI. As previously discussed, an FBI agent detonated the grenade near the Green/Black corner of house as a diversionary tactic as the arresting agents approached, before any gunfire began.⁹

We concluded that once Ojeda began firing, he clearly posed an imminent threat to the agents. Providing a verbal warning to Ojeda at that point was not feasible. Once the agents realized they were under fire, they were justified in applying deadly force to address the threat, without pausing to warn Ojeda.

Ojeda fired at the agents from two positions: from the kitchen door toward the gated doorway, which the agents were attempting to open, and from the kitchen window at agents on or below the porch. We found that the vast majority of the 104 rounds fired by the FBI during the initial gunfight were fired at these two targets, and that these shots were consistent with the Department of Justice Deadly Force Policy. The Instructional Outline for the Deadly Force Policy states that "[w]hen the circumstances justify the use of deadly force, Agents should continue its application until the imminent danger is ended" The fact that the agents fired over 100 shots without hitting Ojeda reflected Ojeda's superior position of cover and elevation, and did not necessarily reflect inadequate fire discipline.

On the basis of forensic evidence, however, the OIG found that the FBI fired three shots through the front door of the residence that may have violated the Deadly Force Policy. None of these shots struck Ojeda or his wife. Nothing in the available witness statements or the forensic evidence suggested that these three shots addressed an imminent threat posed by a person located directly behind the door. However, the agents who we believe may have fired these shots declined to provide voluntary follow-up interviews to the OIG.

B. Assessment of the Perimeter Shots

The OIG also assessed the three shots that Agent Brian fired into the kitchen window at approximately 6:08 p.m. (the "perimeter shots"). One of these shots struck Ojeda and resulted in his death. We concluded that these shots did not violate the Deadly Force Policy.

⁹ This discussion should not be construed as a finding that Ojeda would not have opened fire on the FBI if the flash bang had not been detonated. Ojeda had clearly made preparations to offer violent resistance to the FBI before the agents arrived.

Brian told the OIG that he saw an individual in the kitchen window, illuminated by the interior light of the refrigerator. Brian stated that the individual was crouched down with a gun in his left hand pointing out the window. Brian said he sighted his carbine where he believed Ojeda's center mass to be, and fired three rounds in rapid succession in single fire mode.

We found that the forensic evidence reported by the Puerto Rico Institute for Forensic Sciences was consistent with Brian's description of where he was and what he saw. Ojeda's pistol was found on the floor at his side, loaded and cocked, confirming that Ojeda was holding the gun at the moment he was wounded. His wound was also consistent with a crouching position, with his shoulders generally squared toward Brian. Although Brian's view of Ojeda was partially obscured by the refrigerator at the moment of impact, the forensic evidence indicates that the left side of Ojeda's body, including his left hand (which Brian said was holding the gun), could have been visible to Brian at or immediately prior to the moment that Brian fired the shots. Based on the trajectory of the three perimeter shots, we believe that at the moment of impact Ojeda may have been moving to his right, behind the refrigerator, possibly because he realized he had revealed himself in the refrigerator light.

In reaching our conclusion about the use of deadly force, we took into account the fact that Ojeda had already fired several rounds out the kitchen window, and had evidenced an intention to kill or injure the FBI agents attempting to arrest him. He had already shot three different agents. In addition, Brian and other agents covering the house were in exposed positions.

The discussions between Ojeda and the FBI during the standoff did not mitigate the threat that Ojeda presented at the moment Brian fired. Ojeda had refused the FBI's instructions to come out of the house. He appeared at the kitchen window with a gun. Even if Brian had understood Ojeda's offer to discuss surrender if a reporter were brought to the scene, Ojeda could have resumed firing at the FBI agents at any instant.

For all of these reasons, the OIG concluded that at the moment Brian fired these three shots, he had a reasonable belief that Ojeda posed an imminent danger of death or serious injury to Brian or to other agents, and he therefore did not violate the DOJ Deadly Force Policy. The OIG's expert consultants agreed with this assessment.

VII. Assessment of the Decision to Conduct an Emergency Daylight Assault

In this Section, the OIG summarizes its assessment of the decision by SAC Fraticelli, in consultation with the HRT Deputy Commander, to order an

emergency daylight assault on the Ojeda residence on the afternoon of September 23.

When the sniper-observers reported their belief that they had been discovered by unidentified persons, Fraticelli had to select among several options for action, taking into account the risk that these persons might alert Ojeda to the presence of the sniper-observers or otherwise assist him in evading or resisting arrest. Fraticelli approved a plan proposed by the HRT Deputy Commander to transport ten HRT agents to the residence in two helicopters and conduct an emergency daylight assault on the residence to arrest Ojeda. We concluded that this plan was dangerous to the agents and not the best alternative available to the FBI. In reaching this conclusion, the OIG relied extensively on the assessments provided by its outside experts.

A. Foreseeable Risks from a Daylight Assault

We found that it was readily foreseeable that Ojeda would be armed and prepared to offer violent resistance to the FBI assault that began at 4:28 p.m. on September 23. Moreover, if Ojeda had been armed with a higher power firearm or with an explosive device such as a grenade (which would have been consistent with the FBI's prior experience with the Macheteros), several FBI agents likely would have been killed or seriously wounded in the operation.

The HRT Deputy Commander stated that when he proposed the daylight assault he believed the FBI would still have the advantage of surprise and could get into the house without a gunfight. After hearing the Deputy Commander's advice, Fraticelli ordered the daylight assault. We found, however, that the belief that the FBI could surprise Ojeda with a helicopter assault was unrealistic and inconsistent with the primary justification for ordering the assault: the concern that whoever had detected the sniper-observers would alert Ojeda to the FBI's presence. The assault team did not arrive at the residence until almost two hours after the sniper-observers reported the compromise, providing ample time for someone to warn Ojeda and for him to prepare resistance. In addition, the FBI should have recognized that a plan for delivering the HRT agents by helicopter into a small field located in plain view of the front of Ojeda's residence would generate a great deal of noise and take enough time to permit Ojeda to arm himself in anticipation of the FBI's arrival.

The FBI's plan for an emergency daylight assault was adapted from a plan being prepared for a surreptitious nighttime assault. It was poorly suited to daylight conditions, without the advantage of surprise. Once Ojeda knew the FBI was coming, he had the advantage of high ground, superior cover, and superior visibility. Moreover, the plan called for the agents to approach the house and pass directly in front of the front door and the kitchen window to reach the breach points, which exposed the agents to close range gunfire.

The FBI Critical Incident Handbook describes an “Emergency Assault Plan” as an “immediate measure designed to regain control or stabilize a rapidly deteriorating crisis situation that poses imminent danger to the lives of innocent people.” We concluded that the reported compromise of the sniper-observers and the resulting possibility that Ojeda would escape did not rise to this level of urgency, particularly in light of the available alternatives.

The HRT Deputy Commander told the OIG that after the sniper-observers reported the compromise, no consideration was given to options other than a direct assault on the residence to arrest Ojeda. In light of the risks associated with this option, we concluded that other alternatives should have been given greater consideration.

Although the OIG is critical of the decision to conduct an emergency daylight assault, it is important to note that we are not suggesting that this decision was the cause of Ojeda’s death. Ojeda was not killed or injured during the assault. Ojeda was shot approximately 100 minutes later when he presented a threat of imminent harm to the agents, not because the FBI had selected the emergency daylight assault option.

B. The Surround and Call-out Option

In consultation with its experts, the OIG determined that a superior option was available to the FBI for attempting to arrest Ojeda after the reported compromise: (1) establish a perimeter around the residence sufficient to prevent Ojeda from escaping, (2) demand Ojeda’s surrender with a short deadline for responding, and (3) if Ojeda refused to surrender, use chemical agents (such as tear gas and smoke) to force Ojeda from the residence. Ojeda’s positional advantage would have been reduced or neutralized in this scenario. The sniper-observers had already provided relevant information regarding the residence, including the limited number of exit points from the house that would have to be covered. This information was sufficient for the FBI to adopt, or at least consider, this plan.

The reasons given by the FBI for rejecting or not considering this strategy were troubling. It appears that a major consideration in the advice given to SAC Fraticelli was the fact that several days earlier, during the planning phase of the Ojeda operation, Fraticelli had stated a preference to avoid a “barricaded subject scenario” because of the potential for crowds of sympathizers to assemble near the scene. But the reported compromise of the operation and the loss of the advantage of surprise changed the circumstances and the comparative risks associated with each option so significantly that the surround and call-out option should have received serious reconsideration. We believe that the mindset of avoiding a barricade situation caused the FBI to ignore that option when the circumstances changed.

We acknowledge that the surround and call-out option presented risks. If the agents attempting to establish a perimeter could not establish positions of adequate cover, they might be exposed to gunfire from the residence, particularly if the subject was armed with a rifle. The agents also faced uncertainty regarding whether they could establish a safe perimeter in an area believed to be populated with Macheteros sympathizers. (As it happened, the FBI successfully established such a perimeter after the agent was wounded.) If it had been necessary to launch chemicals into the house, some agents might have been exposed to fire during that procedure. However, these risks to agent safety were not as great as the risks from a foreseeable exchange of gunfire with Ojeda firing from a position of cover at agents approaching the house directly, or exposed on the porch, at very short range.

C. The Extract and Withdraw Option

We also are concerned that the FBI gave little or no consideration to the option of extracting the sniper-observers without taking immediate action to arrest or surround Ojeda at the residence. In raising this concern, we are not making a finding that the “extract and withdraw” option should have been selected in this case. However, when a subject is not creating a crisis situation that poses imminent danger to innocent people, and the available options for immediately arresting or containing the subject present major risks to agents or others, FBI incident commanders should at least consider seriously the possibility of withdrawing. In this case, we do not believe this option was given more than cursory consideration.

D. Modification of the Approach Route

We also found that the FBI could have modified the assault plan to reduce the risk to the agents associated with daytime conditions and loss of the element of surprise. The assault route that the FBI borrowed from a plan for a surreptitious pre-dawn raid – up the front steps and in front of the door and windows on the front side of the house – maximized the exposure of the agents to close-range fire from inside the house. As the FBI was aware, the Red and Black sides of the house had no doors or windows. An alternative approach to the breach point from the Red/ Black corner of the property would have reduced the exposure of the agents to gunfire from the house.

E. Conducting the Assault on El Grito de Lares

We found no support for the allegation made in some media reports that the FBI conducted the arrest operation on El Grito de Lares (September 23) for symbolic reasons, such as to intimidate supporters of Puerto Rican independence. The operation took place in September because that was when the FBI found Ojeda’s house. The FBI actually planned to arrest Ojeda early

on September 24 the day after the holiday. It conducted the emergency assault on September 23 only because of the reported compromise of the sniper-observers.

VIII. Assessment of the FBI's Decisions Regarding Entry

In this Section we summarize the OIG's assessment of the FBI's decisions regarding the delay in entering the Ojeda house after the perimeter shots were fired at 6:08 p.m. The FBI has been criticized for failing to enter the residence for 18 hours after Ojeda was wounded. We divide this analysis into two parts: decisions made before 8:05 p.m. on September 23 while SAC Fraticelli remained in charge of the operation, and decisions made after 8:05 p.m. when FBI Headquarters assumed approval authority over any plan to enter the house.

A. FBI Entry Decisions in Puerto Rico before 8:05 p.m.

We found that between 6:08 p.m. and 8:05 p.m., the FBI in Puerto Rico was following a cautious, methodical approach in preparing to enter the Ojeda residence. The FBI executed a limited breach of the gated doorway at 6:49 p.m. and was preparing to enter and clear the residence after darkness fell and the electricity was cut off. The primary considerations driving this approach were the concern that Ojeda might not be incapacitated and might still present a threat to the agents, and the belief, based on perceptions during the initial gunfight, that there might be a second gunman inside the residence. This approach was designed to exploit HRT's tactical advantage in the dark. It also provided time to gain intelligence about the situation inside the residence and to ensure the entry team was fully prepared. We concluded that if Fraticelli had retained control of the entry decision, the entry probably would have occurred shortly after 8:09 p.m. when electric power to the residence was cut off.

The available forensic evidence indicates that Ojeda likely expired from blood loss before 8:09 p.m. As a result, even if Fraticelli's plan had been implemented, Ojeda was likely dead by the time the FBI would have entered the residence.

We concluded that the FBI's approach was motivated by considerations of agent safety, not by any desire to withhold medical treatment from Ojeda.

One allegation made after Ojeda's death was that the FBI knew Ojeda was seriously injured because of the appearance of a large bloodstain on the front doorstep and the balcony porch floor. Several Puerto Rico media outlets published images of the bloodstain. However, crime scene photographs show that most of the staining occurred on September 24, when Ojeda's body was

turned over and pulled out the front door to check for explosives. Moreover, the agents at the scene likely would not have been able to see the blood that accumulated before Ojeda's body was moved, because their view of the doorstep would have been obscured by heavy foliage or by the balcony railing, as shown in Figures A and D. In addition, it is not clear that Ojeda's blood had yet flowed onto the doorstep before 8:09 p.m., when the power was cut and the porch was in darkness. None of the agents we interviewed reported seeing a bloodstain on September 23.

B. Entry Decisions made at FBI Headquarters

At 8:05 p.m., Assistant Director Hulon informed SAC Fraticelli that any plan to enter the Ojeda residence would have to be approved in advance by the Counterterrorism Division in FBI Headquarters. When Fraticelli and the HRT Deputy Commander proposed a nighttime entry, Hulon instructed him to submit a written entry plan. Later that evening, before any written plan had been submitted, Hulon and Executive Assistant Director Gary Bald decided that there would be no entry until a team of relief agents from Quantico arrived the next day. We reviewed both the procedural decision to require Headquarters approval of an entry plan and the substantive decision to reject a nighttime entry operation.

1. The decision to require Headquarters approval

Bald made the decision to assume Headquarters control over the entry decision. A significant factor in Bald's decision was his assessment of Fraticelli's demeanor and lack of confidence, based on Hulon's description of conversations with Fraticelli. Bald stated that this assessment was confirmed by what he believed were indications that HRT was acting independently of Fraticelli. The decision to require Headquarters approval for the entry was made in the context of a shared belief among senior Headquarters officials that Headquarters involvement was needed to provide balance and perspective to decision-making at the scene.

It was difficult for the OIG to evaluate Bald's assessment of Fraticelli's demeanor and confidence. Hulon told us that Bald's assessment was fair in light of the description Hulon had given to Bald of Hulon's conversations with Fraticelli. In particular, Bald was disturbed by Fraticelli's request for assistance from another SAC and repeated inquiries regarding the status of this request. However, we did not find evidence, based on the decisions made in Puerto Rico between 6:08 p.m. and 8:05 p.m., that Fraticelli was overwhelmed or lacked sufficient confidence to manage the situation. Under Fraticelli's command, the FBI in Puerto Rico was proceeding cautiously and methodically toward a nighttime entry of the residence after the power was cut off. Moreover, we found that Fraticelli's explanation of his reason for

requesting help from a particular SAC with experience in Puerto Rico in the event of a protracted crisis was objectively reasonable.

We also did not find any evidence to confirm Bald's perception that there was any command confusion between HRT and the SAC in Puerto Rico. Bald's perception was based on a misunderstanding of the actions that were taking place at the scene, probably because accuracy was lost in the multiple layers of reporting from the agents at the scene to Bald. In addition, Bald's perception of command confusion was also based on an incorrect statement made by the HRT Commander (who Bald thought was in Puerto Rico but who in fact was still in Quantico) that HRT had the lead. We found no indication that HRT had in fact assumed ultimate command control over the operation or that HRT was operating in a manner contrary to SAC Fraticelli's instructions.

Ultimately, however, we did not find that Bald's decision to require Headquarters approval for an entry plan to be improper. Headquarters' authority to assume such control is not in dispute. Bald's decision to exercise that authority in this case was based primarily on a subjective evaluation of Fraticelli's demeanor that was difficult for the OIG to assess after the fact. Headquarters was ultimately responsible for the outcome of the operation, and senior officials can offer experience and perspective to a crisis situation. While we found that some of Bald's understandings regarding conditions at the scene were inaccurate, we cannot say that his decision to require Headquarters approval of an entry plan was improper.

However, we found that FBI Headquarters' requirement that the entry plan be submitted in writing was unnecessary and unduly bureaucratic, particularly in light of the fact that FBI Headquarters officials, including Hulon, knew that agents at the scene believed that Ojeda was wounded and on the floor. We note, however, that Hulon ultimately rejected the plan for a nighttime entry before it was submitted in writing, so that the writing requirement had a limited practical impact in this case.

2. The decision not to enter the residence

We found that Headquarters' decision not to approve entry of the residence on the night of September 23 was motivated by a concern for agent safety and a desire to avoid additional casualties, not any desire to let Ojeda die. The following considerations were important factors in the Headquarters' decision: 1) agents at the scene had reported the possible presence of a second shooter in the residence; 2) the lack of certainty regarding Ojeda's condition and whether he was still a threat; 3) the belief that Ojeda's intimate knowledge of the interior of the residence mitigated HRT's nighttime tactical advantage; 4) the HRT agents at the scene were fatigued, and a fresh team of HRT agents was being flown to Puerto Rico; and 5) there might be improvised explosive devices inside the residence that would be more difficult to detect at night. In

the judgment of Hulon, in consultation with Bald, these considerations outweighed his concern that Ojeda might need medical treatment. We believe that the decision Hulon made with the information then available to him was not improper.

However, we found that the distance and multiple layers of reporting between the agents at the scene and the FBI Headquarters officials in Washington affected the information that was the basis of the decision not to enter the house during the evening of September 23. The agents at the scene believed on the basis of what they heard from the house that Ojeda had been seriously wounded or killed, and over the course of the evening they became less concerned about the possibility of other subjects in the house. But their assessments did not reach Hulon, who made his decision based on the belief that Ojeda still posed a threat and might have an accomplice.

Yet, Headquarters' decision to delay entry until the next day likely had no impact on the outcome of the operation, or on the death of Ojeda. The forensic pathologist who performed the autopsy estimated that Ojeda died from blood loss approximately 15 to 30 minutes after being shot, which would place the time of death between 6:23 and 6:38 p.m. This indicates that Ojeda was dead before Headquarters assumed control over the entry decision. Indeed, according to the estimates from the Forensic Institute, the only chance to save Ojeda's life would have been for the agents to enter the residence shortly after 6:08 p.m. and evacuate Ojeda immediately. Given that an agent had been seriously wounded in the prior effort to enter the residence, the uncertainty regarding Ojeda's condition, and the belief that more than one weapon had been fired from inside the house during the gunfight, an immediate effort to enter the house would have been a risky action and we cannot fault the FBI for taking a more cautious approach.

IX. The FBI's Preparation for and Conduct of Negotiations

The OIG also reviewed the FBI's preparation for and conduct of negotiations with Ojeda. During the standoff with Ojeda after the initial gunfight, two San Juan FBI agents (one of whom was a certified negotiator) attempted to communicate with Ojeda and convince him to surrender. Ojeda demanded that the FBI bring a particular reporter to the scene, but SAC Fraticelli immediately rejected this proposal.

Prior to deploying to Puerto Rico, HRT had declined an offer from the FBI's Crisis Negotiation Unit in Quantico to provide negotiators for the Ojeda operation. We concluded that this was a mistake and was also inconsistent with the guidance provided in the FBI's MIOG and Critical Incident Handbook. The CONOP clearly contemplated that this operation was not merely a surveillance mission but rather was directed at resulting in an arrest of Ojeda.

Given Ojeda's history of violent resistance and the challenging operational environment, it was foreseeable that the arrest operation could result in a barricaded subject scenario requiring negotiations.

SAC Fraticelli recognized the possible need for negotiators and made some contingency plans by arranging for two San Juan FBI negotiators to be available during the operation. However, Fraticelli and his tactical advisors inadequately integrated the negotiation component into the operation. The negotiators were effectively excluded from HRT's tactical planning and did not have any meaningful interaction with the HRT agents regarding the negotiators' possible role in the operation. In addition, the negotiators did not function as FBI Crisis Management Program guidelines provide. The FBI failed to adhere to its two-negotiator standard by sending only one negotiator to talk with Ojeda.

In addition, Fraticelli told the negotiator to reject Ojeda's demand for the reporter and to tell Ojeda to come out with his hands up. Fraticelli's abrupt approach was contrary to CNU training, which teaches that a negotiator should never reject a demand outright, because doing so can cause the subject to stop talking. We believe it is unlikely these mistakes would have occurred if HRT had deployed with a CNU negotiation team it had experience working with, or had at least coordinated its tactical planning with the San Juan FBI negotiation team.

However, although we are critical of certain aspects of the FBI's preparation for and conduct of negotiations with Ojeda during the standoff, we cannot conclude that they affected the outcome. A Spanish-speaking negotiator was in fact sent to the scene and negotiated with Ojeda for over half an hour. Ojeda had reason to know that his peaceful surrender would be accepted, as evidenced by his wife's safe surrender. We do not believe his decision to remain barricaded in his residence was a consequence of the way the FBI's negotiations were conducted.

Moreover, even if the FBI had acceded to Ojeda's demand, it would have taken hours to bring the reporter to the scene and to prepare him. At 6:08 p.m., long before any reporter could have been brought to the scene, Ojeda was seen in the kitchen window with a weapon and the fatal shot was fired. Ojeda presented a threat at that moment, and we cannot conclude that a different decision regarding the reporter would have likely altered the outcome.

X. Miscellaneous Issues

A. The FBI's Communications with the Commonwealth of Puerto Rico

The FBI was criticized for failing to notify Commonwealth of Puerto Rico officials in advance of the Ojeda arrest operation. Fraticelli told us that he did not notify local officials, the Police of Puerto Rico in particular, because he wanted to keep the operation secret to limit the possibility of compromising leaks.¹⁰

FBI regulations provide the SAC discretion in whether to notify local authorities of operations in his jurisdiction. Restricting who is aware of or involved in an operation where success depends on the element of surprise is a legitimate precaution, and we did not find Fraticelli's exercise of the discretion improper in this case.

The FBI was also criticized for providing Puerto Rico government officials incomplete and unsatisfying information concerning the reasons for the delayed entry. The explanations provided to officials by the FBI – a lack of personnel and technical equipment, and agent fatigue – also resulted in accusations that the FBI's lack of adequate preparation for the operation resulted in Ojeda needlessly bleeding to death. As we described above, we determined that the delay was primarily attributable to good faith concerns for agent safety based on the belief there might be a second shooter in the residence and that Ojeda might still be a threat. By missing several opportunities to provide a better, more complete explanation for the delay to Puerto Rico officials, including these safety concerns, the FBI contributed to the criticism of its conduct.

B. Prior Opportunities to Apprehend Ojeda

In the weeks after the incident, allegations were raised that the FBI may have had sufficient information regarding Ojeda's whereabouts and habits over a period of years to enable it to safely arrest Ojeda away from his home. We determined that although the FBI had previously received information suggesting Ojeda's possible presence in Hormigueros, the FBI did not intentionally bypass opportunities to arrest Ojeda at a different location.

¹⁰ The Puerto Rico Police were generally aware that the FBI had been attempting to locate Ojeda, and had provided some assistance to the FBI in this effort.

XI. Recommendations

Our review identified a number of deficiencies in the FBI's conduct of the Ojeda surveillance and arrest operation. In our report, we make ten recommendations addressing these findings. Most of the recommendations are intended to highlight lessons that we believe should inform the planning and related training for future FBI operations. Other recommendations address specific policy or tactical issues. We summarize the ten recommendations below.

A. Recommendations Regarding Compliance with the DOJ Deadly Force Policy and Related Issues

Recommendation No. 1: Conduct an inquiry relating to the three rounds fired by an unidentified FBI agent and the two unreported rounds fired by a known agent.

After the criminal investigations into this incident have been concluded, the FBI should conduct an inquiry relating to the three rounds fired by an unidentified FBI agent through the front door of Ojeda's residence and the two unreported rounds fired from a known agent, in order to determine whether these rounds were fired in compliance with the DOJ Deadly Force Policy.

Recommendation No. 2: Review the use of flash bangs in outdoor operations.

The FBI should review the use of flash bangs in outdoor environments and under circumstances in which their use could have the unintended effect of alerting the subject or providing the mistaken impression that the FBI is opening fire on a subject.

Recommendation No. 3: Adopt a "standard load" procedure for HRT agents.

The FBI's HRT should adopt a standard load procedure that would enable accurate post-incident accounting of the number of rounds fired by each agent. Other components of the FBI should adopt similar procedures to the extent they are not already in place.

B. Recommendations Regarding the Decision to Conduct an Emergency Daylight Assault

Recommendation No. 4: Adequately consider all available options in emergency situations as time permits.

We found a lack of consideration given to alternative courses of action following the reported compromise of the FBI sniper-observers, despite the dramatically increased risk to the FBI agents associated with an emergency

daylight assault of Ojeda's residence. This case highlights the importance of adequately considering options in emergency situations, including revisiting options that may have been discarded in the initial plan (such as the surround and call-out option), and being prepared to consider how changed circumstances affect the viability of original plans.

Recommendation No. 5: Enhance the Spanish language capability of HRT's sniper-observer teams.

In light of the prevalence of Spanish as the primary language of most Puerto Ricans, including Ojeda and his wife, and the need to identify Ojeda, we believe the FBI should have anticipated that the HRT sniper-observers might need to understand conversations in Spanish. It therefore would have been useful to have had some Spanish-speaking agents on the sniper-observer team. HRT should consider this need in future operations and enhance the Spanish language capability of its sniper-observer teams.

C. Recommendations Regarding the FBI's Entry Decisions

Recommendation No. 6: Ensure that, if decision-making in critical incidents is assigned to FBI Headquarters, there is adequate communication between the field and Headquarters concerning the situation at the scene and the decisions that are made in Headquarters.

FBI Headquarters' involvement can bring significant operational experience to crisis incidents and can provide perspective regarding how decisions in one incident might impact FBI operations more broadly. Headquarters' involvement can also bring a measure of deliberation and caution to crisis incidents that might not otherwise exist. However, this case demonstrated how managers' remoteness from the scene of a crisis incident can affect the substance and process of decision-making. In response to the Ojeda operation, the FBI should carefully consider the conditions under which it will assume control over a crisis incident. The FBI should also evaluate how it ensures that adequate information flows to the Headquarters officials who must approve operational decisions, and how the FBI will ensure adequate communication between FBI Headquarters and the on-scene commanders.

Recommendation No. 7: Ensure that the apparent miscommunication between the HRT Commander and Deputy Commander and the chain of command discrepancy are not repeated.

Management from CIRG and HRT should review the chain of command discrepancy demonstrated by the HRT Commander's order to the Deputy Commander that HRT not enter Ojeda's residence, as well as the apparent miscommunication between the Commander and Deputy Commander concerning this order. Fraticelli, the Puerto Rico SAC, was the commander for

the operation, and the HRT Commander did not have authority to make tactical decisions or give orders such as this. The FBI should take appropriate steps to ensure this situation is avoided in future HRT operations.

Recommendation No. 8: Provide guidance regarding the circumstances under which operational plans from the field should be presented to Headquarters for approval orally or in writing.

Assistant Director Hulon required SAC Fraticelli and HRT to present their proposal for a nighttime entry of Ojeda's residence in writing under circumstances where an oral proposal would have been sufficient and appropriate. One of the reasons Hulon required that the proposal be in writing was that he considered it standard procedure. FBI policy permits the use of oral briefings in lieu of written arrest orders in "exigent circumstances." The FBI should consider providing further guidance regarding what circumstances should be considered "exigent" for this purpose.

D. Recommendations Regarding the FBI's Preparations for and Conduct of Negotiations

Recommendation No. 9: Adequately assess whether an arrest operation could result in a scenario requiring negotiations.

The FBI should use this case in future operations planning and training to illustrate the importance of carefully considering whether negotiators should be deployed under circumstances where a scenario requiring negotiations is reasonably foreseeable, even if undesirable.

Recommendation No. 10: Ensure that negotiators are integrated into the tactical planning where there is a potential need for negotiations.

Recognizing that negotiators might be needed in an operation is only the first step in planning for their potential use. As FBI guidelines provide, effective negotiation requires that the negotiators be integrated into the tactical planning of an operation. This was not done in this case. The FBI should use this case to reinforce the importance of integrating negotiators into the tactical planning of operations where negotiations might be needed.

XII. Conclusion

In this report, we examined the FBI's operation to arrest Ojeda and various issues related to it. We concluded that the FBI agents' use of deadly force, including the shot that struck and killed Ojeda, did not violate the DOJ Deadly Force Policy. We also examined the FBI's decisions to delay entry into the residence until 18 hours after Ojeda was shot. We found that the decisions

were motivated by considerations of agent safety, not by a desire to deny medical care to Ojeda or to let him die. The decision by FBI Headquarters officials to delay entry until the next day reflected a good-faith balancing of the information known to them, although we determined that Headquarters officials' perception of the threat of entry differed significantly from the perception of the agents at the scene.

We examined other aspects of the operation, including the planning for the assault on the residence and the FBI's negotiations with Ojeda. We found problems in the decision-making in these areas. We concluded that the decisions suffered from inadequate consideration of alternative options and inadequate preparation for foreseeable scenarios.

While we did not conclude that any of the actions of FBI officials constituted misconduct, we found several of their decisions deficient because they reflected an inadequate assessment of the known circumstances, or were either contrary to or inconsistent with applicable FBI guidelines. For these reasons, we highlighted several of these decisions as performance issues that we believe the FBI should examine.

Finally, in the report we make ten systemic recommendations relating to problems we found in the Ojeda arrest operation. Our systemic recommendations are intended to improve the planning and conduct of future FBI arrest operations. We believe that, if implemented, they may help the FBI avoid some of the problems that occurred in the Ojeda arrest operation.

CHAPTER ONE: INTRODUCTION

I. Background

This report sets forth the results of an investigation by the Office of the Inspector General (OIG) of the circumstances surrounding the attempted arrest of Filiberto Ojeda Ríos (Ojeda) near Hormigueros, Puerto Rico, on September 23, 2005. Ojeda is one of the founders and leaders of the Ejército Popular Boricua, also known as the “Macheteros” (Cane-Cutters). The Macheteros advocate an armed struggle against the United States Government to achieve independence for Puerto Rico, and have claimed responsibility for various crimes in pursuit of that cause, including four murders, bomb attacks on federal facilities in Puerto Rico, and the 1983 robbery of over \$7 million from a Wells Fargo facility in Hartford, Connecticut.

In 1985, the Federal Bureau of Investigation (FBI) arrested Ojeda in Puerto Rico in connection with the Wells Fargo robbery. Ojeda fired shots at the FBI agents during his 1985 arrest, wounding one of them. Ojeda was released on bond pending his trial in Connecticut for the robbery, and he became a fugitive on September 23, 1990. In July 1992, Ojeda was tried in absentia and found guilty on 14 counts related to the robbery, fined \$600,000, and sentenced to 55 years in prison.

Ojeda was a fugitive for 15 years. He made periodic public statements during that time reiterating the goals of the Macheteros. In September 2005, following an intensive investigation, the San Juan Division of the FBI (San Juan FBI) tracked Ojeda to a residence in a rural location in Hormigueros, Puerto Rico. The San Juan FBI sought the assistance of the FBI Hostage Rescue Team (HRT), a specialized unit of agents headquartered in Quantico, Virginia, to confirm Ojeda’s presence in Hormigueros and to conduct the arrest operation.

Agents from the HRT and the San Juan FBI attempted to enter Ojeda’s residence to arrest him at 4:28 p.m. on the afternoon of September 23, 2005. The operation resulted in a brief but intense exchange of gunfire between Ojeda and the FBI agents. Three FBI agents were shot and one was seriously wounded. Ojeda was not hit during this exchange. The agents did not enter the house or complete the arrest. The gunfight was followed by a standoff lasting 1½ hours, during which Ojeda’s wife surrendered and FBI agents engaged in a dialog with Ojeda. At 6:08 p.m., an HRT agent saw Ojeda through a window and fired three shots at him. Agents heard Ojeda cry out and fall.

The FBI did not move immediately to enter the house after the three shots were fired because of the concerns that there might be a second gunman in the house and the possibility that Ojeda was not disabled. At 6:49 p.m., the agents detonated an explosive charge in order to open a gated doorway to the residence; they looked into the hallway behind the gate but saw nothing. At 7:41 p.m., the agents at the scene reported that they were ready to enter the house. At 8:05 p.m., however, the Assistant Director for the FBI's Counterterrorism Division in Washington, D.C., informed the San Juan FBI that no entry of the residence should be attempted until FBI Headquarters gave approval to an entry plan. Meanwhile, a team of fresh agents from HRT was sent from Virginia to Puerto Rico to relieve the agents at the scene.

The FBI did not attempt to enter the residence that night. At 12:30 p.m. the next day, the FBI entered the residence and found Ojeda on the floor, dead from a single bullet wound that had pierced his right lung. A cocked and loaded pistol was on the floor next to him.

Ojeda's death produced a strong reaction in Puerto Rico. Demonstrations against the operation occurred at several locations. The FBI was criticized in the media and by elected officials for attempting to arrest Ojeda on September 23, which is a holiday of great significance to the Puerto Rican independence movement. The FBI's critics also questioned the need for the agents to assault Ojeda's residence with heavy firepower in order to apprehend Ojeda. In addition, the FBI was criticized for failing to enter the residence for nearly a day after Ojeda was shot. Some people alleged that the FBI came to the residence with the intention of killing Ojeda and that the agents purposely let him bleed to death after he was wounded. Several Puerto Rican law enforcement and government officials also criticized the FBI for a lack of coordination and communication with them and with the public during the arrest operation.

On September 26, FBI Director Robert Mueller requested that the OIG conduct an investigation to determine the facts and circumstances of the Ojeda shooting incident and to make recommendations regarding what actions, if any, the FBI should take in connection with it. Subsequently, the FBI and the United States Attorney General received several written requests for an independent investigation of the circumstances of Ojeda's death, including formal requests from United States Representatives José E. Serrano, Nydia Velazquez, Luis Guitierrez, and Charles Rangel, from Puerto Rico Governor Aníbal Acevedo Vilá, and from the House of Representatives of the Commonwealth of Puerto Rico.

The OIG initiated this investigation immediately after receiving Director Mueller's request. The objectives of the OIG's review were to investigate the facts relating to the incident and (1) to determine whether the FBI agents involved in the operation complied with the Department of Justice's Deadly

Force Policy; (2) to assess the FBI's decision to conduct an emergency daylight assault of the Ojeda residence in light of other potential options for apprehending Ojeda; (3) to assess the FBI's planning for and conduct of negotiations with Ojeda during the standoff; (4) to determine the reasons for the delay between the time Ojeda was shot on September 23 and the time the FBI entered the residence on September 24; and (5) to evaluate communications between the FBI, the Commonwealth of Puerto Rico, and the public regarding the operation. As the investigation proceeded, the OIG identified several additional important issues that are addressed in this report, including an examination of the causes and consequences of the delivery of the HRT team by helicopter to the wrong landing zone and anonymous allegations that the FBI had bypassed numerous opportunities to arrest Ojeda under circumstances less likely to result in violence.

II. Methodology of the OIG Review

In the course of our review, the OIG interviewed over 60 individuals. In Washington, D.C., the OIG interviewed personnel from the FBI Counterterrorism Division and agents who were involved in the operation from the Critical Incident Response Group (CIRG) in Quantico, Virginia. These interviews included all of the agents from the HRT who discharged their weapons or otherwise participated in the assault on Ojeda's residence, as well as agents from CIRG's Operations and Training Unit, Tactical Helicopter Unit, and Crisis Negotiation Unit who participated in or had knowledge of the operation.¹¹

OIG investigators traveled to Puerto Rico several times to interview personnel from the San Juan FBI, including the Special Agent in Charge (SAC), who commanded the operation, and over 20 other agents from the San Juan FBI who were involved in the Ojeda investigation or arrest operation. While in Puerto Rico, the OIG investigators interviewed officials from the government of the Commonwealth of Puerto Rico, including Attorney General Roberto J. Sánchez Ramos, Chief Prosecuting Attorney Pedro G. Goyco Amador, Superintendent Pedro A. Toledo Dávila of the Police of Puerto Rico (POPR), and other current and former officers of the POPR with knowledge relevant to the OIG investigation. We also spoke with Humberto S. Garcia, the United States Attorney for the District of Puerto Rico, and members of the Puerto Rico U.S. Attorney's Office who were involved in the Ojeda matter.

¹¹ On the advice of their counsel, most of the CIRG agents interviewed by the OIG declined to sign the written affidavits memorializing their oral statements. However, each of these agents reviewed the affidavit prepared by the OIG for accuracy and provided corrections if they thought the draft affidavit was inaccurate.

The OIG attempted to contact persons living in the area near the Ojeda residence who had been quoted in the media on matters suggesting that they may have witnessed some aspect of the operation. In connection with this effort, OIG investigators spoke with several persons living in the area near the Ojeda residence. However, several neighbors declined or did not respond to the OIG's request for an interview.

The OIG reviewed the reports of the Instituto de Ciencias Forenses (the Puerto Rico Institute of Forensic Sciences), which took responsibility for processing the incident scene and conducting relevant forensic studies, including the autopsy, bullet and shell casing analyses, trajectory analysis, shooting reconstruction, and blood pattern analysis. The OIG conducted three lengthy interviews of Dr. Pio R. Rechani López, Executive Director of the Puerto Rico Institute of Forensic Sciences, along with other scientists from the Institute, regarding their forensic analyses. The OIG acknowledges the cooperation of Attorney General Sánchez and Dr. Rechani in making the forensic reports and scientists available to us.

The OIG also consulted with the U.S. Department of Defense Armed Forces Institute of Pathology, Office of the Armed Forces Medical Examiner (OAFME), regarding how long Ojeda survived after being shot. The OAFME provided a written report on this issue and responded to questions from the OIG.

In the course of this investigation, the OIG obtained and reviewed thousands of pages of documents generated by the FBI and the U.S. Attorney's Office relating to the Ojeda matter, including draft and final Operations Plans and Orders, investigative files, court filings, photographs, logs, intelligence reports, text messages, and relevant FBI policies, procedures, and training manuals.

In addition, the OIG recruited the following three experts in tactical police operations to provide expert input and guidance on the FBI's tactical decisions in the Ojeda operation and the agents' compliance with the DOJ Deadly Force Policy.

- (1) Ronald M. McCarthy is a former Field Supervisor for the Los Angeles Police Department Tactical Unit. He was appointed by the United States Attorney General to the U.S. Department of Justice Waco review committee, and has testified before the United States Congress as an expert in police special operations. He has also testified as an expert witness in numerous court proceedings regarding law enforcement topics including deadly force, use of special weapons and tactics, and counterterrorism tactics.

- (2) Michael S. Foreman is the former Chief of the Sheriff's Office for Orange County, Florida. Mr. Foreman has 24 years of experience in the field of special weapons and tactics as a team leader and SWAT commander. He has been a consultant, lecturer, and trainer for law enforcement agencies and police academies in North and South America and Europe. He has provided expert testimony and conducted independent reviews regarding law enforcement matters, with an emphasis on tactical issues.
- (3) Gary Van Horn is the Assistant Director in the Office of Law Enforcement and Security at the Department of the Interior and has over 30 years of law enforcement experience. He served for over 23 years with the United States Park Police in Washington, D.C., where he held command positions and served as the National Law Enforcement Specialist for the National Park Service. After retiring as a Major in 2002, he joined the Department of the Interior where he provides oversight and guidance for its law enforcement and security programs. He is also an instructor at the Federal Law Enforcement Training Center in Glynco, Georgia, and previously served as a law enforcement expert for the National Institute of Justice's Technical Assistance and Support Program.¹²

The OIG investigative team also included Special Agents who have had significant relevant experience in tactical operations with other law enforcement organizations in conditions of difficult terrain, including jungle operations.

The OIG was unable to interview some witnesses and obtain some potentially relevant written materials.

- Ojeda's widow, Elma Beatríz Rosado Barbosa, was present at the residence during the initial stages of the operation. Her attorney declined our request that she be interviewed by the OIG. He also declined our request for access to the Ojeda residence. The Police of Puerto Rico had returned control of the residence to Rosado before the OIG investigation began.

¹² Although the OIG's conclusions were aided by the opinions and information provided by these experts, the conclusions in this report are the OIG's alone, are based on all of the information obtained by the OIG, and should not be attributed to the experts, except where specifically stated in this report. The OIG is grateful for the voluntary assistance provided by the three experts.

- A written statement regarding the incident was submitted to the Puerto Rico Department of Justice on behalf of Rosado. Attorney General Sánchez declined to share this statement with the OIG, citing Rosado's right to confidentiality and the fact that her attorneys did not respond to his request for permission to share the statement with the OIG.
- Attorney General Sánchez told the OIG that he commissioned an expert report regarding the survivability of Ojeda's wound. Attorney General Sánchez declined to share this report with the OIG.
- According to media reports, the POPR, or the Puerto Rico Department of Justice, obtained statements from approximately 40 witnesses, most or all of whom lived in the neighborhood near the Ojeda residence. Citing confidentiality concerns, the requirements of Commonwealth law, and the refusal of the FBI to provide certain information subpoenaed by the Commonwealth, Attorney General Sánchez declined to provide any of the witness's written statements, to identify the witnesses to the OIG, or to seek the consent of the witnesses to release their names or statements to the OIG.¹³
- A Commission of the Bar Association of Puerto Rico conducted an investigation of the Ojeda shooting incident and allegations of violations of civil rights in connection with the incident. According to media accounts, the Commission interviewed over 20 witnesses as part of its investigation, and many of these witnesses gave testimony during a public hearing held on December 16 and 17, 2005. The OIG made a formal written request for a copy of any transcripts, written testimony, or witness statements from the Commission, as well as a copy of any videotape of the public hearing. A representative of the Bar Association made statements to the media suggesting that it would cooperate with the OIG, but the OIG did not receive a response to our written request or to several telephone calls to the Bar Association.

¹³ The FBI made the decision to decline to provide Attorney General Sánchez access to FBI agents in connection with the Commonwealth of Puerto Rico's investigation of the incident. The OIG took no position on the dispute between the FBI and the Commonwealth regarding the production of materials relevant to the Commonwealth's investigation.

Although the information we were unable to obtain might have been useful to the OIG's investigation, we believe that our findings and conclusions were not materially affected by our inability to obtain this material. With the exception of Rosado, we have no reason to believe that any of the individuals whose identity or statements have not been provided to the OIG were eyewitnesses to events at the Ojeda residence or would have shed additional light on the facts related to the FBI's actions.

III. Organization of the OIG Report

This report is divided into 11 chapters, including this Introduction. Chapter Two sets forth the historical background regarding Ojeda and the Macheteros and details the FBI's planning for the Ojeda arrest operation. Chapter Three sets forth a detailed chronology of events in the Ojeda surveillance and arrest operation. Chapter Four details the findings of the Puerto Rico Institute of Forensic Sciences relevant to this report.

Chapter Five evaluates whether the FBI agents complied with the Department of Justice Deadly Force Policy in connection with both the initial gunfire exchange and the shots that resulted in Ojeda's death. Chapter Six assesses the FBI's decision to conduct an emergency daylight assault on the residence on the afternoon of September 23. Chapter Seven examines the reasons for the delay between the time Ojeda was wounded and the time the FBI entered the Ojeda residence. Chapter Eight contains an evaluation of the FBI's planning for and execution of negotiations with Ojeda during the standoff at his residence.

In Chapter Nine, we address additional miscellaneous issues, including: (a) communications between the FBI, the Commonwealth of Puerto Rico, and the public with respect to the Ojeda operation; (b) allegations that the FBI was aware of Ojeda's whereabouts substantially in advance of September 2005, but bypassed opportunities to arrest him in circumstances less likely to lead to violence; and (c) the causes and consequences of the failure of the FBI helicopters to deliver the arrest team to the right landing zone.

In Chapter Ten, we provide recommendations stemming from our review of the FBI operation to arrest Ojeda. Chapter Eleven summarizes our conclusions.

[BLANK]

CHAPTER TWO: PLANNING THE OJEDA ARREST OPERATION

In this Chapter of the report, the OIG sets forth the historical background regarding Ojeda and the Macheteros and details the FBI's planning for the Ojeda arrest operation.

I. Historical Background Regarding Ojeda and the Macheteros

A. Filiberto Ojeda Ríos and the Macheteros

Filiberto Ojeda Ríos was born in Puerto Rico in 1933. According to FBI records and press accounts, Ojeda spent several years in Cuba in the 1960s and received training from the Government of Cuba as an intelligence officer. Ojeda returned to Puerto Rico in the mid-1960s and allegedly organized the Movimiento Independentista Revolucionario Armado, a pro-independence group suspected of several bombing attacks on the mainland United States during 1970-1971. In the 1970s, Ojeda allegedly fled to New York to avoid prosecution in Puerto Rico, and helped to found the Fuerzas Armadas de Liberación Nacional (FALN), whose stated goal was an armed struggle for Puerto Rican independence. The FALN was implicated in a series of bombings in the United States in the 1970s that killed six people and injured many more.

According to press accounts and FBI investigative files, Ojeda returned to Puerto Rico in the mid-1970s and helped to organize the Ejército Popular Boricua, also known as the "Macheteros" (Cane-Cutters). Until his death, Ojeda was the leader of and spokesman for the Macheteros. The publicly stated goal of the Macheteros is to obtain the independence of Puerto Rico by armed struggle against the United States government. The FBI considers the Macheteros to be a terrorist organization. A timeline of major events in the history of the Macheteros is provided in Figure 1.

The Macheteros have claimed responsibility for various acts of violence in Puerto Rico as part of their armed struggle. These acts included the murder of a police officer in Naguabo, Puerto Rico, in August 1978. In December 1979, members of Macheteros attacked a United States Navy bus, killing two passengers and wounding nine. On May 16, 1982, the Macheteros attacked four sailors from the U.S.S. Pensacola in San Juan, killing one.

The Macheteros have also claimed responsibility for numerous bombings in Puerto Rico. On October 17, 1979, the Macheteros conducted eight bomb attacks against various federal facilities across Puerto Rico. In January 1981, the organization used bombs to destroy nine U.S. fighter aircraft at the Muniz Air National Guard Base in Carolina, Puerto Rico. Later the same year, the

Macheteros bombed three separate buildings of the Puerto Rico Electric Company. In 1983, the Macheteros fired a Light Anti-Tank Weapon (commonly called a LAW rocket) into the U.S. Federal Building in Hato Rey, Puerto Rico, damaging the offices of the U.S. Department of Agriculture and the FBI. In January 1985, the Macheteros fired a LAW rocket into a building that housed the U.S. Marshals Service and other federal agencies in Old San Juan.

The Macheteros have conducted robberies to finance their activities, including the theft of \$7.1 million from a Wells Fargo facility in West Hartford, Connecticut on September 12, 1983. The Wells Fargo robbery was one of the largest bank robberies in U.S. history.

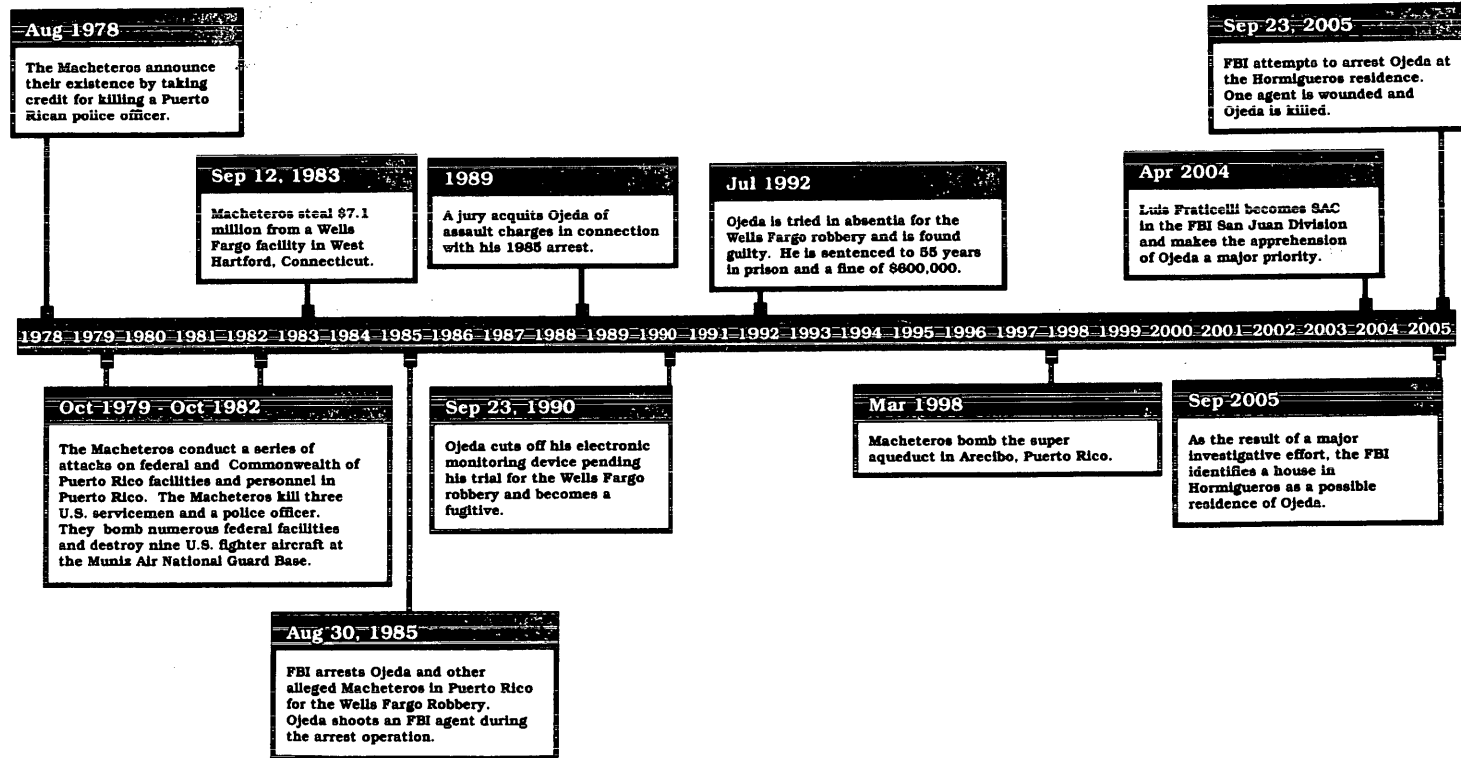
B. The 1985 Arrest of Ojeda

On August 30, 1985, the FBI conducted a large-scale operation in Puerto Rico to arrest Ojeda and other alleged members of the Macheteros in connection with the Wells Fargo robbery. Because Ojeda's conduct during the 1985 arrest operation was a significant factor in the FBI's planning for the September 2005 arrest, we will describe the 1985 arrest in detail.

According to contemporaneous FBI accounts of the incident, at approximately 6:00 a.m. on August 30, 1985, a team of San Juan FBI and HRT agents converged on the apartment in Luquillo, Puerto Rico, occupied by Ojeda and his wife at that time, Blanca Iris Serrano-Serrano. One of the agents made loud announcements in Spanish and English, directed at Ojeda and Serrano, identifying the agents and declaring the FBI's intention to execute an arrest and search warrant. The knocking and announcements continued for several minutes without a response from inside the apartment. The agents made a forced entry at 6:08 a.m. Ojeda fired several shots at the agents from a position at the top of a staircase inside the apartment. One of the shots ricocheted and struck an agent, permanently blinding him in one eye.

The injured agent was evacuated and the other agents took cover. Ojeda fired more shots in rapid succession down the stairs and threatened to shoot anyone who attempted to climb them. The agents engaged in a dialog with Ojeda, who demanded that the "leader of the FBI" come to the scene. At approximately 6:50 a.m., Ojeda agreed to allow his wife to leave the apartment, and she surrendered. The agents continued to urge Ojeda to surrender and instructed him to put his weapons down before descending the stairs. At approximately 7:00 a.m., Ojeda appeared at the base of the stairs holding a pistol in his left hand and an Uzi shoulder weapon in his right hand. The agents instructed him in Spanish and English to drop his weapons. According to the agents, Ojeda then raised the pistol. One of the agents fired at Ojeda. The shot struck Ojeda's pistol and knocked it from his hand. Ojeda dropped the Uzi and was subdued by the agents.

Figure 1
Major Events in the Macheteros/Ojeda Investigation



Ojeda represented himself in his 1989 trial in Puerto Rico on the charge of assaulting the FBI officers during the arrest operation, arguing self defense. He was acquitted by a jury.¹⁴

C. Ojeda Becomes a Fugitive

Ojeda was released on bond pending trial in Connecticut on charges relating to the Wells Fargo robbery. On September 23, 1990, the anniversary of “El Grito de Lares,” Ojeda cut off his electronic monitoring device and announced that he had gone back underground to continue the struggle against the government of the United States.¹⁵ In doing so, he violated the conditions of his release and became a federal fugitive.

The United States District Court in Connecticut issued an arrest warrant the next day, charging Ojeda with bond default. In July 1992, Ojeda was tried in absentia in Connecticut and found guilty on 14 counts related to the Wells Fargo robbery, fined \$600,000, and sentenced to 55 years in prison.

Prior to becoming a fugitive in 1990, Ojeda married Elma Beatríz Rosado Barbosa (Rosado). Rosado went into hiding with Ojeda.

D. Later Activities of the Macheteros

FBI files indicate that since Ojeda became a fugitive in 1990, the Macheteros have claimed credit for one act of violence: the detonation of an explosive device causing damage at the super aqueduct in Arecibo, Puerto Rico in March 1998. Ojeda has periodically been interviewed by members of the print and electronic media in Puerto Rico, and his recorded speeches have been played at pro-independence rallies. According to media accounts and FBI files, in these statements Ojeda has reiterated that the Macheteros remain active as an organization and has continued to advocate an “armed struggle” for Puerto Rican independence. In 2003, Ojeda issued a letter reacting strongly to an FBI “wanted” advertisement that included a photograph of his wife. Ojeda described the Macheteros as “indestructible” and urged supporters to send him the names of FBI agents in Puerto Rico for future publication.

¹⁴ In light of Ojeda’s acquittal on the assault charges, we recognize that there may be accounts of Ojeda’s actions during his 1985 arrest operation that differ from the contemporaneous accounts of FBI agents involved in the operation summarized above. It is beyond the scope of the OIG’s review to resolve any factual disputes relating to Ojeda’s 1985 conduct. The relevance for the OIG is how the FBI’s perception of this conduct affected the decisions it made with respect to his attempted arrest in 2005. For this purpose, the contemporaneous accounts by FBI agents involved in the 1985 operation are the best indication of the FBI’s understanding regarding Ojeda’s conduct at that time.

¹⁵ As detailed below, El Grito de Lares commemorates an unsuccessful revolt in Puerto Rico against Spain in 1868, and is a holiday of great significance to advocates of Puerto Rican independence.

II. The FBI Locates Ojeda in Hormigueros

The Ojeda arrest operation was the culmination of a major investigative effort by the San Juan FBI that was led by Special Agent in Charge (SAC) Luis Fraticelli. Shortly after becoming SAC for the San Juan FBI in April 2004, Fraticelli made the apprehension of Ojeda a major priority. Fraticelli told the OIG that when he arrived in Puerto Rico, the San Juan FBI had assigned the equivalent of about 1.6 full-time agents to the Macheteros investigation. At Fraticelli's direction, the San Juan FBI formed a Domestic Terrorism group, which was later upgraded to Squad status. By April 2005, the Domestic Terrorism Squad was staffed with 11 Special Agents, 4 Intelligence Analysts, and two Task Force Agents from the Police of Puerto Rico. The Domestic Terrorism Squad was utilizing the entire San Juan FBI Special Operations Group (SOG) for surveillance of suspected Macheteros and other associates of Ojeda and the other fugitives.

In early September 2005, the San Juan FBI agents concluded as a result of their investigation that Ojeda and his wife were likely living in a house located on a rural hillside in Hormigueros, on the west side of the island of Puerto Rico. (See Figure 2 – Map of Puerto Rico.) The FBI's investigation also revealed the existence of a second house further up the hill on a dirt road. Although the first house was considered the most likely location for Ojeda, the San Juan FBI agents considered the possibility that the second house might also be associated with him. The San Juan FBI designated the first house "House 1" or "Site 1," and the second house "House 2" or "Site 2."

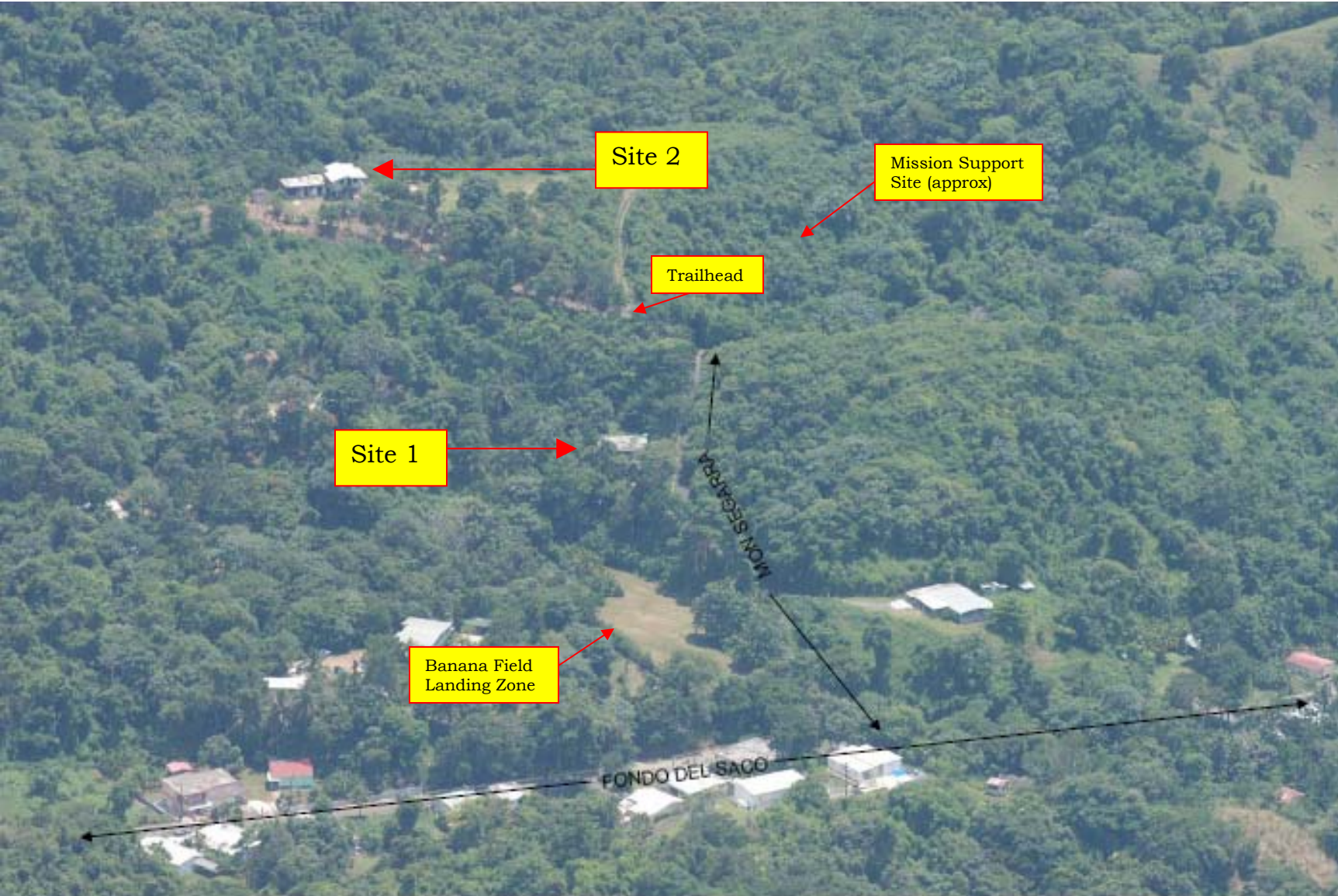
As shown in Figure 3, an aerial photograph of both houses and the surrounding area, Site 1 was located on the paved portion of a road called Camino Mon Segarra, and Site 2 was located on a dirt track extending beyond the paved portion of the road. Further investigation by the San Juan FBI revealed that both target sites were on "Finca Birán," a property owned by an individual whom the FBI had previously identified as a member of the Macheteros.¹⁶ At this point, the San Juan FBI had not seen Ojeda at either house. The San Juan FBI became concerned that the remote location and rugged terrain would make it difficult to confirm Ojeda's presence at either of these houses using conventional surveillance techniques.

¹⁶ According to news accounts, Finca Birán was named after the Cuban birthplace of Fidel Castro.

FIGURE 2
Map of Puerto Rico



FIGURE 3
Aerial View of Sites 1 and 2



III. The Request for the Assistance of the Hostage Rescue Team

On September 12, 2005, the San Juan FBI formally requested FBI Headquarters' approval for the deployment of the FBI's Hostage Rescue Team (HRT) "to conduct a tactical assessment for the purpose of arresting Filiberto Ojeda-Rios." The request stated that the San Juan FBI sought HRT support because the division had exhausted conventional investigative techniques and needed the assistance of the highly specialized HRT "sniper-observers" to approach the residences surreptitiously to determine whether Ojeda was present and to gather intelligence relevant to an arrest.¹⁷ In addition, SAC Fraticelli told the OIG that the San Juan FBI was concerned that Ojeda would likely shoot it out with the FBI again and that Ojeda might use grenades or explosives. He stated that the HRT had special expertise in dealing with such situations.

On September 13, 2005, FBI Executive Assistant Director Grant Ashley, who oversaw the division of which HRT is a part, approved the San Juan FBI's request for HRT assistance.

IV. Background on the Hostage Rescue Team and the Critical Incident Response Group

The HRT is a component of the FBI's Critical Incident Response Group (CIRG), which was established to facilitate the "FBI's rapid response to, and the management of, crisis incidents" by integrating tactical and investigative resources and expertise.¹⁸ Crisis incidents include terrorist activities, hostage takings, bombings, and natural disasters. CIRG is comprised of three branches: Operations Support, Tactical Support, and the National Center for the Analysis of Violent Crime.

HRT is part of the Tactical Support Branch, which also includes the Operations and Training Unit (known within CIRG as the "3-Shop") and the Tactical Helicopter Unit. Based in Quantico, Virginia, HRT is "a full-time, national level tactical team" that, among other missions, deploys in support of FBI field division operations. The Operations and Training Unit supports HRT by managing the HRT training programs and providing "operations management, planning and oversight" during HRT deployments. The Tactical Helicopter Unit provides aviation support.

¹⁷ Within the FBI, a "sniper-observer" is an agent highly trained in marksmanship, field skills, and observation. Deployed sniper-observer teams are responsible for collecting and relaying intelligence about a target, responding to imminent threats, and supporting tactical assaults.

¹⁸ See the FBI's official website (www.fbi.gov).

HRT is comprised of three squads: Blue, Gold, and Red. Each squad has an Assault Team and a Sniper-Observer Team. The squads rotate through three 60-day cycles of mission, support, and training. HRT trains for an array of missions in varied environments. The specialized training includes hostage rescue and barricaded subjects, mobile assaults, manhunt and rural operations, and helicopter operations.

V. The HRT Advance Team Reconnaissance and Assessment

On September 14, 2005, HRT deployed an advance team to Puerto Rico to conduct reconnaissance and assessment regarding the proposed operation to locate and apprehend Ojeda. The advance team included five agents from HRT and the Operations and Training Unit who later participated in the operation. The advance team received a briefing from the San Juan FBI on September 15 regarding the history and current status of the FBI's Macheteros investigation. The briefing was conducted with a PowerPoint presentation that included biographical information about Ojeda and his criminal history, a description of the physical environment where the operation would take place, several pieces of recent intelligence obtained by the San Juan FBI concerning Ojeda's wife and the target residences, aerial photographs of the target residences and surrounding area, and several maps of the territory. Fraticelli stated during the briefing that the purpose of the operation was to conduct surveillance on the residences believed to be occupied by Ojeda and his wife, and if Ojeda's presence was established, to arrest him.

Following the briefing, San Juan FBI agents drove the advance team to the area where the target residences were located to conduct a site survey. The agents did not drive the team close to the residences because the access road did not have an outlet and the agents did not want to arouse suspicion. However, the team was able to assess the terrain and neighborhood by driving a perimeter route around the residences. Each member of the advance team told us that they thought the dense vegetation and steep terrain observed during the survey would present challenges to conducting surveillance of the residence, but no one questioned HRT's ability to operate effectively in the environment. Special Agent (SA) Paul,¹⁹ who was responsible for determining the communications equipment needed for the operation, told us that he quickly realized only satellite communication – as opposed to land-based

¹⁹ In this report, we use pseudonyms for lower-level FBI employees. For senior-level FBI employees, we provide their real names. We identify throughout the report when a pseudonym is first used. Appendix A identifies by position the pseudonyms we use in the report. We have also provided to the Department of Justice and the FBI a key containing the pseudonyms and the real names of the FBI employees.

communication – would work between the agents in the field and the personnel at the Tactical Operation Center (TOC) because of the environment.²⁰

The next day, September 16, 2005, the advance team met with senior San Juan FBI management and several San Juan FBI agents and analysts to discuss the team's observations from the survey as well as specific issues about the proposed mission, including the sniper-observer team's likely infiltration point and the duration the team could remain inserted. Following this meeting, Fraticelli decided to proceed with the operation using HRT resources. The advance team returned to Quantico, Virginia, that day and began mission planning.

VI. Information Regarding the Neighbors

One of the FBI's most significant concerns about the operation was the San Juan FBI agents' belief that the neighborhood surrounding the targeted residences was populated by Macheteros sympathizers. Fraticelli told the OIG that this belief was based on the fact that a known member of the Macheteros owned the property on which the target residences were located, and on the assumption that Ojeda would be hiding among people sympathetic to his cause. Fraticelli stated that the possible presence of Macheteros sympathizers increased the risk of compromise and presented a potential security problem during any attempted arrest of Ojeda.

Several members of the HRT advance team told us that they recalled agents from the San Juan FBI expressing concern about sympathizers during the advance team's visit, and that the advance team factored it into its assessment of the proposed mission. For example, SA Peter,²¹ the sniper-observer team leader, told us that the combination of the residences he observed during the site survey relatively close to the target residence, taken together with the concern about Macheteros sympathizers that was identified by the San Juan FBI, were among the reasons he placed high importance on the sniper-observer team avoiding compromise.

As this report discusses in detail below, the concern regarding the threat posed by potential sympathizers figured prominently in the planning of the operation and was a critical factor affecting the tactical decision-making as the operation unfolded.

²⁰ According to HRT training materials, the TOC is the base of operations for all HRT activity during deployments. The TOC is responsible for gathering, coordinating, and disseminating tactical information.

²¹ "Peter" is a pseudonym.

VII. The Operations Plans

Following the return of the HRT advance team from its reconnaissance and assessment trip to Puerto Rico, the HRT Squad Supervisor prepared a first draft of a written operations plan. The Operations and Training Unit (OTU) assumed responsibility for finalizing the plan, formally referred to as the “Concept of Operations, HRT/SWAT Deliberate Assault Plan,” or “CONOP.” The CONOP is a standard 5-part order, covering Situation, Mission, Execution, Administration, and Command and Control.²² The CONOP serves as a planning vehicle and checklist to assure that all elements of a complete plan are in place. The CONOP is used both to brief managers, to prepare team members, and to facilitate operation rehearsals.

The final CONOP for the Ojeda operation was signed by SAC Fraticelli on September 21, although the elements of the plan had already been briefed to the HRT and San Juan FBI agents involved in the operation on September 20. The CONOP described the planned operation and the specific roles of HRT personnel and some San Juan FBI agents. The CONOP called for HRT agents from two different Squads (Red and Gold) to make up the teams of sniper-observers and assaulters for the Ojeda operation.

In preparing for the operation, HRT gave color designations to the four sides of the Site 1 house. As shown in Figure 4, facing the house, the front side was designated “White,” the left side was designated “Green,” the right side was designated “Red,” and the rear side of the house was designated “Black.”²³

The CONOP specified two critical phases of the operation: a surveillance phase involving the infiltration of a team of HRT sniper-observers with the objective of confirming Ojeda’s presence at Site 1, followed by an arrest phase.

A. The Surveillance Plan

The CONOP provided that during the surveillance phase, a team of six HRT sniper-observers would infiltrate the area of Site 1 by foot and establish surveillance of the residence, with emphasis on collecting an image of Ojeda for transmission to the San Juan FBI in order to confirm his identity. The sniper-observers would also collect other information relevant to a potential arrest operation, such as determining the presence of vehicles, security systems, and other persons at the residence, and identifying the location and composition of “breach points” where the arresting agents could enter the house.

²² This is the format for Raid Orders recommended in the FBI’s Manual of Investigative Operations and Guidelines, Part 2, Section 11 (Techniques and Mechanics of Arrest), Part 4.3.3.

²³ Such designations, which are standard for critical incident planning in the FBI, provide a uniform frame of reference for communications regarding a target location.

FIGURE 4
Aerial View of Ojeda Residence (Site 1)



The CONOP also called for a Quick Reaction Force to be made up of HRT assaulters and San Juan FBI agents in 3 vehicles for each 12-hour shift during the surveillance phase. The Quick Reaction Force would be stationed at a location a short (8-10 minute) drive from Site 1. The function of the Quick Reaction Force would be to extract the sniper-observers in the event of compromise and to be prepared for arrest contingencies. In addition, the San Juan FBI Special Operations Group was assigned to provide vehicle surveillance at “choke points” where vehicles leaving from or coming to the residence were likely to pass.

B. The Arrest Plan

According to the CONOP, the second critical phase of the operation would be the arrest phase. The CONOP stated that: “[b]ased on the information to date, an arrest of opportunity, [sic] Sniper[-observer]s, Vehicle Stop, or Deliberate Assault, appears to be the most likely arrest methods.” The CONOP did not provide any more detailed description of the arrest phase plans because specific plans would depend in large part on the results of the surveillance phase. However, a separate Course of Action outline was generated by the Operations and Training Unit around the time the CONOP was finalized and was used to brief the agents for the operation. This outline detailed various scenarios and contingencies for arresting Ojeda. For example, Course of Action #1 provided that if Ojeda was seen at the residence but did not leave, the first course of action would be to wait for him to leave and conduct a vehicle stop, and the second course of action would be to plan for a deliberate assault on the residence.

HRT Deputy Commander Steve²⁴ told the OIG that HRT’s preference and primary focus was to make the arrest outside of the residence, such as in a vehicle stop while Ojeda was leaving or approaching the residence. Steve said that HRT hoped the sniper-observers would be able to report when Ojeda left the residence by car. Several other HRT agents also stated that a vehicle stop was the preferred outcome and that a deliberate assault on the residence was the least favored course of action during the planning phase.

However, Fraticelli stated that he was concerned about injuries to bystanders that might result from a shooting incident during a car stop, particularly in light of Ojeda’s history of violent resistance. Fraticelli said he therefore preferred that the arrest be made at or near the residence. SA Andy from the Operations and Training Unit also told the OIG that Fraticelli expressed this concern during the planning phase.²⁵ But Fraticelli told us that he ultimately deferred to HRT’s expertise in planning the arrest contingencies.

²⁴ “Steve” is a pseudonym.

²⁵ “Andy” is a pseudonym.

The San Juan FBI prepared a Surveillance Operation Plan for the Ojeda operation. It cross-referenced the CONOP but provided additional details regarding the planned functions of various San Juan FBI personnel. The Surveillance Operations Plan assigned various agents from the San Juan FBI to such post-arrest tasks as transporting Ojeda to Miami, carrying out a search of the residence, and providing perimeter security. The Surveillance Operations Plan referenced a separate San Juan FBI SWAT Operations Plan, but it appears that no such additional plan was ever prepared.

Both the CONOP and the San Juan FBI Surveillance Operation Plan summarized the DOJ Deadly Force Policy and stated that this policy would be in effect for the Ojeda operation. As discussed in more detail in Chapter Five of this report, the Deadly Force Policy states, among other things, that DOJ law enforcement officers may use deadly force “only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.”

C. Consideration of the Surround and Call-Out Option

The CONOP, the Course of Action outline, and the San Juan FBI Surveillance Plan did not address a scenario in which the FBI would surround the Site 1 residence and call for Ojeda to surrender, even as a least preferred course of action. Fraticelli told the OIG that he wanted to avoid a standoff or barricaded subject scenario because he was concerned that Macheteros sympathizers would assemble near the scene in large numbers and that it would be difficult to control the situation. Fraticelli told the OIG that he discussed the question of surrounding the residence with HRT Deputy Commander Steve, who reminded him that during the 1985 arrest of Ojeda the FBI’s approach was to surround him and call for his surrender but that Ojeda responded by firing an automatic weapon at the FBI agents. Fraticelli said that in light of this experience, Steve recommended that speed was the best strategy for dealing with the arrest of Ojeda.

Steve told the OIG that an approach of calling for Ojeda’s surrender before attempting an arrest was rejected in the planning stage because of Ojeda’s history of violent resistance to law enforcement and the Macheteros’ history of using explosives and automatic weapons. Two OTU agents told the OIG that Fraticelli made it clear from the beginning that he wanted to avoid a barricaded subject situation due to Ojeda’s history of violence and the possible presence of sympathizers in the area.

Steve and HRT Commander Craig²⁶ both told the OIG that during the planning phase for the operation they decided not to utilize the CIRG Crisis Negotiation Unit (CNU). Supervisory Special Agent (SSA) Dennis,²⁷ the Unit Chief for CNU, told us that he heard about the Puerto Rico operation on September 19 and immediately contacted Craig to ask if he needed CNU to organize a full package of negotiators to be deployed with the team. Craig said he told Dennis the negotiators were not needed because the operation was primarily a reconnaissance and surveillance mission. Dennis told the OIG that he advised Craig that the San Juan FBI team of negotiators was relatively inexperienced and that Craig should not rely on inexperienced negotiators with a subject like Ojeda. Nevertheless, Dennis said he accepted Craig's decision and informed his unit.

Steve told us that he declined CNU's offer because HRT did not have enough information to justify bringing a CNU negotiator to Puerto Rico and because he knew that the San Juan FBI would have its own negotiators available for that purpose.

Fratlicelli told the OIG that although he wanted to avoid a standoff, he was aware that one could develop, so he made arrangements for two trained negotiators from the San Juan FBI to be available during the operation.

D. Discussions Regarding El Grito de Lares

El Grito de Lares (The Cry of Lares) is an annual celebration held in Puerto Rico on September 23 to commemorate the 1868 revolt in the town of Lares against Spanish rule. El Grito de Lares is an important holiday in Puerto Rico, particularly among Puerto Ricans favoring independence, which has been likened to the Fourth of July.

Fratlicelli told the OIG that the date of the celebration was taken into account in planning the arrest operation because the San Juan FBI received intelligence that Ojeda might leave his residence and attend the celebration in the city of Lares. Fratlicelli said that Ojeda had in years past provided a recorded statement that was played at the celebration. According to Fratlicelli, Ojeda's possible attendance at a celebration in Lares presented an opportunity for a safe arrest away from the residence if the sniper-observer team was able to establish surveillance and detect Ojeda's departure from Site 1. Several HRT agents told us that they were made aware of the event and the intelligence suggesting Ojeda might attend. These agents also said they viewed the event as an opportunity for a safe arrest.

²⁶ "Craig" is a pseudonym.

²⁷ "Dennis" is a pseudonym.

E. Preparations for Medical Emergencies

HRT's medical coordinator drafted a Medical Annex to the CONOP. He also was responsible for placing the appropriate medical equipment and supplies with the Quick Reaction Force vehicles and on one of the helicopters that the Tactical Helicopter Unit planned to bring to Puerto Rico. The medical coordinator told us that fairly early in the planning he learned that Ojeda had a cardiac condition. He therefore positioned most of the medical equipment with the Quick Reaction Force and placed a defibrillator – an item not usually part of the medical package – in the Quick Reaction Force's communications vehicle. The defibrillator was placed with the communications vehicle because that vehicle would remain at a fixed location. The medical preparations were otherwise typical of most HRT operations. For example, the Medical Annex included important contact information and the locations and capabilities of the nearest medical facilities, Centro Medico Rio Piedras and Centro Medico Mayagüez.

F. Chain of Command

The CONOP listed the Tactical Chain of Command from the top down as SAC Fraticelli, San Juan FBI ASAC Leslie, HRT Deputy Commander Steve, and HRT Red Squad Supervisor Doug.²⁸

G. Communications Links

HRT's Tactical Operations Center (TOC) was equipped with a secure satellite radio system to permit communications between the TOC, the sniper-observer team, and the Quick Reaction Force vehicles. Communications on the satellite system could be monitored at HRT headquarters in Quantico, Virginia.

H. Helicopters

The CONOP called for the use of two Tactical Helicopter Unit helicopters for the operation: a Bell 412, which carried a crew of three (two pilots and a tactical air officer) plus seven passengers, and a smaller McDonnell Douglas 530, which carried two pilots plus a maximum of three passengers on external pods. Both helicopters were equipped with fast rope rigs for dropping agents quickly without landing the aircraft. The CONOP did not call for using the helicopters to transport agents to the scene for an arrest operation. Rather, the helicopters' planned function was to provide medical evacuation services in case of an injury and to evacuate Ojeda quickly after he was arrested, if necessary. The helicopters were also intended to be available to assist in

²⁸ "Leslie," "Steve," and "Doug" are pseudonyms.

command and control by relaying information to the commander at the TOC or by transporting him in the helicopter if needed.

The Tactical Helicopter Unit pilots flew the helicopters from Quantico to Aguadilla, Puerto Rico. The leg of the trip from Miami to Aguadilla was originally planned for September 19, but was delayed due to Hurricane Rita, which at that time was a tropical storm forming in the Caribbean. The helicopters left Miami on Wednesday, September 21, arriving in Aguadilla in the late evening.

VIII. Establishment and Organization of the HRT Tactical Operations Center and the San Juan FBI Command Post in Aguadilla

On September 19, an advance party from HRT traveled from Virginia to a federal facility near Aguadilla, Puerto Rico, approximately 25 miles from the target residences. The advance team was responsible for establishing communications systems and infrastructure for the operation and coordinating with the San Juan FBI personnel supporting the operation.

HRT set up a Tactical Operations Center (TOC) in two rooms on the upper floor of a residence at the facility. In general, the TOC was staffed throughout the operation by HRT Deputy Commander Steve, up to three agents from the Operations and Training Unit, an Intelligence Analyst, and a communications technician. A written log was maintained by the Intelligence Analysts and other TOC personnel throughout the operation which recorded events and precise times as the operation unfolded (the "TOC Log").

The San Juan FBI set up a Command Post on the lower floor of the same building. The San Juan FBI Command Post was staffed by SAC Fraticelli, two ASACs (including Leslie, who was designated second in command in the CONOP), the San Juan FBI Chief Division Counsel, and various agents from the San Juan FBI Domestic Terrorism Squad, SWAT Team, and Special Operations Group. A separate command post was established in the FBI's offices in San Juan under the supervision of another ASAC.

IX. The Role of the Police of Puerto Rico in the Arrest Operation

One issue that became controversial in the days after the operation was the extent to which the Police of Puerto Rico (POPR) had been given advance notice of the Ojeda arrest operation. We determined that although the POPR was aware that the FBI had been attempting to locate Ojeda, and had provided some assistance to the FBI in this effort, the POPR did not have advance notice that the FBI had located Ojeda in Hormigueros. The POPR also did not receive notice of the arrest operation until after the exchange of gunfire between Ojeda

and HRT agents, at which time POPR officers responded to the scene and established an outer security perimeter.

Fratlicelli told the OIG that the POPR was aware prior to the September 2005 arrest operation that San Juan FBI had been actively attempting to locate Ojeda as part of its Macheteros investigation. Fratlicelli told us that he learned that POPR itself had previously investigated Ojeda and the Macheteros, and had provided its work file on the investigation to the FBI on February 11, 2005.

Fratlicelli also stated that on February 14, 2005, he met with POPR Superintendent Pedro A. Toledo Dávila (Toledo) concerning, among other things, potential POPR support for the FBI's Macheteros investigation. Fratlicelli said that he obtained Toledo's approval to reassign the two POPR officers working with the FBI as task force agents to the Joint Terrorism Task Force (JTTF) to work specifically on the Macheteros investigation.

Fratlicelli told the OIG that he did not advise Toledo about the arrest operation, or even that the San Juan FBI believed it had located Ojeda's residence in Hormigueros. Fratlicelli said he did not do so because he wanted to keep the operation secret and limit the possibility of leaks to the public. Fratlicelli also said that he had met with Toledo on June 11, 2005, and told Toledo that the FBI was close to locating Ojeda. He said that he told Toledo that the San Juan FBI would need POPR assistance with perimeter security in any arrest operation. Fratlicelli said Toledo was emphatic that he did not want to know any other details but that Fratlicelli should call when the POPR was needed.

In a meeting with the OIG, Toledo confirmed that the FBI did not inform the POPR of the arrest operation in advance and indicated that he thought the FBI was concerned about it being leaked by the POPR. According to subsequent news accounts, Toledo acknowledged that the POPR was generally aware that the San Juan FBI was attempting to locate and capture Ojeda, but he stated that "we knew nothing about Hormigueros."

[BLANK]

CHAPTER THREE: CHRONOLOGY OF EVENTS IN THE SURVEILLANCE AND ARREST OPERATION

In this Chapter, the OIG sets forth a detailed chronology of events in the execution of the Ojeda surveillance and arrest operation during September 21-24, 2005. Figure 5 is a timeline of significant events during the operation.

I. Surveillance on September 21-22

A team of six HRT sniper-observers was inserted at 10:20 p.m. on Wednesday, September 21, at a roadside location approximately 800-1000 yards from Site 1. The sniper-observers included SAs Peter (the sniper-observer team leader), Paul (the radio operator), Eric, Gary, Bruce, and Dan.²⁹ They carried surveillance equipment, communications equipment, weapons, and food and water for several days. The terrain included extremely steep inclines and dense vegetation, and the sniper-observers needed several hours to reach locations near the target residences.

The sniper-observers used land-based radio equipment, including earpieces and transmitters, to communicate with one another. In addition, they carried equipment for satellite voice and text communications with the TOC.

The sniper-observers reached a clearing near Site 2 in the pre-dawn hours of Thursday, September 22. Two sniper-observers determined that Site 2 was under construction and appeared to be unoccupied. Two others walked down the steep road running adjacent to Site 1 and made a brief examination of Site 1. They were unable to find a location that would enable the sniper-observers to observe the residence or the gate at the entrance to the driveway without risking compromise. The sniper-observer team located what appeared to be an old, abandoned foot trail leading off the road and into the vegetation. The team withdrew to a position of cover down the trail, where it established a Mission Support Site approximately 200-250 meters from the Site 1 residence. According to the TOC Log, by 6:17 a.m. on September 22, all six sniper-observers had withdrawn to the Mission Support Site.

²⁹ “Eric,” “Gary,” “Bruce,” and “Dan” are pseudonyms. “Peter” and “Paul” were previously identified as pseudonyms.

II. Issuance of the Search Warrant

During the morning of September 22, 2005, the United States Attorney's Office in Puerto Rico filed an application in the United States District Court for the District of Puerto Rico for a search warrant for Site 1, together with a motion to keep the application under seal. The application and motion were granted by Chief Judge José Antonio Fusté at 12:00 noon that same day. The warrant required the FBI to conduct the search between September 22 and September 26.³⁰

The warrant authorized the FBI to execute the search at any hour of the day or night for evidence of violations of several criminal statutes.³¹ The provision for a day or night search was based on several considerations set forth in the affidavit filed with the application: (1) the greater likelihood that Ojeda would be observed at night; (2) the need to limit the possibility of Ojeda leaving Site 1 after he was observed but before the search was executed; and (3) the security concern that a daylight approach of the residence would place the arrest team at risk. The warrant also granted the FBI an exception to the so-called knock and announce requirement in light of Ojeda's previously demonstrated propensity for violence when confronted by law enforcement.

III. Surveillance on September 22-23

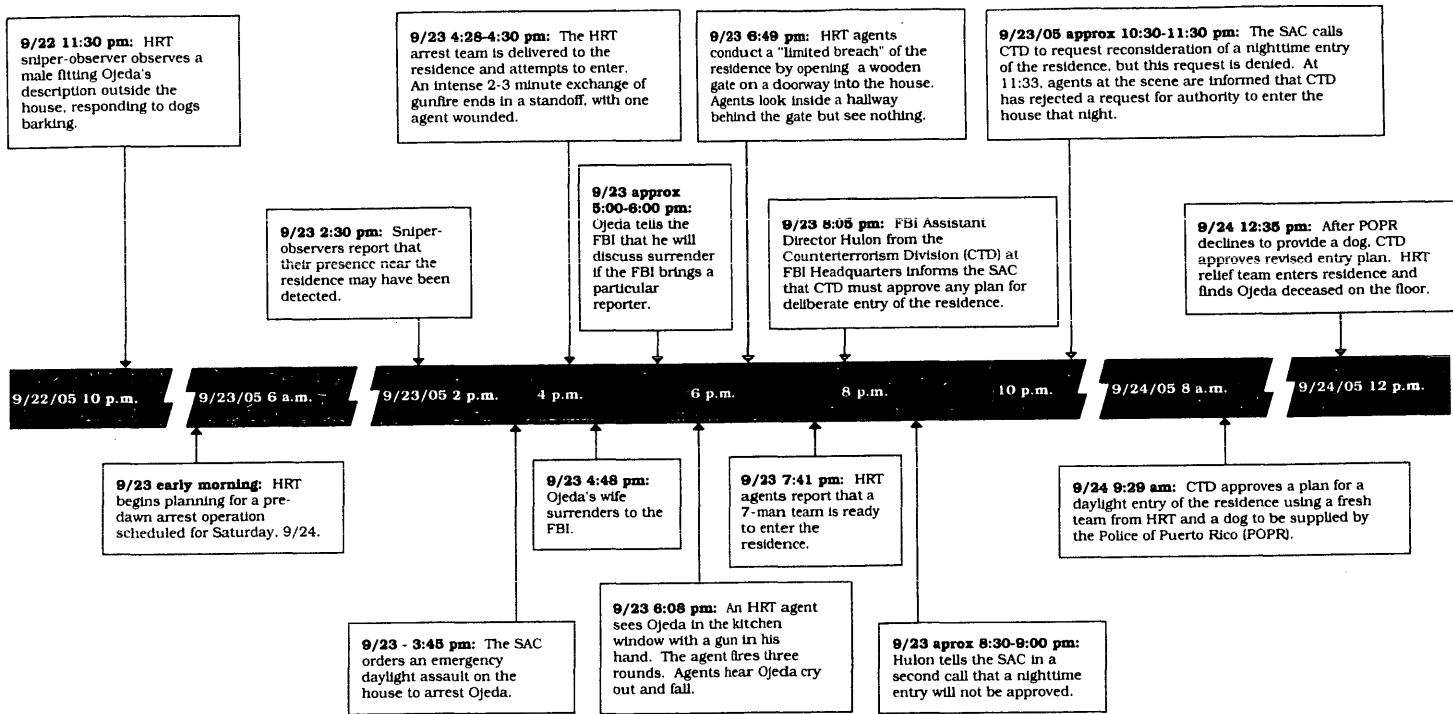
During daylight hours on September 22, the sniper-observers rested at the Mission Support Site and took rotating security shifts at a checkpoint approximately 30 meters up the trail toward the road. At approximately 12:30 p.m., the San Juan FBI Special Operations Group (SOG) observed Rosado at a location near the residence in her vehicle, a Red 4-Runner. The agents observed Rosado engage in what they believed were obvious countersurveillance techniques while driving. By 1:15 p.m., the SOG reported that Rosado had returned to Site 1.

Based on Rosado's activities on September 22 and other information developed during the investigation, the FBI command post suspected Ojeda and Rosado might depart between 2:00-3:00 a.m. the next morning (September 23) to attend El Grito de Lares festival activities. At 4:00 p.m. on September 22, the TOC transmitted a text message to the sniper-observers

³⁰ The outstanding warrant for Ojeda's arrest was attached to the search warrant application. The arrest warrant was issued on September 25, 1990, by the U.S. District Court for the District of Connecticut for Ojeda's failure to appear at trial for the Wells Fargo robbery.

³¹ Title 18, United States Code, Sections 3148, 2332(f), 2383, 2384, 2385, 2339, 2339(a), and 1071.

Figure 5 Ojeda Operation Timeline



advising them of that prediction and authorizing the sniper-observers to make an arrest if Ojeda departed the residence.

At 5:56 p.m., the TOC transmitted another text message to the sniper-observers stating:

Be advised, per our most recent communications with the SJ field office, the search warrant has been signed to expire 2400 26 September; however, none can be executed without the sighting of an elderly male subject, leaving, entering, in or around the target. If a male is seen leaving at night or early am, it can be assumed that it is the subject. You are being advised that while compromise is still a concern, ID of a male is paramount for warrant execution. Feasibility of a deliberate assault rests on these observations.

As noted above, the search warrant was made contingent on the identification of Ojeda at the residence, but it did not provide that any elderly male subject could be assumed to be Ojeda. Fraticelli told the OIG that he instructed HRT that if an elderly male was seen at the residence during late night hours they could assume it was Ojeda, based on intelligence obtained by the San Juan FBI that Ojeda and his wife were still together as husband and wife.

At approximately 9:00-10:00 p.m. on September 22, four sniper-observers left the Mission Support Site to resume surveillance of Site 1. Two of these four sniper-observers took positions near the driveway gate at Site 1 to be in position to arrest Ojeda if he attempted to depart the residence by car.

The other two sniper-observers, Peter and Gary, conducted reconnaissance around the perimeter of Site 1, trying to find a location that would permit daylight surveillance of the residence without risking compromise. They worked their way up toward the White side of the residence from down the hill, but encountered a chain-link fence that appeared to surround the house. Peter maintained a position near the fence on the White side, while Gary worked his way along the fence toward the Green side of the residence to gather intelligence about the physical features of the house and grounds.

As Gary moved along the Green side of the fence toward the Black side of the residence, two dogs began barking excitedly. Gary told the OIG he believed that the dogs had detected his presence. Lights came on inside the residence and at a neighboring residence behind Gary on the Green side. Gary froze in order to evade detection. Peter moved down the hill away from the house.

Gary told the OIG that when he peeked up, he saw a woman on the porch and heard her talking to a man who was in the yard inside the Green

side fence, with a flashlight. The man walked to within approximately 20 feet of where Gary was hiding, but apparently did not see Gary. Gary described the man as elderly, with white hair and a medium build, which Gary said met the description of Ojeda provided by the San Juan FBI. Gary stated that he could not see the man's face clearly. Based on the San Juan FBI description and his presence with the woman previously identified as Rosado, Gary concluded the man was Ojeda. After the couple returned to the residence, Gary attempted to back away from the residence, and the dogs began barking again. Once again, the man and woman came outside with a flashlight and then went back into the house.

Gary stated that he attempted to communicate with the other sniper-observers by his headset radio, but discovered that he seemed to be in a dead spot. He was able to hear transmissions from the other sniper-observers but could respond only by clicking or "squelching" his radio on and off. In this way, by answering questions posed to him by Peter, Gary communicated the fact that he had identified an elderly male subject. According to the TOC Log, this information was relayed back to the TOC at 11:43 p.m. on September 22. The TOC instructed the sniper-observers that the SAC had authorized them to arrest Ojeda if he came outside the house.

IV. Deliberations Regarding a Course of Action on September 23

According to the TOC Log, between 1:00 a.m. and 5:00 a.m. on September 23, there were several communications between the sniper-observers and the TOC regarding a course of action in light of the identification of an elderly male fitting Ojeda's general description and the barking dog incident. The sniper-observers recommended to the TOC that a deliberate assault on the residence to arrest Ojeda be conducted that same morning. Some of the sniper-observers expressed concern that they might already be compromised as a result of the barking dog incident. According to the TOC Log, the sniper-observers told the TOC at 3:43 a.m. that this had been a "significant event." The sniper-observers also told the TOC that they could not cover escape routes and could not maintain daylight surveillance to monitor movement from the house by foot or vehicle without being compromised. The sniper-observers advised the TOC that Ojeda or his neighbors would notice that the vegetation around the house had been disturbed when daylight arrived.

Fratlicelli and other agents from the San Juan FBI were initially persuaded that an arrest operation should be undertaken that morning because of concern that the sniper-observers had been detected and Ojeda would flee. HRT Deputy Commander Steve and the HRT Master Breacher became concerned, however, that the available information regarding the house

was inadequate to assure a successful breach of the door by explosive charge without killing or injuring the occupants.

Fratlicelli ultimately decided not to order an assault on the residence for that morning. Fraticelli said he based his decision on Steve's assessment of the risks to the occupants. In addition, Fraticelli was still hopeful that Ojeda would depart the residence by car later that morning to attend the El Grito de Lares celebration, and that he could be apprehended by the Quick Reaction Force at that time.

At 4:47 a.m., the TOC instructed the sniper-observers to fall back to the Mission Support Site. Steve and Fraticelli decided to rely on the SOG to detect any attempt by Ojeda to depart from Site 1 by car, and to rely on the Quick Reaction Force to arrest Ojeda in a car stop if that took place. They doubled the size of the Quick Reaction Force team on duty between 6:00 a.m. and approximately 10:00 a.m. from three vehicles to six, using both squads from HRT together with SWAT Team agents from the San Juan FBI. In addition, the San Juan FBI assigned the entire SOG and four agents from the Domestic Terrorism squad to achieve complete surveillance coverage at all potential vehicle exit routes. However, the FBI did not observe Ojeda again that morning.

V. The Plan for a Pre-dawn Arrest Operation on September 24

At 7:23 a.m. on September 23, the TOC transmitted a text message to the sniper-observers at the Mission Support Site requesting more detailed information regarding the target residence, including descriptive information regarding the exterior and recommended points of entry. SA Gary responded in a detailed text message sent at 8:34 a.m. in which he described the residence but noted that: "The house is obscured by foliage/canopy, so observation of white side access points from the perimeter fence is very poor." He noted that because the Black and Red sides abutted a steep hillside and bluff, the assaulters would only have to deal with the White and Green sides. The message recommended entering on the Green side through a large window that the sniper-observers described as a "7 ft. high by 4 ft wide glass paned window with no reinforcements." The message also stated that "there appears to be a large glass window/door on the white/red corner."³² No explicit recommendation for an approach route was stated in the message, but Gary described an easily breached gate in the perimeter fence toward the Green/Black corner and suggested "you can hop down the Black/Green corner of the wrap around porch to enter [the] house."

³² In fact, the window on the Green side was made of block glass and the entry on the White/Red corner was a gated doorway. See Figure 6.

Based on this information, Fraticelli and Steve discussed options for arresting Ojeda. Fraticelli told the OIG that at this stage two options were discussed: surrounding the residence and calling Ojeda out, or conducting a stealthy, “deliberate” assault on the residence in the pre-dawn hours of September 24. As noted above, Fraticelli had previously expressed his strong preference to avoid a barricaded suspect scenario because of the difficulty of controlling crowds of Macheteros sympathizers. Other witnesses said they did not recall any discussion of the “surround and call-out” option at this stage, and stated that Fraticelli had already made clear that he wanted to avoid this option.

Fraticelli and the HRT personnel agreed to conduct the deliberate pre-dawn assault. Therefore, at approximately 10:00 a.m., all of the HRT assaulters were recalled from their positions on the Quick Reaction Force in order to rest and prepare for the assault the next morning before dawn. Agents from the San Juan FBI SWAT Team assumed Quick Reaction Force responsibilities. The details of the plan were developed by Steve and the Operations and Training Unit agents, with input from other HRT personnel.

The HRT plan called for the sniper-observers to move forward at 10:00 p.m. on September 23 to confirm the subject’s presence at the house. The assault would be executed by 3:00 a.m. The assault units would approach the residence in darkened vehicles, dismount downhill of the target, link up with the sniper-observers at the front gate, and use bolt cutters to enter the driveway gate if necessary. The assault units would approach the White side of the house, proceed through the front yard, and advance up onto the porch. The Red Squad would breach the residence at the large window or door at the Red/White corner, and the Gold Squad would breach the house at the large window on the Green side. The sniper-observers would cover the perimeter around the residence and agents from the San Juan FBI SWAT would be assigned to “clear” the area under the house (which the sniper-observers had described as supported by stilts on the White side).

The plan was a “hasty deliberate assault with rolling green,” which meant that once the assault units were on the property they would advance quickly to the two breach points. In a standard deliberate assault, the breaches would be coordinated and would be executed only after a countdown initiated by the commander from the TOC after the units confirmed they were in position. “Rolling green” meant that the agents would breach the residences on their own initiative after they reached the breach points. Because the FBI had a “no-knock” search warrant, HRT did not plan to announce itself before breaching.

The breaches would be accomplished either mechanically with a Halligan tool³³ or breaching shotgun, or with a small explosive charge known as a “slap charge.” If neither breach was successful, the HRT Master Breacher would use an explosive charge to breach the front door. After the breach, the agents would conduct a rapid room-to-room maneuver, called a “clear,” until the subject was captured.³⁴ This clear would be “unbriefed” because the floor plan was unknown. FBI vehicles would be positioned just below the gate for a quick departure with the subject after the arrest.

By the late morning on September 23 the planning for the assault was substantially complete and the planners met with the Red Squad Supervisor and the Team Leaders from the Red and Gold assault teams to review it and finalize details.

VI. The Compromise of the Sniper-Observers

At approximately 2:30 p.m. on September 23, the sniper-observers were at the Mission Support Site, in the woods. Paul was on security duty at the checkpoint up the foot trail toward the road. According to Paul, a vehicle drove up the road past Site 1 and stopped near the trailhead leading toward the Mission Support Site. (See Figure 3.) A second vehicle arrived several minutes later and the doors of the vehicles opened. Paul stated that he was able to hear people talking in Spanish, but could not understand what was being said because he does not speak the language. Other sniper-observers who were positioned further away from the road also told the OIG that they heard vehicles and voices, but they could not make out what was said.

Paul moved into position to observe what the speakers were doing, and saw one person gesturing with his hands and pointing at the ground and toward the trailhead. He could not see the second person, but heard two voices. Paul then heard a third vehicle arrive, but he was not sure if anyone got out.

Paul returned to the Mission Support Site and reported to the sniper-observer team leader Peter and the other sniper-observers what he had observed. The sniper-observers became concerned that the person gesturing toward the trailhead had detected evidence that the sniper-observers had used the trail. Paul told us that this concern was heightened by the fact that the

³³ A Halligan tool is multipurpose tool, consisting of a claw, a blade, and a pick, which can be used for quickly breaking through barriers, such as locked doors.

³⁴ A “clear” is a rapid, deliberate action to enter a particular structure, such as a residence, locate anyone inside, and secure the area.

barking dog incident had occurred the night before and by the belief that the local population included Macheteros sympathizers.

According to the TOC Log, Peter informed the TOC by radio at 2:36 p.m. that a vehicle had pulled up near the Mission Support Site, possibly compromising the sniper-observers. Shortly thereafter Peter reported to the TOC that three vehicles were near the Mission Support Site. Several sniper-observers told us they subsequently heard one vehicle go back down the hill toward Site 1 and another vehicle go up the hill toward Site 2.

According to the TOC Log, at 2:48 p.m. Peter recommended to the TOC that the Quick Reaction Force “get here ASAP and hit the house.” Peter and the other sniper-observers confirmed to the OIG that they urged the TOC to adopt this course of action. Several of the sniper-observers told the OIG that their primary concern was that Ojeda would receive warning of their presence and would escape from Site 1 and return underground. They stated that this latest incident, taken together with the barking dog incident of the night before, gave them great concern that the operation had been compromised. They also told the OIG they were concerned that the compromise might lead to a confrontation between the sniper-observers and Macheteros sympathizers believed to be living in the area.

At 2:53 p.m. the TOC received a report from the San Juan FBI SOG confirming that a green SUV was seen near Site 2, with people walking around nearby.

At the time the sniper-observers reported the incident near the Mission Support Site, the TOC was being staffed by OTU agents Kevin and Andy,³⁵ who had begun preparing a written “fragmentary order” for the deliberate pre-dawn assault being planned for September 24.³⁶ Steve, Fraticelli, and OTU agent Jason³⁷ were advised of the reported compromise and came to the TOC between approximately 3:00 and 3:20 p.m. They questioned the sniper-observers by radio regarding the incident, and inquired whether the sniper-observers felt they were in danger and whether they could evacuate the area without further compromise so the pre-dawn deliberate assault could proceed as planned. Peter responded that the sniper-observers were definitely compromised. According to the TOC Log, Peter told the TOC that the vehicle

³⁵ “Kevin” and “Andy” are pseudonyms.

³⁶ A fragmentary, or FRAG, order is an abbreviated form of an operation order, usually issued on a day-to-day basis, which eliminates the need to restate information contained in the CONOP. Fragmentary orders are issued to change or modify a CONOP or to execute a particular course of action.

³⁷ “Jason” is a pseudonym.

occupants had looked at the trailhead and it was “obvious” to the occupants that someone (the sniper-observers) had used the foot trail. Peter also reported that the only exit route for the sniper-observers by foot was the way they had come in, and that they did not have sufficient water to make that trip.

VII. Deliberations Regarding a Post-Compromise Course of Action

Entries on the TOC Log indicate that preparations for an emergency daylight assault via helicopter were begun almost immediately after the sniper-observers recommended that action to the TOC at 2:48 p.m. Deliberations regarding this course of action continued, however, until Fraticelli made the final decision at approximately 3:45 p.m. to conduct the day-time assault on Site 1 to arrest Ojeda.

Fraticelli described for the OIG the deliberations leading to that decision. He stated that the option of extracting the sniper-observers by vehicle was rejected because there was no practical means of extracting them without driving very close to the residence, thereby alerting Ojeda to the FBI’s presence.

Fraticelli also told the OIG that when the sniper-observers reported they were compromised he proposed to Steve that the FBI surround the residence to prevent Ojeda from escaping, and then call him out. Fraticelli stated that although he did not want to get into an extended barricaded subject scenario, he felt that the FBI would lose the element of surprise in a daytime assault.

According to Fraticelli, Steve told him it would be feasible to go ahead immediately with the arrest plan that HRT had devised for the pre-dawn hours of September 24, using 2 teams totaling about 12 agents, most of who would be transported to the scene by helicopter. Fraticelli told the OIG, however, that he was concerned that Ojeda would hear the helicopters and be prepared for the assault. Fraticelli said that Steve told him that the helicopters would come in low so that Ojeda would not see them coming or hear them until very late. The agents would “fast rope” to the ground and assault the residence to arrest Ojeda. Fraticelli said that Steve reminded him that the 1985 arrest had shown that Ojeda would not surrender easily if surrounded and that he would use the time to prepare for violent resistance.

Fraticelli told the OIG that after the discussion with Steve he became convinced that an immediate assault on the house was the best option. He said he felt that HRT was expert at this kind of operation.

However, Steve and the OTU agents who participated in the deliberations provided accounts of the deliberations that differed in part from the account provided by Fraticelli. Steve told the OIG that no consideration was given to any option other than a direct assault on the house, such as surrounding the

house and calling for the subject's surrender. Steve told us that he did not think there was a stealthy way to surround the house, and that surrounding the house would create a potential hostage situation with Rosado. He stated that even with a helicopter insertion, he believed the HRT would have enough of an element of surprise to complete the operation without a gunfight or injury.

OTU agent Jason told the OIG that he did not recall whether there was any discussion of the option of surrounding the house as an alternative to conducting a daylight assault. Jason stated that because Fraticelli had been unequivocal about wanting to avoid a barricaded subject scenario, there was no discussion at that stage of bringing a negotiator to the scene. OTU agent Andy told us that surrounding the residence instead of conducting an emergency assault was not considered to be an option, because Fraticelli had already indicated that he wanted to avoid a barricaded subject situation. OTU agent Kevin also stated that Fraticelli had expressed concern about avoiding a barricaded subject scenario, and that the planners were concerned with the difficulty of establishing an adequate perimeter in an area believed to be populated by Macheteros sympathizers.

VIII. Preparations for the Daylight Assault

The HRT Squad Leader (Doug) began to marshal the Red and Gold assault teams to prepare for the operation. Doug utilized the original plan for the nighttime assault, with both teams approaching the house on the White side. As previously planned, the Red team would breach the window or door at the Red/White corner, the Gold team would breach the window on the Green side, and both teams would move toward the center of the house, clearing rooms and arresting Ojeda.

The primary difference from the plan for the nighttime assault was that the assault teams would be transported to the scene by helicopter. Ray, the Unit Chief for the Tactical Helicopter Unit, quickly devised an emergency aviation assault plan for transporting 10 HRT assaulters in 2 helicopters to a banana field immediately downhill of Site 1.³⁸ Ray planned to find the banana field using GPS coordinates for Site 1 that had been provided to him in advance of the operation, and by visual recognition from an aerial photograph (Figure 3) that had also been provided to him by the San Juan FBI. He estimated that the trip from their location near Aguadilla to the banana field would take about 11 minutes. In order to minimize the amount of time the helicopters would be heard in advance of the assault, the plan was to approach the target from the south, flying very low at an altitude of 200-300 feet above the trees. The

³⁸ "Ray" is a pseudonym.

sniper-observers had reported that they did not recommend that the helicopters attempt to land in the banana field, so Ray made preparations to rope drop the HRT assault teams.

As the emergency assault plan took shape, the TOC gave instructions to the San Juan FBI SWAT units who were at that time stationed in vehicles a few minutes away from Site 1 in their capacity as the Quick Reaction Force. The TOC instructed two agents from the San Juan FBI SWAT Team to link up with HRT assaulters at the banana field and to assist in the assault. The remainder of the Quick Reaction Force was assigned to secure Site 2 when the HRT assaulters arrived to address any threat posed by the persons at or near Site 2, including those who had been seen or heard near the footpath to the Mission Support Site. Units from the San Juan FBI SOG were assigned to cover two choke points on roads near the target to prevent vehicles from entering or exiting. Numerous other SWAT and SOG agents from the San Juan FBI were summoned to assist at the scene. Fraticelli also directed two San Juan FBI negotiators to report to the scene in case they were needed, along with an ASAC who was also a negotiator.

The sniper-observers made plans to move toward Site 1 when the HRT assaulters approached, with two sniper-observers taking positions near the Green/Black corner of the residence, and the rest at a position uphill of the residence near the road leading toward Site 2.

The HRT assaulters prepared for the operation by putting on flight suits, standard issue body armor bearing “FBI” identifiers, helmets, boots, and gloves. They were equipped with radio headsets that permitted communications among the assaulters and the sniper-observers. The agents also carried “flash bangs,” which are non-lethal grenades used for creating diversions or disorienting subjects. The agents responsible for breaching the residence carried Halligan tools, breaching shotguns, and small explosive “slap charges.”

Each assaulter carried an HRT-issued .223 caliber M4 carbine shoulder weapon and a .45 caliber sidearm. Each assaulter determined for himself the quantity of ammunition to carry. The HRT M4 carbines were equipped with a selector switch enabling them to fire in either semi-automatic or fully automatic mode.³⁹

³⁹ According to Steve, use of the fully automatic mode by HRT agents is normally a matter of agent discretion, subject to the DOJ Deadly Force Policy and considerations of “fire discipline.” Steve stated that HRT agents normally do not use the automatic mode because it is easier to maintain fire discipline in semi-automatic mode. No specific instructions were given to the HRT agents regarding the use of fully automatic mode in the Ojeda operation. Each agent who fired his weapon during the incident told us that he only fired in semi-automatic mode.

(continued)

Shortly before 4:00 p.m., Doug briefed the assaulters on the tarmac near Aguadilla before they boarded the two HRT helicopters. He reviewed the assault plan that had been developed for the deliberate assault originally planned for pre-dawn hours of September 24, including the “stack” or order in which the agents would proceed toward the house, and the functions they would perform during the assault. The HRT assaulters had originally planned to rehearse the assault during the afternoon of September 23, but were unable to do so before the emergency assault was ordered.

All of the HRT assaulters told the OIG that they were aware that the DOJ Deadly Force Policy would be in effect during the operation.

IX. Transportation to the Target

Fratlicelli stated that he made the final “go” decision for the emergency assault at approximately 3:45 or 4:00 p.m. on September 23. Ten HRT assaulters boarded the two HRT helicopters: seven on the larger Bell 412 and three on the smaller McDonnell Douglas 530. The Bell 412 was piloted by Ray, Unit Chief for the Tactical Helicopter Unit, and by SSA Dale.⁴⁰ The McDonnell Douglas 530 was piloted by SSAs Todd and Robert.⁴¹ The Bell 412 served as the lead helicopter.

The helicopters departed from Aguadilla at approximately 4:00 p.m. As the helicopters neared the target area, two sniper-observers moved down the hill to meet the assaulters near the banana field and directed them to the house, and two sniper-observers moved toward the residence at the Black/Green side to cover potential routes of escape. Vehicles from the San Juan FBI SOG and the San Juan FBI SWAT Team (the Quick Reaction Force) moved to a position on the road leading toward Site 1 at a location near the banana field. One San Juan FBI SWAT agent, Ron,⁴² got out of a vehicle

We note that MIOG, Part 2, Section 12-3.1(3), restricts the operational use of fully automatic fire to HRT and SWAT personnel. The same provision states that qualified Special Agents may only use a weapon capable of automatic fire if it is equipped with a fire selector lock to prevent fully automatic fire, which may only be removed by authority of the SAC or his designee. The FBI does not interpret the fire selector lock requirement to apply to HRT or SWAT agents. The HRT M4 carbines used in the Ojeda operation were not equipped with such locks.

⁴⁰ “Dale” is a pseudonym.

⁴¹ “Todd” and “Robert” are pseudonyms.

⁴² “Ron” is a pseudonym.

and awaited HRT near the driveway gate. The other SWAT agents moved up the hill to Site 2, where they took one person who was in the yard into temporary custody.

Ray, who was piloting the Bell 412, told the OIG that as he was approaching the GPS coordinates he had been given for Site 1 from the south, he passed over an open area that ended approximately 1/10 of a mile south of the target coordinates, but he could not see the target residence. He sought assistance from the sniper-observers on the radio but did not hear anything. Robert, who was piloting the McDonnell Douglas 530, also described the open area and also said he was unable to see the target residence. Ray stated that he did not want to fly over the target residence, so shortly after passing over the edge of the open area he made a clockwise turn back toward it. The McDonnell Douglas 530 made a similar turn.

Robert told the OIG that the Bell 412 radioed the McDonnell Douglas 530 requesting help, and that Robert responded by stating that the open area they had passed over had to be the landing zone. Ray told us that his co-pilot, Dale, said “I think that was it,” referring to the open area they had passed over.

On the ground, the sniper-observers heard the helicopters as they approached but realized they were not arriving at the banana field landing zone. Paul, the HRT agent responsible for communications, told the OIG that he attempted to make contact with the helicopters as they approached the location, but was unable to because the UHF antenna he had on his radio was not sufficient for transmission to the helicopters, and he did not have a longer VHF antenna. Sniper-observer Eric also said he attempted unsuccessfully to radio the helicopters. Sniper-observer Bruce went to mark the banana field with a landing panel, but the helicopters never arrived at that landing zone.

Instead, the helicopters executed a rope drop of the assaulters over the open area, which was on a steep slope.⁴³ At 4:20 p.m., Ray reported to the TOC that the first group of assaulters was on the ground. The second group, from the smaller helicopter, was dropped immediately thereafter. Within a minute, the sniper-observers reported to the TOC that the helicopters were not at the banana field.

On the ground, the 10 HRT assaulters realized that they were not at the banana field landing zone. They moved quickly up a steep hill to a road. On the road, the assaulters encountered an agent from the San Juan FBI SOG, who was wearing his FBI raid jacket and manning a “choke point” in a Dodge

⁴³ The site where the helicopters dropped the assault teams is not depicted on Figure 3. It is located beyond the right (south) edge of the photograph.

Durango SUV. The assaulters got into the Durango or climbed on its running boards and rear bumper, and the agent drove them quickly to Site 1.

X. The Assault on Site 1

At 4:28 p.m., the Durango carrying the 10 HRT assaulters arrived at Site 1. As the Durango arrived, three sniper-observers (Peter, Eric, and Bruce) and an agent from the San Juan FBI (Ron) were positioned near the driveway gate. Two other sniper-observers (Gary and Dan) were covering potential escape routes from positions outside the fence near the Black/Green corner of the residence. As these two moved closer to the house they were detected by dogs inside the fence, which began barking loudly. A sixth sniper-observer (Paul) was positioned on the road above Site 1, relaying information about the operation to the TOC by satellite radio. As the Durango approached, Eric moved forward to open the driveway gate, but the San Juan FBI agent drove the vehicle through the gate toward the house without stopping. Moments later Bill, an HRT assaulter who had fallen off the back of the Durango on the way up the hill, ran into the yard and joined the other assaulters.⁴⁴ Ron also followed the vehicle into the yard in order to join up with the assaulters. The three sniper-observers at the gate followed the assaulters into the yard and took positions of cover.

In Subsection B below we discuss the events during the assault and exchange of gunfire at Site 1. It is important to understand that these events occurred very quickly, over a period of as little as 2-3 minutes. However, in order to understand the rapid sequence of these events it is necessary to appreciate the features and layout of the property, which we describe first in Subsection A.

A. Features and Layout of Site 1

The driveway into Site 1 led into an open yard on the White side of the residence. Figure 6 (a photograph taken after a great deal of foliage had been removed) shows important features on the front of the house (the White side). There was a low concrete wall in the yard with a break in the middle, opening to a set of rough cinderblock steps. The steps led up a steep embankment to a narrow, open balcony porch running along the White side of the house. In the yard to the right of the low cement wall was a garden shed with an entrance facing away from the house, toward the driveway. The second story of the shed was a covered gazebo accessible from the porch. To the right of the gazebo and along the Red side of the house there was a very steep hillside sloping up toward the road. There was a low retaining wall along this slope.

⁴⁴ “Bill” is a pseudonym.

FIGURE 6
Selected Features on Front (White) Side of Residence (Foliage Removed)



FIGURE 7
3-D Diagram of Interior of the Residence

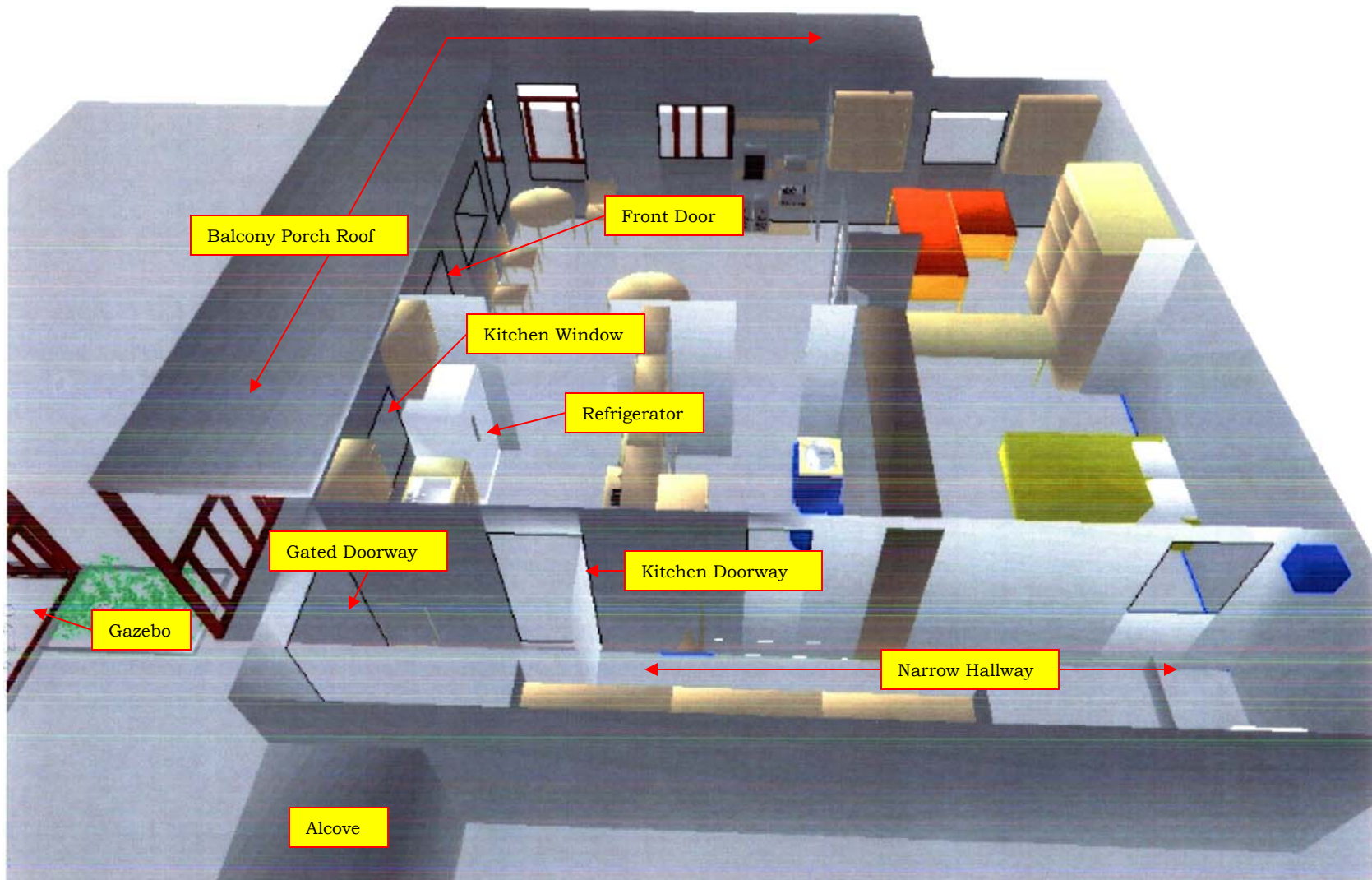


FIGURE 8
View of the Front of the Residence (Before Foliage Removed)



The front door of the house was located in the center of the White side, at the top of the steps. On each side of the front door were “Miami windows” with slatted panes. The window to the left of the front door (facing from the outside) opened into the living room; the window to the right opened into the kitchen (the “kitchen window”). Further down the porch to the right, near the White/Red corner of the residence, was a doorway covered by a locked wooden gate (the “gated doorway”). The gated doorway led into a narrow hallway running from the front of the house to the back. Inside the hallway on the left side was another door leading into the kitchen (the “kitchen door”). To the right of the gated doorway, somewhat around the corner of the house, was a small exterior alcove. Figure 7 is a three dimensional diagram of the interior of the residence showing many of these features. It also illustrates the relationship between the gated doorway leading into a narrow hallway and the kitchen door inside the hallway.

At the time of the operation, the front of the house was obscured by heavy vegetation, including shrubs and tree limbs. Figure 8 shows the front of the house before this vegetation was removed, as it would have appeared to the FBI agents when they approached.

B. The Exchange of Gunfire

At approximately 4:28 p.m. the Durango pulled into the yard and stopped a short distance from the low cement wall. Several HRT assaulters told the OIG that they thought they heard small arms semi-automatic gunfire from the house even before the Durango stopped.⁴⁵

Sniper-observer Gary, who was covering the Black-Green corner of the house, threw a non-lethal “flash-bang” grenade toward the house as a diversionary tactic as the vehicle approached the house. It frightened a large dog, which ran from the Green side around to the front of the house. Gary and Dan (who was positioned near Gary) told the OIG that the flash bang detonated shortly before any gunfire was exchanged. Other HRT agents also stated that they heard the flash bang, which is extremely loud and which agents can easily distinguish from gunfire. Some of them told the OIG that they thought that they heard gunfire from the house before they heard the flash bang, however.

⁴⁵ Two agents stated that one shot hit the windshield of the Durango as it approached the house. However, the San Juan FBI told the OIG that it found no evidence that the Durango had been struck with any shots. The left rear window of the Durango was broken during the operation, which agents from the San Juan FBI stated was likely the result of being struck by equipment carried by one of the HRT agents on the running board. This window would not have been exposed to the house as the Durango approached. It is possible that the shattering of glass gave some of the agents the misimpression that the vehicle had been struck by a gunshot.

According to several media accounts, Ojeda's wife, Rosado, claimed that the FBI agents fired first. However, Rosado declined to be interviewed for this investigation. As we explain in detail in Chapter Five, we concluded, based on the evidence and the testimony, that Ojeda fired at the agents first.

As noted above, the assault plan called for the Gold Team assaulters (Bill, Tom, Alan, George and Ken⁴⁶) to enter through a window on the Green side and the Red Team assaulters (Doug, Scott, Don, Frank, and Brian⁴⁷) to enter through a window or door believed to be located near the Red/White corner (which turned out to be the gated doorway). The HRT assaulters jumped off the Durango and moved toward the house to conduct the assault in accordance with this plan. They were joined by Ron from the San Juan FBI SWAT. The San Juan FBI agent who was driving the Durango backed it away from the low cement wall toward the driveway gate.

Several assaulters told us they perceived small arms fire coming from the kitchen window as they approached the house. They moved through the gap in the low cement wall up the cinder block steps. The large dog that had been frightened by Gary's flash bang came running toward the steps and Scott shot it to prevent an attack on another agent. The dog fell to the base of the embankment near the gap in the wall.

Frank and Don reached the porch and moved to the gated doorway. Tom also reached the porch and took a position to the left of the front door. Seconds later, Brian followed the other agents onto the porch and began looking for a breaching point on the right side. The remaining assaulters took various positions on the steps and the embankment to each side of them but did not proceed forward because of the gunfire from the house.

Frank prepared to break open the locked wooden gate at the door near the Red/White corner with a breaching shotgun. Frank told the OIG that in order to get a proper angle for using the breaching shotgun effectively, he had to step away from the wall of the house to a position directly in front of the lock on the wooden gate to the door. At that moment, Frank noticed that someone had "goose necked" a pistol from the kitchen door on the left interior side of the hallway. Frank said he heard several shots and felt three separate impacts on his ballistic vest that he perceived to be gunshots fired from the pistol.

Frank moved to a position of cover on the porch to the left of the gated door and began to check himself for wounds. Frank said he heard several more gunshots originating from inside the house. After finding no wounds,

⁴⁶ "Tom," "Alan," "George" and "Ken" are pseudonyms.

⁴⁷ "Doug," "Scott," "Don," "Frank," and "Brian" are pseudonyms.

Frank crawled on the front porch to a position below the kitchen window. Brian told the OIG that he saw ricochet shots near Frank, as if Frank was a target while he was down on the porch. A forensic examination of Frank's helmet after the incident revealed that it had been struck from behind by a 9 mm bullet that was fired from Ojeda's pistol. Frank told the OIG he believed that he received the shot while he was crouched below the kitchen window. Frank later determined that he was hit four times during the gunfire exchange: two non-penetrating shots in his ballistic vest, one penetrating shot in his abdomen, and one non-penetrating shot in his helmet.

Don, who was also positioned near the gated doorway, told the OIG that he saw an arm holding a handgun extend out from a door inside the hallway, fire approximately three shots, and then retreat.⁴⁸ Don stated that the gunman repeated this action approximately three times. Don returned semi-automatic fire into the hallway with his M4 carbine after each occasion, firing a total of approximately 28 rounds, or one magazine. Don said he also recalled hearing gunshots originating from the kitchen window to his left, which led him to believe that there was more than one subject firing at the FBI.

Don told the OIG that he saw Frank on the porch squatting against the wall. Frank said he had been hit. Don then stood up at the kitchen window and saw a dark figure standing on the other side. This dark figure immediately began firing rounds at Don through the slatted window. Don said that two rounds passed by his head on the left and one round passed by his head on the right. Don immediately returned semi-automatic fire from his M4 at the gunman, firing approximately 28 rounds through the kitchen window.

At this point, Brian was on the porch near the front door. When Brian heard Frank say he was hit, Brian ran down the porch toward him. Brian told the OIG that as he ran down the porch he was struck by a round on his left side (the side facing the kitchen window) in the Kevlar portion of his armor vest. He stated that after the shot he fell over the porch railing and onto the slope below. Brian said the blow was painful and he initially thought he had been wounded. In fact, the bullet left a large bruise in Brian's side but did not penetrate the vest. Brian later examined his armor and realized he had also been struck on the chest plate by a different shot.

Brian took cover on the embankment below the porch. He told the OIG he saw George crouched under the window to the right of the front door. Brian said he saw a gun inside the window over George's head. Someone was firing the gun without aiming it, "goose-necking" the gun out the window while keeping his head below the window. Brian yelled "get your head down" at

⁴⁸ The door Don described was the doorway from the kitchen into the narrow hallway. (See Figure 7.)

George and fired at the window, aiming high so as to avoid hitting George.⁴⁹ The gun in the window was pulled back, the firing from the house stopped temporarily, and George retreated down the embankment. Firing resumed from the window and Brian fired again at the window.⁵⁰ Frank was still down on the porch.

Several HRT agents told the OIG that at this point in the exchange they saw or heard a burst of automatic gunfire coming from inside the kitchen window. At this point Frank was crouching on the porch below the kitchen window. Frank said he saw the muzzle flash of the weapon firing over his head. Several HRT agents also told the OIG that they saw glass from the kitchen window shatter outward as result of the automatic fire. At least one HRT agent said he saw vegetation being impacted by the automatic fire. George told the OIG that at the moment the automatic gunfire began he was running along the embankment below the porch toward Frank, and that, in response to the burst of gunfire, he dove for cover below the concrete outcropping situated just below the porch. A forensic examination of George's helmet revealed that it was struck by a bullet of indeterminate caliber in the battery case on the left side, which would have been the side facing the kitchen window as George moved toward Frank. George stated he believed he was hit in the helmet during the burst of automatic fire from the kitchen window.

Frank told the OIG that immediately after the first burst of automatic fire above his head subsided, he raised his M4 carbine up to the window and fired several rounds into the house. During his interview, Frank said he did not see anyone in the house when he fired because he was unable to safely raise his head to a level where he could see through the window. He later added that his purpose in firing into the kitchen window was to attempt to eliminate the threat of additional gunfire from the subject. Frank stated that immediately after he fired, a second burst of gunfire came from the window. Several other HRT agents also told the OIG that they recalled multiple bursts of automatic gunfire from the kitchen window.

A total of eight HRT agents told the OIG that they returned fire at the kitchen window from various positions during the exchange of fire. The

⁴⁹ George told the OIG that he did not go on the balcony porch but rather stayed below it and moved along the front edge of the porch floor. George said that he moved toward Frank when he heard that Frank was hit, which could have put him between Brian and the kitchen window when Brian saw the gun being goose-necked.

⁵⁰ Brian told the OIG that he fired a total of 8-10 rounds at this point. However, as discussed in Chapter Four, there were only four shells found at the scene that could be matched to Brian's weapon. Brian acknowledged, and the forensic evidence indicates, that three of Brian's shots (including the later shot that wounded Ojeda) were fired later in the day from a different position. It therefore appears likely that Brian overestimated the number of rounds he fired from his position on the slope below the porch during the exchange of gunfire.

statements of Frank, Don, and Brian are described above. In addition, Ken said he fired 10 to 12 rounds at the muzzle flashes he saw in the kitchen window, shooting from a location on the embankment below the porch, to the right of the front door. Doug said he fired three to five rounds at the window from his position near the gap in the low concrete wall. Tom said that after seeing automatic gunfire from the kitchen window, he fired approximately 10 rounds toward the window from a standing position on the porch near the front door. Scott stated that in response to the burst of automatic fire he returned fire at the kitchen window with approximately 12 to 14 rounds from a position on the embankment below the porch near the kitchen window. Eric (one of the sniper-observers) said that after the second burst of automatic gunfire from the kitchen window, he fired 5 to 10 rounds from a position behind the low concrete wall, aimed at the muzzle flashes he saw.

Six agents at the scene told the OIG that near the end of the gunfire exchange they perceived that several shots were fired from inside the house through the front door, making holes in the door and shattering the wood. One agent stated that he thought that he observed these rounds hit the dirt near the cinder block steps. Three holes in the exterior of the front door of the residence are apparent in photographs taken after the incident. However, according to the Puerto Rico Institute of Forensic Science, these holes were made by shots originating from outside into the residence, and the trajectories of these shots correspond to impacts in the ceiling inside the residence.⁵¹

Many of the agents interviewed by the OIG reported that during the exchange of gunfire they perceived that at least two different weapons were being fired from inside the residence, possibly by two different subjects. The perception of the agents that there might be two subjects firing different weapons was reported to the TOC and recorded in the TOC Log about a half hour after the firing subsided. Several factors were cited to the OIG as the basis for this belief: 1) several agents reported that they heard both automatic and semi-automatic fire from inside the residence, leading them to believe that two different guns were being fired; 2) agents reported that early in the exchange shots were fired both out the kitchen window and out the hallway toward the gated door, leading some agents to believe that there might be two different subjects; and 3) as noted above, six agents misperceived semi-automatic fire coming through the front door of the residence at a moment simultaneous or nearly simultaneous with the bursts of automatic gunfire coming from the kitchen window.

⁵¹ Photographs of the holes through the door and corresponding ceiling impacts are provided in Chapter Five. As explained in Chapter Five, the OIG did not learn about the origin of these shots until after we interviewed the HRT agents. When we attempted to obtain information from the HRT agents regarding this issue, they told the OIG, through their attorney, that they declined to provide voluntary follow-up interviews. We therefore have been unable to identify the agent who fired these rounds.

According to the TOC Log, the initial exchange of gunfire subsided at 4:30 p.m., about two minutes after it began. At this point, Frank and Tom were still on the porch. Scott and Don had taken cover in an alcove near the Red/White corner, out of any line of fire from the kitchen window or the hallway behind the gated door. The other HRT assaulters and Ron from the San Juan FBI were in various locations on the embankment below the porch or behind the low concrete wall at the base of the bank.

At this point, Frank began experiencing severe pain in his abdomen from the bullet wound, and he reported that he was hurt. Other agents threw flash-bang grenades onto the porch as a diversion and George assisted Frank off the porch onto the embankment below it. Additional flash-bangs were detonated and Tom got off the porch. George attempted to search Frank for wounds but initially could not find any. Because they were still exposed on the embankment, George and Frank moved down the embankment and behind the low cement wall, to the right of the gap. Other HRT agents also moved off the embankment into positions of better cover. George resumed his examination of Frank and discovered a wound in the abdomen. George called out that Frank needed to be evacuated.

XI. The Evacuation of the Wounded Agent

As Frank was being helped down the embankment, the agent who was driving the Durango turned it around and backed it up toward the residence, close to the low concrete wall. Two agents assisted Frank into the rear of the vehicle. Bruce, who was an emergency medical technician, got into the vehicle to provide first aid to Frank. At approximately 4:40 p.m., the Durango left Site 1 to transport Frank to a hospital in Mayagüez. At approximately 5:50 p.m., Frank was airlifted by a U.S. Customs Service helicopter to a hospital in San Juan for abdominal surgery. The round that struck Frank damaged his small intestine.

By 9:45 p.m., Frank was out of surgery. A portion of his small intestine was surgically removed. Frank has since recovered and rejoined HRT.

XII. The Standoff

A. The Surrender of Elma Beatriz Rosado Barbosa

At approximately 4:48 p.m., a few minutes after Frank was evacuated from the scene, Ojeda's wife, Elma Beatriz Rosado Barbosa (Rosado), surrendered to the FBI. San Juan FBI SWAT agent Ron – who speaks and understands Spanish – told the OIG that somebody inside the residence yelled

in Spanish, “someone is coming out.”⁵² The front door of the residence opened and Rosado emerged with her hands empty and extended in front of her. Alan, who was at the top of the cinder block steps, told the OIG that he observed someone else’s hands behind Rosado guide her out and then shut the door. Alan said Rosado appeared nervous but not panicked, and initially walked toward the Green side of the residence. Alan told her she could not go that way, grabbed her, and moved her back down the steps to Ken. Ken then placed her face down behind the concrete wall in front of the residence and handcuffed her.

Ron questioned Rosado in Spanish and asked her to help the agents talk to her husband. He also asked her how many people and weapons were in the residence, whether there were explosives, and if anyone was injured. Ron said that Rosado did not respond. Rodger, a San Juan FBI negotiator and native Spanish speaker, also attempted to communicate with Rosado by asking her name and whether anyone other than Ojeda was in the residence.⁵³ He told us that Rosado remained silent and did not answer his questions.

Fratlicelli told the OIG that he ordered Rosado taken to FBI office space in a General Services Administration facility. He also instructed that a hood be placed over her head during part of the transport so she would not learn the location of a facility housing FBI assets. Rosado was removed from the scene at 5:46 p.m. She was ultimately transported to the Metropolitan Detention Center in Guaynabo, Puerto Rico.⁵⁴

B. Communications between the FBI and Ojeda

Ron told the OIG that after his unsuccessful attempt to talk to Rosado he began talking to Ojeda in Spanish. From behind the low cement wall below the residence, Ron yelled for Ojeda to exit the residence with his hands raised. Ojeda asked who everybody was, to which Ron responded, “the FBI.” Ojeda responded that the agents were criminals, imperialists, colonialists, and the mafia. Ron repeated that it was the FBI and asked Ojeda whether he was injured. Ojeda stated that he wanted to talk to the press. Ron told Ojeda that

⁵² As mentioned above, Ron was the only San Juan FBI agent who participated in the initial assault. He was also the only agent present during the assault who was fluent in Spanish. After the initial exchange of gunfire subsided, additional Spanish-speaking San Juan FBI agents arrived at the perimeter, including Rodger, a negotiator.

⁵³ “Rodger” is a pseudonym.

⁵⁴ The following day, September 24, 2005, Fraticelli spoke with Humberto Garcia, the U.S. Attorney for the District of Puerto Rico, and they agreed that it would not be possible to convict Rosado for harboring a fugitive or assaulting a federal officer. She was therefore released that day. Rosado’s hands were never tested for gunshot residue during her arrest or detention.

the press was not coming. Ojeda refused to tell Ron whether anyone else was in the house and said that he would only talk to a particular reporter, Jesus Dávila.⁵⁵ Ron told him that Dávila was not coming and again asked Ojeda whether he was injured. Ojeda responded, “I’m here.”

Ojeda continued to refuse to surrender and began speaking in revolutionary slogans that, according to Ron, sounded like a rehearsed speech. A radio could be heard playing in the residence. Ron asked Ojeda whether they could speak by telephone, but Ojeda said he did not have one. Ron estimated that he continued trying to talk Ojeda out of the residence for 30 minutes. According to Ron, during this time, Ojeda stated in Spanish, “I know you are the FBI,” and words to the effect of, “you know what I want, shut up.”

The San Juan FBI had sent two certified crisis negotiators to the scene, SAs Larry and Rodger, as well as an ASAC who was also a negotiator.⁵⁶ Larry told us that he was able to hear from his location on the hill above the house that Ron was trying to communicate with Ojeda. At some point, Larry got word that HRT asked for a negotiator. Larry told us it is standard practice to use two negotiators when talking to a subject – one to engage the subject and the other to keep focus. Here, however, he was told HRT requested only one. Rodger, a Spanish speaker who Larry said was well-versed in Puerto Rican culture, was sent to the Ojeda residence.

Rodger arrived at the residence at approximately 5:30 p.m. and took a position near a window inside the garden shed below the gazebo. (See Figure 6.) Rodger told the OIG that he called out to Ojeda by his first name, but did not get a response. Ron, who had not moved from his position, told Rodger to call Ojeda “Señor” because he had previously responded to that when Ron addressed him that way. Rodger told Ron that if he already had contact with Ojeda, he should try again.

Rodger joined Ron’s calls to Ojeda, and Ojeda eventually responded. According to Rodger, Ojeda stated, “Traigan al periodista Jesus Dávila,” which translated meant, “Bring the journalist Jesus Dávila.” Rodger asked Ojeda why he wanted Dávila brought, but Ojeda did not respond. Rodger asked a second time, but Ojeda only said, “Traigan a Jesus Dávila,” which translated meant, “Bring Jesus Dávila.” Rodger stated that Ojeda repeated this approximately three times.

⁵⁵ Dávila is a journalist for El Diario La Prensa, a Spanish language newspaper in New York City that covers events in Puerto Rico.

⁵⁶ “Larry” is a pseudonym. “Rodger” was previously identified as a pseudonym.

During this period, bottles of water were being tossed from one agent to another around the perimeter. According to Rodger, when the bottles hit the ground, Ojeda yelled “cuidado, cuidado ahi,” meaning “be careful, be careful there.”

Rodger said he told a HRT agent in the shed with him that he needed another negotiator. Rodger stated that he felt a second negotiator would facilitate the negotiation process. The agent told Rodger that he could not leave his post. Rodger contacted Fraticelli with his cell phone. He told Fraticelli about Ojeda’s request for Dávila and who Dávila was. Rodger told the OIG he did not mention anything about surrender because he did not recall Ojeda discussing it prior to this call. Rodger said that Fraticelli spoke with someone and then told him that no one would be brought to the scene because it was too dangerous.

Fraticelli told the OIG that he recalled Rodger calling him from the scene regarding Ojeda’s demand for the reporter Dávila. According to Fraticelli, he immediately told Rodger to tell Ojeda that the reporter would not be brought to the scene and that he should come out with his hands up. Fraticelli said that he made this decision immediately, because he had been trained not to insert a third party – such as a reporter – into a gun fight situation.

Rodger told the OIG that based on his negotiations training he did not inform Ojeda of Fraticelli’s decision, and instead continued calling out to him. At some point, Ojeda responded, “Yo no voy a negociar con ninguno de ustedes hasta que no traigan al periodista Jesus Dávila. Entonces podemos hablar de mi entrega.” The statement translated meant, “I am not going to negotiate with any of you until you bring the journalist Jesus Dávila. Then we can talk about my surrender.”

Ojeda’s use of the word “surrender” apparently reached the TOC, but it is not clear that this information ever reached Fraticelli. The TOC Log contained two entries, both at 5:37 p.m., reporting that the negotiators were communicating with Ojeda and that he would surrender if a reporter was brought to the scene (although according to Rodger’s recollection this is not exactly what Ojeda actually stated). HRT Deputy Commander Steve told the OIG that he recalled hearing over the radio about Ojeda’s offer to surrender if a specific reporter was brought to the scene, but said he did not discuss Ojeda’s demand with Fraticelli or anyone else. Fraticelli told the OIG that he did not recall hearing that Ojeda had discussed “surrender.” Fraticelli’s recollection is consistent with Rodger’s statement that his first conversation with Fraticelli occurred before Ojeda had used that word. Rodger told us that at some point he made a second cell phone call to Fraticelli, but could not recall whether this was before or after Ojeda used the word “surrender.”

Rodger asked Ojeda if he had a telephone so they could talk that way. Ojeda replied that he did not. Rodger offered to provide Ojeda a phone, but he did not respond. Rodger continued to call out to Ojeda, telling him that things would be more difficult if he did not communicate. Ojeda still did not respond.

Based on the TOC Log and agent statements, we believe that Rodger's communications with Ojeda took place between approximately 5:30 and 6:00 p.m.

XIII. Activation of the Strategic Information and Operations Center at FBI Headquarters

According to a log maintained in the San Juan FBI command post in the federal office building in San Juan, at 4:40 p.m. the San Juan FBI notified the Strategic Information and Operations Center (SIOC) in FBI Headquarters about the shooting incident in Puerto Rico. The San Juan FBI called SIOC with more details about the incident at 5:18 p.m. Information regarding the shooting also was relayed to the FBI's Domestic Terrorism Operations Unit (DTOU) in the Counterterrorism Division (CTD) at FBI Headquarters.⁵⁷ This information was relayed to senior managers in the Counterterrorism Division as it was received. Gary Bald (the Executive Assistant Director (EAD) for the National Security Branch, which contains the Counterterrorism and Counterintelligence Divisions, and the Directorate of Intelligence), Willie Hulon (Assistant Director (AD) for CTD), and John Lewis (Deputy Assistant Director (DAD) for CTD) subsequently began monitoring the events in Puerto Rico.

At approximately 5:30 p.m., shortly after learning of the exchange of gunfire between Ojeda and HRT, DAD Lewis ordered the activation of a command post within SIOC to monitor the events in Puerto Rico, coordinate communication with the TOC and the San Juan FBI, and provide guidance to Fraticelli. The OIG was told that activating SIOC under these circumstances was standard operating procedure and that it did not automatically shift command of the operation from the field to FBI Headquarters. We were told that as the SAC for the San Juan FBI, Fraticelli remained in charge.

The SIOC was staffed with personnel from DTOU. Based on entries in the SIOC log maintained during the event, FBI Headquarters' involvement in the incident was initially limited to monitoring events in real time and coordinating the FBI's response to the incident by alerting several management

⁵⁷ The DTOU oversees FBI domestic terrorism operations (such as the Macheteros investigation) and had supported the San Juan FBI's decision to use HRT to locate and apprehend Ojeda. DTOU had been briefed by the San Juan FBI case agent regarding various critical events as the Ojeda arrest operation unfolded.

officials and SWAT components from FBI field offices to prepare for possible deployment to Puerto Rico in the event the situation became prolonged.

AD Hulon told us that he spoke with Fraticelli shortly after learning of the exchange of gunfire. He said they discussed the need to establish and maintain a perimeter and begin negotiating Ojeda out of the residence – standard FBI procedure with a barricaded subject, according to Hulon. Fraticelli asked Hulon during this call for additional SAC support in Puerto Rico and specifically requested that the SAC from the FBI's Dallas Division (Dallas FBI) be sent. Fraticelli told us that he made this request because the Dallas FBI SAC was a Spanish speaker and had an understanding of Puerto Rico from the five years he served there as an agent earlier in his career. Fraticelli also said that the SAC had been his mentor and that he trusted his judgment. Fraticelli stated that he requested both SAC and ASAC support because he believed San Juan was faced with a protracted situation and those involved to that point in time had already worked for several days with limited rest. Fraticelli told us that after he spoke with Hulon he called the SAC to see if he was available to come to Puerto Rico. The SAC responded that he was.

Hulon told us that he assumed Fraticelli's request for the Dallas FBI SAC was made because Fraticelli had previously served under him as an ASAC in Dallas and because the SAC had experience working as an agent in Puerto Rico. However, Hulon also said he found the request unusual. He told us that in his experience SACs typically turn to their ASACs for support during division operations; the need for additional SAC support is not an immediate consideration and Hulon said that Fraticelli's request for help so early in the event was somewhat out of the ordinary. Hulon said Fraticelli was fairly insistent about the request and characterized Fraticelli during this call as intense, excitable, and stressed. Hulon said he told EAD Bald about Fraticelli's request and shared his impression that it was unusual. As we explain below, Fraticelli's specific request for the Dallas FBI SAC was a factor in FBI Headquarters' decision to require that Fraticelli obtain CTD's approval for any plan to enter Ojeda's residence.

XIV. Crowds Assemble at Several Locations in Puerto Rico

Reports of an incident at Ojeda's residence involving the FBI were broadcast on local radio shortly after the exchange of gunfire between Ojeda and HRT. The reports claimed Ojeda had been arrested and that the FBI had picked El Grito de Lares as the day on which to take the action because of its significance to the independence movement. It was also reported that an FBI agent (Frank was not identified by name) had been shot and transported to the Mayagüez Medical Center, prompting one radio station to announce, "FUPI has

been rallied to attack the dog at Mayagüez Medical Center.”⁵⁸ POPR officers were dispatched to the hospital to provide security from the crowds that appeared in response to the radio announcement. In addition, San Juan FBI ASAC Adam⁵⁹ arranged for FBI agents to provide Frank with 24-hour security. Adam characterized the scene at the hospital as a “media circus.”

The combination of the radio reporting and the conspicuousness of the operation – the loud exchange of gunfire preceded and followed by multiple helicopters circling over the location – caught the public’s attention. Citizens, including members of the press, soon gathered on a road near the scene. According to the FBI, agents from the U.S. Bureau of Alcohol, Tobacco and Firearms, as well as officers from POPR, arrived to provide outer perimeter security shortly after the exchange of gunfire. According to POPR Mayagüez Area Commander Héctor Agosto, POPR deployed 40 to 50 officers to the location. Agents from the San Juan FBI SWAT primarily took up positions along an inner perimeter close to and around Ojeda’s residence.

The FBI and POPR worked together to coordinate road blocks and control access to the area. The San Juan FBI agents we interviewed stated that the POPR did an effective job controlling the crowd even as it grew agitated as the night progressed. The OIG was told the crowd numbered approximately 100 people by 5:30 p.m. and that it chanted at various times, “FBI assassins.” At some point during the night, it began raining. A POPR commander responsible for coordinating perimeter security told the OIG that the rain caused a considerable number of people to leave the area, reducing the potential for a riot.

XV. The Decision to Send Relief HRT Teams from Quantico

At approximately the same time that the conversations between the FBI negotiator and Ojeda were taking place (between 5:00 and 6:00 p.m.), the decision was made to send a new team of HRT agents to the scene from Quantico to relieve the team that was in a standoff at the scene. In the course of the afternoon of September 23, HRT Deputy Commander Steve provided several telephone updates to HRT Commander Craig in Virginia. Craig told the OIG that after the initial exchange of gunfire, Steve asked Craig to deploy additional HRT resources from Quantico to Puerto Rico because the HRT agents at the scene were fatigued after being awake for up to 48 hours. Craig said that he called the Acting SAC for CIRG and asked him to contact FBI

⁵⁸ FUPI is the Spanish acronym for the Pro-Independence University Federation (Federación Universitaria Pro-Independencia). FUPI is an organization of students primarily studying at the University of Puerto Rico, dedicated to the goal of an independent Puerto Rico.

⁵⁹ “Adam” is a pseudonym.

Executive Assistant Director Ashley to obtain verbal authority to deploy HRT's Blue Squad and the remainder of Gold Squad. After approval was granted, Craig called the Unit Chief for CIRG's Operations and Training Unit, and asked him to prepare the HRT teams for deployment later that night.

According to Steve, he spoke with Craig on several occasions on September 23 and said that they discussed sending reinforcements to the scene. Steve said that he told Craig that replacements would only be needed if the situation was not resolved that night and carried into the next day. Steve said he also told Craig that evidence recovery would likely continue through the daylight hours on September 24 even if the standoff were resolved that night (September 23).

At 5:33 p.m. on September 23, the HRT agents at the scene were told that because some of them had gone without rest for 50 hours or more, plans were being made to relieve them but it might take a day for the fresh agents to arrive.

XVI. Ojeda Struck by a Shot from the Perimeter

A. Brian's Position

Immediately after Frank was evacuated, the HRT agents began a "cover and withdrawal" process to permit the agents who were exposed on the bank to move back to better cover.

A makeshift on-scene command post was established behind the garden shed. Don and Scott remained in the alcove around the Red/White corner. Brian told the OIG that he became concerned that Don and Scott were exposed in that location because someone could come quickly out of the gated door and fire at them around the corner, and they would have no cover. Brian therefore moved back behind the shed, climbed up the steep hill behind and to the right of the shed, and moved toward the house.

There was a retaining wall part of the way up the hillside running to the right of the shed toward the house. (See Figure 6.) Brian stated that there was an area behind the retaining wall that was large enough to provide him with a crawl space as he moved toward the house. Brian stated that while he moved along the wall he did not receive any specific instructions.

Brian said he heard discussions in Spanish (which he does not speak) between Ojeda and a San Juan FBI agent during the time he was moving into position on the hillside and while he was covering the house. However, Brian told us that at no time did he hear anyone from the FBI say that the subject

FIGURE 9
View of Residence from Approximate Position of Shooter



was discussing the possibility of surrender. He also said that at some point these discussions seemed to come to an end.

Brian told the OIG he was trying to get a clear view of Don and Scott, and also to get a view of the gated door and the window between that door and the front door. Brian said he found a position behind the wall where he could make eye contact with Don and Scott and also cover the window and the gated door. Brian said his head and shoulders were above the retaining wall and his M4 was pointed at the house. Figure 9 is a photograph of the residence taken from a location close to where Brian was positioned.

Ken told the OIG that he was instructed to take a similar position behind the retaining wall to see and support Scott and Don. Ken stated that he climbed up the hillside and crawled forward to a position which was about five feet to the left of Brian. Ken said that he felt very exposed at this location because his head and part of his body were above the wall and in view of anyone in the house. Ken said that Brian was in a similar position of exposure.

During this time frame, there were discussions among the HRT agents at the scene and between Doug and the TOC regarding a course of action. Doug moved from the command post behind the garden shed around the Red side of the residence and was able to get on the roof of the house. He moved near the alcove in order to consult with Scott and Don. Brian said he was not given any new instructions and that he continued to cover the house from his position.

B. The Shots

Brian was at an elevation slightly higher than the kitchen window. He told the OIG that he shifted his attention between the window and the gated door. He could also see Don and Scott in the alcove. Brian's view into the window was at a fairly sharp angle from the right. He told the OIG he could see the side of a light-colored refrigerator inside the left half of the window. The refrigerator took up about half of his field of view inside the window. The other half was in darkness.

Brian told the OIG that while in his position on the wall, he saw movement in the kitchen window on several occasions but that he took no action because he could not identify a threat due to the dark conditions.

However, Brian said that at one point, he saw some kind of movement inside the window and then saw the refrigerator door open and the refrigerator light go on. Brian stated that he saw an individual crouched down with a gun in his left hand pointing out the window. He said he could not see the individual's eyes or tell where he was looking. Brian stated that the individual clearly had the weapon pointed in the direction of Brian and his teammates,

but he was unsure whether the individual was sighting the gun at anyone in particular.

Brian told the OIG that at that moment he realized that the individual was armed and that Brian was visible to him. Brian said he was aware that another agent had been wounded by a shot from inside the house and that Brian himself had been hit by at least one shot from inside the house. Brian said he was also aware the individual had previously fired his weapon from the window he was currently positioned at and had shot Brian from that window. Brian stated that he concluded that the individual posed an imminent threat to himself and other agents. Brian took his weapon off the “safe” setting, sighted the weapon where he believed the person’s center mass to be, and fired three rounds in rapid succession in single-fire mode. Brian estimated that about three seconds elapsed between the time he saw the refrigerator light come on and the time he fired his weapon. Brian told the OIG he did not see the refrigerator light after he took the shots and that it was possible that the individual was closing the door of the refrigerator at the time Brian took the shots. According to the TOC Log, Brian fired the three shots at 6:08 p.m.

Brian said that he had no communications with anyone between the time he saw the light come on and the time he fired his weapon. None of the other agents interviewed by the OIG reported any communications with Brian at that time.

Several agents told the OIG that immediately after hearing three shots from the perimeter, they heard Ojeda scream “ay, ay, ay.” Brian stated that the scream trailed off into a gurgling sound that he believed indicated a significant injury to the lung or airway. Several agents reported hearing noise from inside the house that sounded like someone stumbling or falling down, objects falling, or moving furniture. Bill stated that he heard a moan after the screams. No witnesses reported hearing any other sounds from the subject, although the radio continued to play inside the house.

Scott (who was in the alcove) and Ken (who was to Brian’s left behind the wall on the hillside) were both able to identify Brian as the source of the three shots. Several agents told the OIG that they heard Brian state over the radio that he thought he had hit the subject. No other agent reported being in a position to see what Brian saw in the window at the moment he fired the shots, however. Ken was the only agent near Brian, and he told the OIG that from his position he could see the gated door but not the window.

At approximately 6:16 p.m., the SIOC was informed that shots had been fired from the perimeter and that Ojeda might have been hit. Hulon conferred with Bald, and they agreed that the best course of action at that point was to

hold the perimeter.⁶⁰ Hulon stated that he communicated this recommendation to Fraticelli.

XVII. The Limited Breach of the Residence

Doug (the assault team leader at the scene) told the OIG that after he heard the perimeter shots he requested approval from the TOC to conduct a “law enforcement clear” of the residence. At approximately 6:13 p.m., HRT Deputy Commander Steve advised Doug that entry should not be attempted yet. Steve told the OIG this decision was based on the possibility that Ojeda had not been disabled and that additional armed and hostile subjects might be in the residence.

At approximately 6:22 p.m., as nightfall approached, Steve approved Doug’s request to conduct a “limited breach” of the gated door near the Red/White corner of the residence in anticipation of entering under cover of darkness. Steve told us that he did not discuss this request with Fraticelli. However, Fraticelli told us that Steve asked his permission to take this action and that he gave it.

At approximately 6:49 p.m., an HRT agent detonated an explosive charge that had been placed on the wooden gate covering the doorway near the Red/White corner. HRT agents also detonated flash bangs at other locations to create a diversion. The charge failed to break open the wooden gate, however, so one of the agents breached the gate by physically prying it open.

Consistent with their instructions, the agents did not enter the gated doorway. However, the agents were able to see through the doorway into the narrow hallway leading toward the back of the house. (See Figure 7.) They could also see the kitchen door cracked open on the left side of the hallway interior. The agents did not see or hear any activity inside the house in response to the explosive charge. Doug reported to the TOC that the agents were not able to see any persons or bodies down the hallway past the breached door. This information was relayed to the SIOC a few minutes later.

Hulon told the OIG that at some point after he was informed that Ojeda may have been hit, he called HRT Commander Craig in Quantico, Virginia. Hulon told us that he spoke with Craig several times from SIOC to discuss the situation and knew that Craig was also having conversations with HRT in

⁶⁰ Hulon told us that he recalled hearing that the shots were in response to gunfire from inside the residence, although he said the initial reporting was not clear on this point. This understanding is reflected in contemporaneous notes taken by Bald. However, we found no evidence that Brian’s shots were fired in response to gunfire from the residence and believe what Hulon heard may have been inaccurate reporting from the TOC.

Puerto Rico. Hulon said he called Craig because he trusted his judgment and was aware of his knowledge and expertise regarding HRT's capabilities. According to Hulon, Craig told him during this call that Steve was talking about entering the residence using night vision goggles. Craig told Hulon that this was not a good idea and said that HRT should stand down and not enter the residence that night. Hulon said he agreed. He told us that he got the sense Craig might have already told Steve not to enter the residence, but that he was not certain this was the case.

Craig told the OIG he recalled this conversation with Hulon and said that Hulon solicited his opinion about how to proceed. Craig said he recommended that HRT stand down and maintain a perimeter around the residence until the HRT deployment from Quantico arrived in relief. Craig said Hulon concurred. Craig stated that Hulon then asked who was in charge of the scene, and Craig told him HRT was unless Hulon ordered otherwise.⁶¹

XVIII. Decisions Immediately After the Limited Breach

The OIG received conflicting accounts regarding the decision-making immediately after the limited breach at 6:49 p.m. Craig said that Steve wanted to clear the residence at that point because he felt the assaulters had a tactical advantage. Craig told us that he disagreed and ordered Steve not to enter. Craig stated he based this decision on several considerations: (1) the possibility that there might be more than one shooter, (2) the subject(s) had demonstrated a willingness to kill FBI agents, (3) the agents at the scene were tired, (4) the subject(s) appeared to be prepared for an encounter and may have established a bunker inside the residence, rigged improvised explosive devices, or possessed a hand grenade, (5) it was not a hostage situation, (6) the subject(s) had already shot three HRT agents, one of whom required evacuation, (7) any advantage of speed or surprise was lost once the perimeter had been established after the initial exchange of gunfire, (8) it was not prudent to further risk HRT lives, and (9) the HRT agents being sent from Quantico would be rested and have with them a robot and bomb technicians.

However, Steve's statements to the OIG were in conflict with Craig's assertion that he told Steve not to enter the residence after the limited breach. Steve said he spoke with Craig several times on Friday, September 23, following the exchange of gunfire between Ojeda and HRT, and that Craig did not give him any instructions or advice. In fact, according to Steve, as night

⁶¹ In fact, the SAC was in charge at this time. As we discuss in Chapter 7, Craig's statement to Hulon figured prominently in FBI Headquarters' decision to require the SAC to obtain its approval for any plan to enter the residence.

fell the TOC began planning an operation to clear the residence under cover of darkness using night vision goggles and stealth.

Fratricelli's recollection of events was consistent with Steve's. Fraticelli said he fully intended to authorize entering the residence after he learned Ojeda had likely been shot. He told us that as night fell, HRT began preparing for the "law enforcement clear" by calling out to Ojeda, making the limited breach, assessing entry points, assembling an entry team, and ensuring that the agents had night vision goggles.

In addition, Fraticelli approved HRT's request to cut the electricity to the residence to increase HRT's tactical advantage during the entry. Fraticelli told us there was a significant delay in actually getting the electricity turned off: the utility company was called at 6:34 p.m., but the electricity was not turned off until approximately 8:09 p.m. Fraticelli said that he was aware Steve had spoken with Craig some time after the exchange of gunfire between Ojeda and HRT, but Fraticelli believed Steve was just providing an update on the situation. Fraticelli told us that he did not know if Craig ever gave Steve an order or a recommendation not to enter the residence.

The TOC Log supports Steve's and Fraticelli's statements that HRT was planning a law enforcement clear of the residence following the limited breach. According to entries made between 7:05 and 7:58 p.m., the HRT agents were checking that they had the proper gear (body armor, helmets, and night vision goggles), assessing alternative entry points, and determining how many agents were needed. By 7:41 p.m., Doug had a 7-man team ready to enter the residence. There are no entries in the TOC Log reflecting any order from Craig not to enter.

XIX. FBI Headquarters Assumes Control of the Law Enforcement Clear

At FBI Headquarters, EAD Bald became concerned with Fraticelli's ability to manage the situation in Puerto Rico when Hulon told him about Fraticelli's request for help. Bald said that his impression, based on his conversation with Hulon, was that Fraticelli was overwhelmed and lacked the confidence in his own ability to manage the situation. He said this impression was reinforced when Fraticelli inquired about the status of his request for the Dallas FBI SAC in subsequent calls with Hulon. Bald said that in his experience, SACs receive outside SAC assistance when the situation is prolonged. He felt that Fraticelli's request was attributable to a lack of confidence, not to ensure an extended SAC presence. We asked Hulon whether it was fair for Bald to draw the impression he did based on what Hulon told him about his conversations with Fraticelli, and Hulon told us he believed that it was.

Bald said that his concerns regarding Fraticelli were confirmed when he was told at approximately 7:00 p.m. that an HRT agent had gotten close enough to the residence to look inside through a window.⁶² In Bald's view, the agent's actions were inconsistent with the earlier guidance he believed Hulon had given Fraticelli, which was to hold the perimeter. Bald said he was also concerned that HRT was making decisions independent of Fraticelli. In his contemporaneous notes, Bald wrote, "call [Craig]. Who is calling shots now – Lou [Fraticelli]? CIRG? CTD?" Hulon made this call to Craig – we believe at approximately 7:25 p.m. – who told him that HRT had the lead. Told this by Hulon, Bald thought Craig was wrong and believed CTD, through the SAC, should have control. Bald addressed the issue with EAD Ashley, who agreed that CTD had the lead and that HRT should report to the substantive division it is supporting (CTD in this operation).⁶³

Based on his impression that Fraticelli was overwhelmed by events and lacked the confidence to manage the situation, together with a concern that HRT might be acting independent of the SAC, Bald concluded that he needed to act to ensure there was a proper chain of command in place before any further deliberate action was taken at the scene. He therefore instructed Hulon sometime shortly before 8:00 p.m. that any deliberate assault or entry of the residence would have to be approved by Hulon.

Hulon told the OIG that he was aware of Bald's concerns about who was in charge of the operation and knew that Bald and Ashley had discussed the subject. Hulon also said that while he personally was not concerned at that time about management of the operation, he did not disagree with Bald's decision because he believed Fraticelli probably needed some support, which Hulon had been providing up to that point. Hulon told us that he did not consider the decision to give him approval authority over the entry of the residence unusual. He said he believed Bald's decision was intended to eliminate any command confusion, clearly delineate that one entity was responsible for decision-making, and provide as much support to the SAC as

⁶² Bald told us that Hulon provided this information to him, and his contemporaneous notes support this recollection. However, Hulon said that while he recalled talking with Bald about making sure HRT did not enter the residence prematurely, he did not recall any reporting about an agent looking through a window and therefore did not believe he could have passed that information to Bald. Fraticelli, who would have been Hulon's primary source of information about events at the scene, also told us that he did not recall any such reporting. We did not find any evidence during our investigation that an agent looked through a window around the time Bald recalled receiving the information; therefore, either the reporting or Bald's understanding of the reporting was erroneous.

⁶³ We interviewed Craig before we interviewed Bald and Hulon. We therefore could not ask Craig in that interview about Bald's interpretation of his statement to Hulon that HRT was in charge of the scene unless Hulon said otherwise. When we asked to conduct a follow-up interview with Craig, his counsel declined our request for the follow-up interview.

possible. Hulon added that Fraticelli still retained authority to act in exigent circumstances.

XX. Counterterrorism Division Rejects a Nighttime Entry

At 8:05 p.m., Hulon called Fraticelli and told him that there would be no entry of the residence without Hulon's approval. During this call, Fraticelli recommended that a nighttime entry be conducted and HRT Deputy Commander Steve explained to Hulon that HRT could take advantage of the darkness. Although Hulon did not believe this was the best course of action, he left open the possibility by requesting that HRT draft an entry plan and provide it to FBI Headquarters for consideration. HRT began drafting such a plan after this call ended.⁶⁴

However, a short time later, Hulon and Bald discussed the comparative merits of entering the house at night or during daylight, and decided the entry should be postponed until the next day.

Fraticelli told us that he recalled having a second phone conversation with Hulon at some point that evening – we believe before 9:00 p.m. – during which Hulon conveyed this decision. However, the HRT agents at the scene were not notified until 11:33 p.m. The reasons for Hulon and Bald's decision, the circumstances surrounding the delay in the decision reaching HRT, and the HRT agents' reaction to the decision are set forth below.

A. Reasons for the Decision

Bald and Hulon each identified several reasons for not approving a plan to enter the residence the night of September 23. First, they believed, based on reporting from Fraticelli, Steve, and the TOC, that there might be a second shooter in the residence. This belief was based on the HRT agents' perceptions of the location and sound of gunfire being directed at them as they assaulted the residence.

Second, although the reporting indicated that Ojeda might have been hit by the shots from the perimeter, it was not known whether he was incapacitated and therefore whether he still presented a threat to agents entering the residence. The fact that Ojeda had already shot at the agents and had refused to surrender with his wife or at any time during negotiations indicated that Ojeda would resist any effort to apprehend him.

⁶⁴ By 8:45 p.m., the HRT agents at the scene were told that FBI Headquarters had to approve any entry plan and that the TOC was drafting one.

Third, Ojeda's intimate knowledge of the interior of the residence – and HRT's complete lack of knowledge – countered the tactical advantage HRT might have had at night using night vision goggles.

Fourth, Hulon told us that he also felt the HRT agents' fatigue factored against entering that night. (Some of the agents had been without rest for up to 48 hours.)

Fifth, Hulon considered the possibility, based on the history of Ojeda and the Macheteros, that the residence contained improvised explosive devices that would be more difficult to detect during a nighttime entry.

Sixth, Hulon told us that while he was aware that Ojeda might have been hit by the perimeter shots and in need of medical attention, this significant factor favoring a night entry had to be balanced against the other factors favoring a delay. Hulon told us that the decision to delay entry was not made to let Ojeda bleed to death. In Hulon's judgment, which was informed by HRT Commander Craig's recommendation and the discussion with Bald, waiting until the next day to enter the residence was the better course of action. Bald, who was also aware that Ojeda might have been hit by the perimeter shots, stated that Ojeda's possible need for medical attention was a consideration but believed the factors favoring a carefully planned deliberate action outweighed Ojeda's uncertain needs.

B. Communication of the Final Decision

Even though Hulon did not think HRT should conduct a nighttime entry, he told Fraticelli and Steve during the 8:05 p.m. telephone call to put a nighttime entry plan in writing and send it to FBI Headquarters for review. Hulon told us that he asked for the plan in writing because he considered it standard procedure and a written plan would allow FBI Headquarters to carefully review the proposal. Hulon stated that he did not think it would take more than 30 minutes to draft the plan, particularly if HRT was ready at that time to enter the residence and just waiting for approval. HRT Deputy Commander Steve said he told Hulon the plan could be provided within an hour. At the end of the call with Hulon, both Steve and Fraticelli believed that a nighttime entry might still be conducted.⁶⁵

Hulon told us that he spoke with Bald about the nighttime entry option after his call with Fraticelli and Steve. Bald said that he recalled talking to

⁶⁵ We asked Bald whether there is a requirement that entry plans be provided in writing and he said there is not. He told us that he believes such plans should be in writing if time permits because doing so decreases the chance for misunderstanding or confusion. However, Bald said there would have been nothing wrong with proposing the entry plan orally in this case.

Hulon about the comparative merits of a nighttime and daytime entry and characterized the conversation as a brainstorming discussion. Bald said that although Hulon had authority to make the entry decision without Bald's approval, Bald thought it was prudent for Hulon to discuss the matter with him. Both Hulon and Bald told us that they agreed in this conversation that a nighttime entry was not a good idea. Hulon told us that he considered this judgment a final decision on the matter and recalled that the conversation took place sometime before 9:00 p.m.

However, Hulon said he could not recall whether he explicitly communicated this decision to Fraticelli or Steve after the conversation with Bald. Hulon told us that he assumed the decision was understood because he had not received an entry plan and because Craig was in contact with Fraticelli and Steve regarding the relief HRT agents being sent from Quantico.

Fraticelli told us that he recalled a second phone conversation with Hulon that evening during which Hulon said they had decided against a nighttime entry. Fraticelli said Hulon told him that the perimeter should be maintained and that a new HRT team was being sent from Quantico to conduct the entry the next day.

Apparently, Steve was not made aware of Hulon's decision because HRT did in fact draft an entry plan and fax it FBI Headquarters later that evening, at 11:25 p.m. By that time, Hulon and Lewis had left FBI Headquarters for the night.⁶⁶ The HRT plan, drafted as a Fragmentary Order, stated:

This type of entry must be conducted at night-time gives the HRT operators the advantage of sight that the subject will not have. The same type of operation conducted during daylight hours exposes the HRT Operators to unnecessary risk and provides equal advantage to the subject because he will be able to see as well as the Operators.

Tactically, the plan called for HRT agents to enter the White side of the residence through the breached wooden gate and the kitchen door inside it, take the subject into custody, and transport him to a designated holding area or medical facility. The order stated, "if the subject is still alive, but unable to move to surrender, then we have an obligation to assess his condition and render medical assistance." The order also indicated that the power to the residence had been cut off and that the agents would utilize night vision goggles and infrared lasers. The order stated, "[a]t this point, it is anticipated

⁶⁶ The SIOC Log indicates that Hulon and Lewis departed FBI Headquarters at 11:15 p.m. Bald had left FBI Headquarters earlier that evening.

this type of entry is the safest manner available in which to successfully resolve this crisis with the least amount of risk to FBI personnel and the subject.”

Hulon and Lewis did not see the nighttime entry plan. Both officials told us that when they left FBI Headquarters that night – at approximately 11:15 p.m. according to the SIOC log – they did not believe the entry decision was still pending. Hulon said he felt a final decision had been made. Lewis recalled this decision being conveyed to him earlier that evening. Hulon, who reviewed the entry plan for the first time with OIG investigators, also said he was surprised that it took over three hours for the plan to be drafted and faxed, particularly in light of what he considered to be the plan’s relative simplicity and brevity.

The decision to delay the entry until the next day did not reach the HRT agents until late in the night, following Fraticelli and Steve’s attempt to persuade DAD Lewis that a nighttime entry was the best course of action. Fraticelli told us that he hoped Lewis, if persuaded, could in turn persuade Hulon, who Fraticelli knew from his earlier conversation had decided against a nighttime entry.

Fraticelli said he called Lewis and emphasized to him the security concerns at the scene created by the large crowds of Macheteros sympathizers, and the possibility that Ojeda might still be alive and in need of medical attention. Fraticelli told us that Lewis, who gave the impression that Hulon had gone home for the night, said he would talk to Hulon. Fraticelli told us that Lewis called back approximately 15 or 20 minutes later and told him that he had spoken to Hulon, who had rejected the proposal. Steve told us that Fraticelli announced after he spoke with Lewis that there would be no entry that night and that a fresh HRT team was being brought down to enter the next morning. According to the TOC Log, the HRT agents at the scene were informed at 11:33 p.m. that FBI Headquarters had rejected the proposed nighttime entry. This was the first time that the HRT agents were informed that there would not be a nighttime entry.

Lewis told us that he did not recall a conversation with Fraticelli late in the evening on September 23 in which Fraticelli tried to persuade him to obtain approval to enter the residence that night. Lewis said that by this time he believed Hulon had already made a final decision. However, Lewis did recall having a brief conversation with Hulon that evening about entering the residence to provide medical care to Ojeda if needed and about the SAC’s concern regarding hostile crowds. Lewis said Hulon reiterated in this conversation his decision not to enter until the next day.

Hulon did recall speaking with Lewis by cell phone after they left FBI Headquarters at about 11:15 p.m. and drove separately to their homes. Hulon said they discussed the decision to enter the residence the next day instead of

that night, but Hulon could not recall any details of the conversation and did not know whether Lewis had a prior call with Fraticelli that prompted the discussion.

C. HRT Agents' Response to the Decision

Many of the HRT agents at the scene strongly disagreed with the decision to reject the nighttime entry and wait until the next day. In fact, several told us that they believed HRT should have entered the residence shortly after the limited breach of the gated door. Don, who was located in the alcove when the door was breached, told the OIG that he repeatedly sought permission from Doug to enter the residence following this action. Don identified to us several reasons for believing this was the best course of action, including that it would enable HRT to take custody of any other persons in the house, render the scene safe for the HRT and San Juan FBI agents on the front perimeter of the residence, and administer medical aid to Ojeda. Don and other HRT agents at the scene told us they were trained Emergency Medical Technicians capable of rendering emergency medical care.

Scott, who was in the alcove with Don when the gated door was breached, echoed Don's reasons for wanting to enter the house immediately after the breach. Scott stated that the approaching darkness would have given HRT a significant tactical advantage in entering the house, and it also created a security risk for the San Juan FBI agents at the perimeter who did not have night vision goggles. Scott said this had the potential to compromise the San Juan FBI agents' ability to distinguish between HRT agents and members of the public Scott heard gathering near the scene, as well as the San Juan FBI agents' ability to keep members of the public from penetrating the outer perimeter. Scott also noted that the batteries for the radios and night vision goggles deplete over time and that the HRT agents' increasing fatigue would create more potential for mistakes and exposure to danger.

Red Squad Supervisor Doug told us he also favored entering the residence that night because the assault team would have the advantage of the cover of darkness. However, consistent with instructions he was receiving from the TOC, Doug declined the agents' requests for permission to enter.

Most of the agents told us they were under the impression that FBI Headquarters made the decision not to enter the night of September 23 primarily out of concern for the agents' fatigue and emotional state.⁶⁷ Some also believed that the possibility of explosives or a second shooter in the

⁶⁷ However, HRT Deputy Commander Steve told us that he never heard that emotions or fatigue were among the reasons given for not entering on September 23. He said that he was told FBI Headquarters simply did not think a nighttime entry was worth the risk.

residence were factors. The agents stated, however, that they believed HRT was capable of entering the residence that night. For example, Paul told us he was upset with the decision because he was confident the agents at the scene could conduct the entry and believed waiting until daylight actually increased the danger. He said HRT trains for the very circumstances it faced in Puerto Rico and would not have needlessly placed their lives at peril because of emotion. Bill told us that he did not believe the HRT agents at the scene were significantly affected by fatigue and said they had the necessary equipment and were ready and able to perform the entry.

Kevin of the Operations and Training Unit, which is responsible for drafting HRT operations plans, told us he was not aware of any tactical reason not to enter and clear the residence. He said he did not feel the HRT personnel at the scene were too fatigued or emotionally involved. He also said he believed it was unlikely there were any explosives or booby traps in the residence based on the amount of movement in the house during the exchange of gunfire and the fact that Ojeda's wife came out the front door when she surrendered. Alan also questioned the concern about explosives and told us that one of the reasons HRT wanted to clear the residence quickly was to prevent Ojeda from setting booby traps that might kill or injure agents entering the residence.

XXI. Notification of the Puerto Rico Department of Justice

During the course of the operation, the FBI provided periodic updates to the United States Attorney's Office (USAO) for Puerto Rico. Shortly after the perimeter shots were fired, the FBI notified the USAO that Ojeda had been shot. Between approximately 6:45 p.m., and 7:15 p.m., the Criminal Chief for the USAO alerted Roberto J. Sánchez Ramos, the Attorney General for the Commonwealth of Puerto Rico, and Pedro G. Goyco Amador, the Chief Prosecuting Attorney for the Commonwealth, of the shooting and requested that local prosecutors be sent to the scene. Sánchez told the OIG that this was the first notification that the Puerto Rico Department of Justice received from the FBI regarding an operation to apprehend Ojeda.

Sánchez and Goyco both told the OIG that the request for local prosecutors was made pursuant to a requirement under Puerto Rican law that they be present before any bodies could be removed from the scene. Sánchez and Goyco said that they inferred from the USAO's request that Ojeda was seriously injured or dead.

According to a log maintained in the San Juan command post, local prosecutors who worked for Sánchez and Goyco arrived at the scene at 8:36 p.m. Goyco told the OIG that when the prosecutors arrived, the FBI did not permit them to approach the house, and at some point the FBI informed them that there would be no entry that evening. Goyco called the USAO and

was told that the prosecutors could go home that night. However, Sánchez instructed the prosecutors to wait at the scene overnight.

XXII. Approval of a Modified Fragmentary Order for a September 24 Daytime Clear

The HRT relief team departed from Dulles International Airport at 1:00 a.m. on September 24. HRT Commander Craig accompanied the team. In addition to HRT's Blue Team and the remainder of the Gold Team, the deployment group included several bomb technicians and a bomb disposal robot from the FBI's Laboratory Division, a negotiator team that Craig said was brought in an advisory capacity, and two agents from the Operations and Training Unit. The Squad Supervisors for the Blue and Gold Teams both told the OIG that before departing from Dulles they understood their teams' mission was to replace the HRT agents at the scene and conduct a clear of Ojeda's residence.

The deployment from Quantico arrived in Puerto Rico on September 24, 2005, at approximately 5:00 a.m. The newly arrived agents were told, among other things, that there was a possibility the residence held explosives or booby traps and that there had been no communication with Ojeda since the time it was believed he had been shot.

At approximately 6:45 a.m., Fraticelli provided a status report to Hulon, who had returned to FBI Headquarters. Fraticelli told Hulon the deployment from Quantico had arrived and was assessing the situation. Fraticelli also told him that a course of action was being developed and that Fraticelli would forward it to FBI Headquarters after he reviewed it. Craig, who by then was at the TOC in Aguadilla, informed the SIOC at approximately 7:02 a.m. that the plan would be completed within an hour.

The plan was drafted at the TOC by two relief agents from the Operations and Training Unit shortly after they arrived. The plan was written as a fragmentary order and modeled after the nighttime clear fragmentary order that had been prepared the previous evening. The new plan called for a two-phased daylight clear of the residence. The first phase involved the insertion of a POPR canine unit to determine the location or activity of the subject(s) in the residence. If the dog alerted on occupant presence or activity, HRT would try to make verbal contact; if the dog returned to his handler – indicating no subject presence or activity – the HRT entry team would conduct a clear of the residence. The order provided that the subject would be given medical attention as necessary once he was located and secured.

The proposed order was faxed to FBI Headquarters by 9:00 a.m. Hulon and Lewis reviewed the draft and recommended minor changes by telephone.⁶⁸ Fraticelli reviewed and initialed the final version, and it was faxed to FBI Headquarters by 9:19 a.m. At 9:29 a.m., Hulon called Fraticelli and told him the fragmentary order was approved.

Three helicopters transported the relief HRT agents and Laboratory Division personnel to the scene, arriving at approximately 8:30 a.m. There, Blue Squad Supervisor Victor⁶⁹ met with Red Squad Supervisor Doug and began replacing the HRT agents maintaining the perimeter with the new personnel from Quantico. Victor was advised at 9:33 a.m. that FBI Headquarters had approved the fragmentary order and that the operation could move forward.⁷⁰

XXIII. Execution of the Daytime Clear

Although the daytime clear was approved at 9:33 a.m., it was not conducted until three hours later. The primary reason for the delay was related to the first phase of the entry plan: inserting a dog into the residence to determine the location or activity of the subject(s).⁷¹ Victor said that San Juan FBI ASAC Leslie, who was the On-Scene Commander at the time, told him that a POPR dog could be brought to the residence within 30 minutes. This dog was never brought to the scene, however, because it was determined to be an explosives dog and not a “bite dog” that keys on live humans. Victor told us that the San Juan FBI SWAT contacted POPR and requested that the correct type of dog be brought to the scene. POPR said it would take about an hour.

The hour passed and the dog was still not at the scene. Victor said the San Juan FBI contacted POPR again regarding the dog’s status and was told it would be another hour before the dog arrived. Victor communicated this

⁶⁸ The primary changes concerned the language used to describe Ojeda’s condition. For example, the sentence fragment, “close observation into the residence for any indications of life inside,” was changed to, “close observation into the residence for any indications of subject movement or activity.” Similarly, the sentence “[t]he dog will be sent into the residence to alert to any conscious person,” was changed to, “[t]he dog will be sent into the residence in an effort to determine the location or activity of any subject(s) currently in the residence.”

⁶⁹ “Victor” is a pseudonym.

⁷⁰ The substantial crowd that formed near the outer security perimeter during the previous night did not reappear on September 24.

⁷¹ Victor told us there was also some early consideration given to using the bomb disposal robot brought by the Laboratory Division. The idea was quickly rejected because the steep access to the house would have made it difficult to move the robot into position without exposing agents to possible gunfire from the residence.

information to the TOC at 10:52 a.m. and recommended that the clear proceed without the dog. However, Hulon required the entry team to wait for the dog to conduct the clear.

The dog finally arrived at about 11:54 a.m., but stayed only briefly because the handler received instructions from POPR Superintendent Toledo not to participate in the operation. Toledo told the OIG that he denied the FBI permission to use POPR's dog because he understood that the FBI feared there might be explosives in the residence and Toledo did not want to put POPR's dog handler at risk. Victor reported the situation to the TOC at approximately 12:00 noon and again recommended that the clear be conducted without the dog. Fraticelli concurred and called Hulon for approval, which he gave at approximately 12:22 p.m.

Once Hulon approved the clear, Victor's 7-man entry team walked up the road adjacent to the Red side of the residence. At approximately 12:34 p.m., three diversionary flash bangs were thrown as the team climbed over a retaining wall, entered the residence through the breached wooden gate, and then moved through the kitchen door into the kitchen. The agents discovered Ojeda's body prone on the floor with a small pool of coagulated blood and a loaded and cocked Browning Hi-Power 9-mm handgun on the floor nearby. The body was located near the front door. Ojeda was dressed in a green camouflaged cap; a green, sleeveless vest; green camouflaged, long-sleeved overalls; and black combat boots.⁷² An FBI emergency medical technician was unable to get a pulse from the body and observed that rigor mortis had set in. After searching the house for any additional occupants, the entry team reported at 12:37 p.m. that the residence was secure and there appeared to be a single dead subject.

Victor told us that the entry team did not immediately turn Ojeda's body over because Victor was concerned a grenade could be under Ojeda's torso or in his left hand, which was under his body and not visible. Two additional items were identified during the clear as potential explosive threats: a case with some wire protruding from it and a large rucksack in the bedroom. Before the bomb technicians were called in to resolve these threats, a preliminary survey of the residence was conducted by the San Juan FBI Evidence Response Team Coordinator, a San Juan FBI Task Force agent, a San Juan FBI photographer, a medical examiner from the Puerto Rico Institute of Forensic Sciences, and a local prosecutor. According to the FBI, Dr. Rechani, Executive

⁷² A label inside the vest worn by Ojeda bore the inscription, "important body armor fragmentation protective: upper torso (w/collar, m-1955)." The Forensics Institute referred to this item both as a "body armor vest" and "bullet-proof vest." The FBI referred to it as a "flak jacket" vest in a report describing what Ojeda was wearing when he was found.

Director of the Institute, and Chief Prosecutor Goyco were also present during this walk-through. The survey was completed by 2:00 p.m.

An HRT bomb technician participated in the explosives sweep of the residence. He told us that to deal with the possibility that Ojeda might have an explosive device under him or in his hand, a winch was attached to Ojeda's vest and the body was pulled out over the lip of the exterior door step to the front door. As the torso passed over the lip, Ojeda's hand fell free; no explosive device was found. The bomb technician recalled observing some blood over the lip of the exterior door step before the body was moved, but told us that it was not a significant amount. This observation was consistent with photographs of the doorway taken before and after HRT moved Ojeda's body. Figure 10 is a photograph of the doorstep before Ojeda's body was moved. Figure 11 is a photograph taken after the body was moved. The increased amount of blood visible in Figure 11 resulted from pulling Ojeda's body over the exterior door step on September 24. The agents at the scene told the OIG that they did not notice a blood stain on the doorstep prior to the entry at 12:34 p.m.

When it was clear the body did not present a risk, the bomb technicians turned their attention to the other two items identified as possible threats. The case with the protruding wires was removed and opened using the winch. It contained a trumpet.⁷³ The large rucksack found in the bedroom was inspected visually, and no explosive hazards were observed.

Ojeda's body was first moved at approximately 2:00 p.m. and the bomb technicians completed their work at approximately 2:44 p.m. Victor told us that the San Juan medical examiner then reentered the residence and pronounced Ojeda dead. The local prosecutors were again permitted into the residence at this point. The scene was subsequently turned over to investigators from the Puerto Rico Institute of Forensic Sciences for processing. These investigators removed Ojeda's body from the residence at approximately 5:00 p.m. The San Juan FBI Evidence Response Team remained at the scene to provide the Institute investigators technical assistance and then search the house pursuant to the federal search warrant obtained on September 22. The search was concluded at 9:30 p.m. According to the Evidence Recovery Log, the FBI seized over 100 items from the residence, including a substantial amount of computer equipment, books, and other documents.

⁷³ At least one Puerto Rico newspaper reported a rumor that the FBI took the trumpet from the scene as a "trophy." This is not accurate. Investigators from the Puerto Rico Institute of Forensic Sciences took custody of the trumpet when they processed the scene. The Director of the Institute told us that the item will be returned to Ojeda's family when it is no longer needed for the investigation.

FIGURE 10
Doorway Bloodstain Before the Body was Moved



FIGURE 11
Doorway Bloodstain After the Body was Moved



[BLANK]

CHAPTER FOUR: FINDINGS OF THE PUERTO RICO INSTITUTE OF FORENSIC SCIENCES

Following the law enforcement clear of the residence on September 24, the Instituto de Ciencias Forenses de Puerto Rico (the Puerto Rico Institute of Forensic Sciences) assumed the lead role in processing the scene and conducting the forensic analyses relevant to the Ojeda matter.⁷⁴ One reason that the FBI deferred to the Institute was to avoid allegations that the FBI had manipulated the scene. Members of the San Juan FBI Evidence Response Team (ERT) monitored the Institute's processing and documentation of the scene, assisted in making measurements, and made suggestions to the Institute personnel. However, the FBI did not participate in generating any of the forensic reports related to the scene. Dr. Pio R. Rechani López, Executive Director of the Institute, also told the OIG that the Institute found no evidence that the scene had been manipulated or tampered with by the FBI.

Since late October 2005, the Puerto Rico Forensic Institute has made several findings and generated forensic reports regarding the Ojeda crime scene. Much of the material prepared by the Institute was shared with the OIG for this investigation, and scientists from the Institute met with OIG investigators on three occasions to describe their findings in more detail and to answer questions. The findings of the Forensic Institute relevant to the issues addressed in this report are summarized below.

I. Findings on the Scene

The Institute prepared a report of Findings on the Scene. Among other things, the report stated that a Browning 9 mm pistol was found on the floor of the residence near Ojeda's body. The pistol was loaded to capacity, with 13 unfired bullets inside its magazine and one in the chamber, indicating that it had been re-loaded. The pistol hammer was found cocked. Subsequent examination of the pistol revealed that it had been modified to fire in both automatic and semi-automatic mode. There were 107 spent shell casings from .223 caliber bullets and 19 spent casings from 9 mm bullets found at the scene.

⁷⁴ The Puerto Rico Institute of Forensic Sciences is a component of the Puerto Rico Department of Justice, and its Director reports to Puerto Rico Attorney General Sánchez.

II. Autopsy

The Puerto Rico Institute of Forensic Sciences conducted the autopsy of Ojeda. According to the Autopsy Report, Ojeda died of a single gunshot wound that entered his body just below his right clavicle, perforated the right lung, and exited the middle of his back on the right side. There were no other wounds. The bullet was recovered from inside the “flak jacket” vest Ojeda was wearing.

The autopsy report did not specify a time of death. Dr. Francisco Cortés, the Forensic Pathologist who performed the autopsy, told the OIG that based on the size of the wound and reasonable assumptions about Ojeda’s heart rate and blood pressure, he estimated that Ojeda expired from loss of blood approximately 15 to 30 minutes after being shot. He opined that Ojeda could have survived the wound if he had received immediate first aid and surgical care.

However, Dr. Cortés noted that he does not treat live patients, so that his views on the survivability of Ojeda’s wounds and his estimate of the length of time that Ojeda might have survived were based on his experience as a pathologist and on his review of the medical literature.

The OIG also consulted with the U.S. Department of Defense Armed Forces Institute of Pathology, Office of the Armed Forces Medical Examiner (OAFME), regarding how long Ojeda survived after being shot.⁷⁵ Based on its review of the autopsy records and other pertinent materials, the OAFME concluded that the wound from the bullet was not immediately fatal, but that it was not possible to determine exactly how long Ojeda would have survived. When the OIG inquired whether Ojeda could have survived longer than two hours, the Medical Examiner responded that it was unlikely.

III. Bullet and Shell Casing Examinations

The Puerto Rico Institute of Forensic Sciences conducted microscopic comparisons of bullets and bullet fragments recovered from the scene with bullets fired from Ojeda’s pistol and from the carbines discharged by the HRT agents during the operation. The Institute determined that the .223 caliber bullet recovered from inside Ojeda’s vest was fired from an M4 carbine bearing serial no. W034332, which according to the HRT was the carbine used by Brian. The other .223 bullet fragments found at the scene were too deformed for the Institute to match them to a particular weapon.

⁷⁵ The OAFME is a component of the Armed Forces Institute of Pathology, a Department of Defense agency specializing in pathology consultation, education, and research.

The Institute determined that the 9 mm bullets recovered from Frank's abdomen and from his helmet were fired from Ojeda's Browning pistol. The Institute also determined that eight other bullet fragments found at various locations at the scene were fired from Ojeda's pistol. We were unable to determine the locations where these fragments were found from the reports provided by the Institute.

The Institute conducted microscopic comparisons of 107 shell casings from .223 bullets that were found on the outside of the residence with sample casings from bullets fired by M4 carbines used by the HRT agents. Based on distinctive marks left on the casings by the firing pins, the Institute was able to match all 107 shell casings to particular HRT weapons.⁷⁶ Table 1 reports these results for each weapon matched to a shell casing found at the scene. For comparison purposes, the table also provides the estimate given by the agents during their interviews of the number of rounds they fired.

The Institute also provided sketches indicating the location where .223 casings matched to each weapon were found at the scene. This information is summarized in Table 1. For comparison purposes, we have also summarized each agent's statement regarding his location at the time he discharged his weapon in the last column of the Table. The OIG did not find any significant discrepancies between the locations reported by the Institute and the statements provided by the agents, particularly in light of the fact that when the shell casings were ejected from the M4 carbines they would not necessarily have landed in the precise location where the agent was firing. In addition, the agents reported firing many rounds from locations on the narrow paved porch. These casings were particularly likely to have bounced off the porch or otherwise have been moved during the operation as agents moved around the residence.

A total of 19 shell casings were found on the floor inside the residence. The Institute determined that all of these casings were from 9 mm bullets fired from Ojeda's pistol. Because Ojeda did not leave the house during the incident, all of the spent casings from the rounds he fired should have been found in the interior of the residence. We therefore concluded that Ojeda fired a total of 19 rounds during the gunfight.

⁷⁶ Two of the shells were not initially matched to any of the weapons carried by the eight agents who recalled firing during the operation. The Institute subsequently matched these shells to a weapon that the FBI told us was carried by SA George, who did not originally report that he had fired his weapon. After learning of these results in May 2005, the OIG requested a follow-up interview of George, but his attorney told the OIG that no further voluntary interviews would be provided. The trajectories and impact points of these two rounds are unknown, although neither round struck Ojeda. Ron McCarthy, who is one of the OIG's experts regarding shooting investigations, told the OIG that it is not unusual for an individual agent present during an intense and stressful shooting incident that involves many agents firing their weapons to fail to recall that he fired his weapon.

TABLE 1
Comparison of Shell Casing Evidence as
Described by Forensic Laboratory with Agent
Statements

M4 Carbine Serial Number	Agent Name	Number of shell casings matched	Agent's estimate of rounds fired	Location of shell casings matched to this weapon	Agent's statement of location when rounds fired
WO34332	Brian	4	11-13	Bank and pavement near retaining wall	Bank and behind retaining wall
WO34222	Don	54	56	Bank and pavement near gazebo	Porch near gated doorway and kitchen window
WO34351	Scott	11	12-14	Bank, pavement near gazebo	Porch near kitchen window
WO32819	Tom	8	10	Bank and low wall	Porch near front door
8207452	Ken	10	10-12	Bank	Bank
WO34315	Frank	7	"several"	Bank below kitchen window	Porch below kitchen window
WO32487	Eric	8	5-10	Bank and low wall	Low wall
WO34429	Doug	3	3-5	Bank	Bank
W349993	George	2	0	Pavement near gazebo	Did not recall firing

IV. Trajectory Analysis

The Forensic Institute identified 111 bullet holes and 76 bullet impacts in various areas of the residence. The Institute estimated the bullet trajectories for many of these holes and impacts. The Institute's estimates were constructed without the benefit of the witness statements given to the OIG by the FBI agents. However, the OIG found that the location of the holes and impacts as reflected in Institute sketches and crime scene photographs, together with the Institute's trajectory analysis, were consistent with the FBI agents' statements in many important respects.

- There were a large number of bullet holes and impacts in the back and sides of the narrow hallway behind the gated doorway. These holes and impacts were consistent with Don's description of the rounds he fired into the hallway during an exchange of gunfire with Ojeda, when Don saw a pistol being "goose necked" out the kitchen door.
- There were six impacts in the interior walls of the narrow hallway near the gated doorway that were consistent with rounds being fired from inside the hallway toward the front of the house. We found that these impacts were consistent with Don's description of shots being fired toward him from inside the kitchen door. The shots were poorly aimed, probably as a result of Ojeda firing them without sighting his target, by "goose necking" his pistol.
- There were approximately 12 bullet holes in the left side of the refrigerator indicating trajectories through the kitchen window at an acute angle to the side of the house. The OIG concluded that these trajectories were consistent with Don's description of the rounds he fired into the window during an exchange of fire with Ojeda, and with Brian's description of the three rounds he fired from the perimeter. Several of the holes entering the side of the refrigerator corresponded to exit holes in the front of the refrigerator. The Forensic Institute analyzed three of these trajectories in its shooting reconstruction, described below.
- There were a large number of bullet holes in the frame and lattices of the kitchen window. The Forensic Institute identified several holes indicating a trajectory from the inside out, reflecting rounds fired out the window by Ojeda. The Institute found a larger number of holes indicating a trajectory from the outside in, from a variety of angles that

appear to correspond generally to the locations that the FBI agents stated they fired from.⁷⁷

- There were several holes and impacts in the interior of the residence that were consistent with shots fired through the kitchen window that traveled diagonally across the interior of the residence toward the Green side or the Black/Green corner, including one that exited a window on the Green side and struck a ladder in the yard. The location and trajectory of some of these shots suggested that they were among those fired by Don into the kitchen window. The Institute determined that two of these impacts represented the termination points for two of the rounds fired by Brian from the perimeter.
- There were nine impacts in the kitchen ceiling and five over the kitchen cabinets opposite the kitchen window. The OIG concluded that these impacts were consistent with shots fired upward into the kitchen window, possibly from an elevation below the window. These shots may have been fired by Frank from his position on the porch underneath the window or by other agents positioned on the bank below the porch.
- There were five holes or impacts in the interior of the kitchen, in the wall to the right of the kitchen door. These impacts appeared to be consistent with rounds being fired into the kitchen window from a location on the porch near the front door, which was the location from which Tom said he fired.
- There were a number of holes and impacts in parts of the balcony, gazebo structure, and exterior of the house. The Forensic Institute found that some of these holes and impacts originated from the direction of the residence and a larger number from outside the residence toward it, from below upward. The OIG concluded that the former impacts were consistent with rounds fired by Ojeda and the latter impacts were consistent with rounds fired toward the

⁷⁷ The number of holes in the frame and lattices of the kitchen window is likely considerably smaller than the total number of rounds that were fired through the window, because some shots shattered the glass and left no holes, and other shots likely passed through the window without striking any part of it, especially after the glass was shattered. Ojeda was positioned close to the window and may have been able to aim his weapon between the glass slats, firing without striking the frame or lattices.

kitchen window from positions on the bank below it, as described by several agents.

The OIG found only one set of trajectory estimates by the Forensic Institute that clearly conflicted with the statements provided by the FBI agents. Several agents reported perceiving shots from inside the house coming through the front door. The Institute found, however, that there were three holes in the front door from rounds fired from a location outside the door and from below (from down the cinder block steps), not from inside the house. The Institute also found three impacts in the living room ceiling that corresponded to the holes in the door and confirmed the upward trajectory. In Chapter Five we describe our analysis of these shots.

V. Shooting Reconstruction

The Forensic Institute also produced a written report titled “Reconstruction of a Shooting,” and personnel from the Institute provided additional information regarding their conclusions during an interview with the OIG. The Institute concluded that the round that struck Ojeda was one of three shots that originated from a location near the retaining wall at the right side of the house, at a distance of approximately 19 feet. The Institute found that the three rounds passed through the kitchen window, penetrated the left side of the refrigerator, and exited the front of the refrigerator. Two of the shots presented impacts or final penetrations within the residence, while the third (the round that struck Ojeda) did not. The third trajectory exited the refrigerator at hole I-85 at a height of 49 inches, which the Institute found to coincide with the position of the bullet wound on Ojeda’s body, assuming a crouched position. From these facts, the Institute concluded that Ojeda was behind the refrigerator when he was struck by the shot, and that he was most likely in a position about one step away from the refrigerator toward the living room at the moment of impact.

The Institute’s reconstruction of the shooting was based entirely on the forensic evidence, without any knowledge of the statements provided by the FBI agents.

VI. Blood Patterns

The Puerto Rico Institute of Forensic Sciences conducted a blood pattern analysis, which it described in a written report. The Institute also provided the OIG with additional information regarding this analysis. The Institute found that Ojeda’s flak vest prevented an immediate spatter of blood at the location where Ojeda was wounded. The Institute concluded that Ojeda took one or two steps toward the front door before falling to the floor, with his head near the

door. Two large pools of blood formed, one near Ojeda's head coming from the wound near his shoulder, and the other near the bottom of his vest further away from the door.

The blood pattern report concluded that the front door was closed at the time the blood was flowing but that the slope of the floor and the pattern of blood were consistent with a slow movement toward the door, forming a flow on the front step. As shown in Figure 10 (a photograph taken after the FBI entered at 12:35 p.m. on September 24 but before Ojeda's body was moved to check for explosives), there was a flow of blood down the front step making a stain on the floor of the balcony porch. Institute personnel told the OIG that the bloodstain on the front step was greatly increased when Ojeda's body was turned over and pulled out the front door onto the porch in order to check for explosive devices. The much larger and more obvious stain was reflected in later photographs (e.g., Figure 11) and in photographs published in some Puerto Rico newspapers.

CHAPTER FIVE: OIG ANALYSIS OF WHETHER THE OJEDA SHOOTING WAS IN COMPLIANCE WITH THE DEPARTMENT OF JUSTICE DEADLY FORCE POLICY

In this Chapter, the OIG analyzes the issue of whether the shots fired by the FBI agents during the Ojeda operation, including the one that struck Ojeda, were in compliance with the Department of Justice Deadly Force Policy. We also address related issues pertaining to the FBI agents' discharge of weapons in this case.

We first describe the Deadly Force Policy. We then discuss our conclusions regarding whether the agents complied with the Policy in the course of firing over 100 rounds during the initial exchange of gunfire during the period from approximately 4:28 p.m. to 4:30 p.m. on September 23. We separately address whether the three rounds fired from the perimeter at approximately 6:08 p.m. that afternoon, including the shot that struck Ojeda, were in compliance with the Policy. Finally, we discuss the lack of a "standard load" or equivalent policy for assuring that agents can provide an accurate accounting for the number of rounds that they discharge during a shooting incident.

I. The Department of Justice Deadly Force Policy

FBI agents are required to comply with the Department of Justice Deadly Force Policy in discharging their weapons during an arrest operation. The Deadly Force Policy, which is included in the FBI's Manual of Investigative and Operational Guidelines (MIOG), Part 2, Section 12-2.1, states in relevant part:

Law enforcement officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person If feasible and to do so would not increase the danger to the officer or others, a verbal warning to submit to the authority of the officer shall be given prior to the use of deadly force.

The MIOG contains definitions of terms used in the Policy. In addition, the Department has issued an Instructional Outline to guide the interpretation of the Policy, together with scenarios illustrating various applications of the Policy. Complete copies of the Deadly Force Policy, Instructional Outline, and Scenarios are provided in Appendix B.

Among other definitions, the MIOG elaborates on the meaning of “imminent danger”:

“Imminent” does not mean “immediate” or “instantaneous,” but that an action is pending. Thus, a subject may pose an imminent danger even if he is not at that very moment pointing a weapon at the Agent. For example, imminent danger may exist if Agents have a probable cause to believe . . . [t]he subject possesses a weapon, or is attempting to gain access to a weapon, under circumstances indicating an intention to use it against Agents or others

The Instructional Outline also states that the Deadly Force Policy “shall not be construed to require Agents to assume unreasonable risks to themselves,” and that “[a]llowance must be made for the fact that Agents are often forced to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving.”

Section 30-3.8 of the FBI’s MIOG, Part 2, provides additional guidance to FBI agents regarding “fire discipline” in the application of deadly force. It states that a situation meeting the criteria set forth in the Deadly Force Policy

does not justify indiscriminate “area” type firing. All use of firepower must be preceded by the acquisition of a known hostile target. This does not preclude the directing of selective suppressive fire at a low visibility target (such as a window from which gunfire is emanating) to cover movement of personnel, rescue of wounded individuals, or evacuation of innocents.

MIOG, Part 2, Section 30-3.8(4).

In the sections below, we evaluate the FBI’s use of deadly force during the Ojeda arrest operation in reference to the standards set forth in the Deadly Force Policy and related provisions of the MIOG.

II. Assessment of the FBI’s Use of Deadly Force During the Initial Exchange of Gunfire

As noted above, the HRT agents fired approximately 104 rounds from their M4 carbines during the initial exchange of gunfire between approximately 4:28 p.m. and 4:30 p.m. The OIG concluded that the vast majority of these shots were fired in compliance with the Deadly Force Policy. However, the OIG concluded that if the three rounds fired through the front door of the Ojeda residence by an unidentified agent were fired intentionally, they were not fired in compliance with the Policy and did not reflect appropriate fire discipline.

In reaching the conclusion that most of the rounds were fired in compliance with the Deadly Force Policy, the OIG examined the preliminary question of how the exchange of gunfire began. At least nine agents who approached the house from the front yard and three sniper-observers positioned near the house told the OIG that they heard gunfire originating from inside the house before any FBI agents returned fire. Several agents stated that the firing from inside the house began even before the agents got off the vehicle. None of the agents reported that they thought that any FBI agent fired on Ojeda in the house before the agents were fired upon. According to the Puerto Rico Institute of Forensic Sciences, the forensic evidence did not permit a determination of who fired the first shot.

The OIG found no persuasive evidence that the FBI fired any shots at the residence until after Ojeda began firing on the agents. First, the emergency assault plan under which the agents were operating called for the agents to breach the residence at two points and to clear the house rapidly and arrest Ojeda. Firing on the residence before breaching it would have been inconsistent with this plan and could have disrupted the plan by slowing the agents' advance and giving Ojeda further notice of their presence. It also would have been inconsistent with the explicit instruction given to the agents in advance of the operation to comply with the Deadly Force Policy.

Moreover, as the agents approached the house from the front yard they were in an extremely poor position to initiate a gunfire exchange. Because of the heavy vegetation obscuring their view of the front of the house, the fact that the doors and windows were elevated well above the level of the yard, and the darkened condition of the interior, the agents would not have had a clear target to shoot at. (See Figure 8.) In contrast, from Ojeda's elevated position behind the window he would have had a clearer view of the agents as they got off the vehicle in the front yard in the daylight and ran up the cinder block steps toward the porch.

The only suggestion that the FBI fired at the residence before Ojeda opened fire was the allegation made by Rosado (Ojeda's wife) in subsequent public speeches and media interviews that the FBI fired first. Rosado declined to be interviewed by the OIG for this investigation. The OIG concluded that it is possible that Rosado got the impression that the FBI opened fire first as the result of the detonation of a diversionary "flash bang" grenade by one of the sniper-observers at the moment the FBI vehicle pulled up to the house. As previously noted, the two FBI sniper-observers who were positioned near the Green/Black corner of the residence both told the OIG that one of them detonated a flash bang grenade near the house as a diversionary tactic moments before any gunfire was exchanged, and other agents confirmed

hearing a flash bang. Rosado and Ojeda might have interpreted the sound of a flash bang as gunfire initiated by the FBI.⁷⁸

The OIG's experts agreed that the use of a flash bang outside the residence could have created the impression inside the residence that the FBI was firing on the house. The experts pointed out that using a flash bang outdoors to create a distraction is not nearly as effective as using it indoors, where the noise, pressure waves, and extremely bright light all work to the advantage of the arrest team. They felt that using a flash bang outdoors creates a firecracker effect and risks alerting the subject rather than distracting or confusing him. We concluded that the FBI should review the implications of this incident for the use of flash bangs in an outdoor environment and under circumstances in which their use could have the unintended effect of alerting the subject or being mistaken as the FBI opening fire on a subject before seeking his surrender.

It is also possible that the round fired by Scott at Ojeda's dog as it ran toward the HRT agents might have been interpreted by Rosado as firing on the house. Gary said that the dog ran to the front of the house in response to the flash bang Gary threw at the Green/Black corner, before any gunfire had begun. If so, Scott's shot at the dog would have occurred seconds after the flash bang and could have preceded the other shots in the exchange. We note, however, that Scott said he thought that firing from the house had already begun by the time he shot the dog.

Taking all of these factors into account, the OIG concluded that Ojeda opened fire on the approaching FBI agents before any agents discharged their weapons at him or at the residence.⁷⁹ However, we found that Rosado and Ojeda might have erroneously perceived that the FBI initiated the gunfire.⁸⁰

⁷⁸ We also believe that it is unlikely that the HRT agents began firing at the house in response to hearing the flash bang explosion. The agents are familiar with the use of flash bang grenades and are able to distinguish the sound from gunfire. Moreover, as noted above, at the moment the flash bang was detonated the agents would not have had a specific target to fire at.

⁷⁹ The OIG is not suggesting that there are no circumstances under which it would have been appropriate for the agents to fire first. There is no requirement in the Deadly Force Policy that a subject fire his weapon before deadly force can be used. There are numerous circumstances under which it would be reasonable for an agent to believe that a subject posed an imminent danger of death or serious injury without the subject firing a weapon. In the Ojeda case, however, the agents could not see the subject clearly as they approached the residence, and the basis for the agents' belief that the subject posed an imminent danger was the fact that shots had been fired at them before they began firing back.

⁸⁰ Our concerns regarding the detonation of the flash bang as the agents approached should not be construed as a finding that Ojeda would not have opened fire on the FBI if the flash bang had not been detonated. Ojeda had clearly made preparations to offer violent resistance to the FBI before the agents arrived.

Once Ojeda began firing at the agents from the house, he clearly posed an imminent danger of death or serious physical injury to the agents, justifying their application of deadly force. The agent statements and the forensic evidence establish that the vast majority of .223 shots from FBI weapons were directed in two locations: into the hallway behind the wooden gate and into the kitchen window. Numerous agent statements and the forensic evidence confirm that Ojeda was firing his pistol at FBI agents from these two locations.

A. Rounds Fired Through the Wooden Gate into the Hallway

Don told the OIG that he fired approximately 28 shots, or one full magazine, through the wooden gate in an exchange with someone who was firing from inside the house. There were a large number of impacts found in the back and side walls of the narrow hallway behind the wooden gate that were consistent with Don's statement. Both Frank and Don described seeing a pistol being "goose necked" out the kitchen door into the hallway, aimed toward agents outside the gate.

The forensic evidence confirms that Ojeda was firing at the agents from inside the hallway. This was the location from which Frank was shot and seriously wounded while attempting to breach the wooden gate. The Forensic Institute confirmed that the bullet that wounded Frank was fired from Ojeda's gun. In addition, based on photographs and sketches of the scene provided by the Forensic Institute, we found that there were six impacts in the inside wall of the hallway near the gated door that could only have resulted from rounds fired toward the front of the house from *inside* the hallway. The FBI agents did not enter the hallway until long after the gunfight was over.

In light of this evidence, the OIG concluded that 28 rounds fired by Don down the hallway early in the gunfight were in response to shots from Ojeda originating from the hallway. Because there was gunfire from this area, Don had a reasonable belief that there was a subject located inside the hallway who posed an imminent danger of death or injury to Don and the other agents. Don's shots into the hallway were consistent with the Deadly Force Policy. The OIG's experts concurred with this conclusion.

B. Rounds Fired Toward the Kitchen Window

According to the agent statements and the available forensic evidence, the vast majority of the remaining shots fired by the FBI agents were directed at the kitchen window. All of the agents who reported discharging their weapons described this window as a location from which the subject was firing. The agents reported gunfire originating from the window in both semi-automatic (single-shot) and automatic mode. The Puerto Rico Institute of Forensic Sciences was able to trace the trajectory of at least five shots from

inside the kitchen that struck the lattice of the kitchen window. The Institute also confirmed that Ojeda's pistol had been modified to permit it to be fired in either automatic or semi-automatic mode.

The shots fired from inside the kitchen window likely included several shots that struck FBI agents, including the shot that struck Frank in the back of the helmet, the shot that struck Brian in the side of his ballistic vest, and the shot that struck George in the battery pack of his helmet. The OIG concluded that the agents had a reasonable belief that the person inside the window posed an imminent danger of death or serious injury, and that the numerous rounds fired by the FBI agents at the person firing from the window were in compliance with the Deadly Force Policy.⁸¹

C. The Infeasibility of Providing a Warning

The Deadly Force Policy states that “[i]f feasible and to do so would not increase the danger to the officer or others, a verbal warning to submit to the authority of the officer shall be given prior to the use of deadly force.” The OIG concluded that it was not feasible for the FBI agents at the scene to give such a warning. This conclusion follows from our determination that Ojeda fired at the agents first. Once the agents realized they were under fire, they were justified in applying deadly force to address the threat, without pausing to warn Ojeda.

D. The Exercise of Fire Discipline

The OIG also considered whether the number of rounds fired into the narrow hallway or at the kitchen window during the gunfight by the agents as a group (approximately 100 rounds) and by Don in particular (over 50 rounds) violated FBI standards, described above, relating to appropriate fire discipline. According to the OIG's experts, an M4 carbine can fire 50 rounds in semi-automatic mode in as little as 9 seconds. The experts did not find the volume of fire by Don or the agents as a group to be disproportionate to the threat or to reflect a lack of fire discipline. We also note that the Instructional Outline for the Deadly Force Policy states that:

When the circumstances justify the use of deadly force, Agents should continue its application until the imminent danger is ended

⁸¹ We are unable to determine whether the two rounds fired from SA George's weapon were in compliance with the Deadly Force Policy or requirements of fire discipline because George did not report firing his weapon during the incident, and he declined to give a voluntary follow-up interview on this subject. We therefore do not know exactly where or why George fired his weapon, although we believe it is likely that he was responding to the same imminent threat perceived by the other agents, namely, the shots coming from inside the narrow hallway or from the kitchen window.

through the surrender or physiological incapacitation of the subject(s).

This guidance informs our assessment of the volume of fire used by the agents in an effort to bring the threat posed by Ojeda firing at them at close range to a timely halt. Don and the other agents were permitted to continue applying force until Ojeda no longer posed a threat. They were not required to limit their shots in order to match the number of rounds fired by Ojeda.

Section 30-3.8 of the FBI's MIOG, Part 2, states that “[a]ll use of firepower must be preceded by the acquisition of a known hostile target.” The experts also stressed that agents should be trained to fire only at an identified target posing the imminent threat of harm. They stated that suppressive fire at a general area does not satisfy this standard, particularly where the possibility of injury to innocent persons exists. This does not mean the subject must be identified visually, although several agents said they saw a gun in the window or in the narrow hallway. We found that the “target” requirement was satisfied with respect to the shots that the agents took into the hallway and into the kitchen window because there was no doubt that a threat was coming from those specific locations in the form of shooting from inside the house. In addition, the fact that the agents fired a large number of shots without hitting hit Ojeda reflected Ojeda’s superior position of cover and elevation and did not necessarily reflect indiscriminate targeting. We did not find a basis to conclude that any of the agents violated FBI requirements of fire discipline.

E. The Three Shots Through the Front Door

Although the OIG concluded that the vast majority of rounds fired by the agents during the initial exchange of gunfire were fired in compliance with the Deadly Force Policy and did not violate FBI standards for fire discipline, we did not reach the same conclusion with respect to three rounds fired by the FBI through the front door of the residence. Several agents told the FBI that they perceived that several shots came from inside the house through the front door during the initial exchange of gunfire, a perception that contributed to their belief that there was more than one weapon being fired inside the house. The Puerto Rico Institute of Forensic Sciences reported, however, that there were three holes in the front door and that all of them were made by shots from the outside. The estimated trajectory of these shots is shown in Figure 12. Each of these trajectories could be matched to a bullet impact found in the ceiling of the living room, behind the front door, as shown in Figure 13.

Because there were no bullets or bullet fragments found in the house that could be attributed to these particular holes and impacts, it was impossible to determine from the forensic evidence which of the FBI agents fired the three rounds through the front door. We interviewed all of the agents

FIGURE 12
Trajectory of Shots Through Front Door



FIGURE 13
Ceiling Impacts from Shots Through Front Door



who recalled firing their weapons, and none reported having fired any rounds at or through the front door.

At the time of the OIG interviews of the HRT agents, the findings of the Puerto Rico Institute for Forensic Sciences regarding the shots through the door had not yet been provided to the OIG. Therefore, we did not explicitly ask each agent whether he fired any shots through the door. Several agents told us that they perceived rounds coming out of the door, which we have since interpreted as equivalent to a denial that these agents fired the shots. After receiving the information from the Institute, we sought follow-up interviews with agents Eric, Ken, and Doug, who did not mention any shots through the door during their original interviews and who, based on the descriptions they gave of their positions at the time they fired their weapons, might have been at the location near the bottom of the steps where these shots originated. As noted above, these agents declined to provide voluntary follow-up interviews.

We consulted with the OIG experts regarding these three shots. The experts stated that the three shots through the front door may not have been appropriate or in compliance with the Deadly Force Policy, because it is unclear what the agents could have been targeting in that location. One expert stated that these shots might have been the result of an “unintentional press” as the agent approached the house during the latter part of an intense gunfight, and that the agent might not even have known that he fired his weapon at the time. However, the experts pointed out that it was not known whether other people were in the house or whether Rosado was involved in the gunfight, so that untargeted shots through the door created a danger of injury to innocent occupants. The Deadly Force Policy states that “[e]ven when deadly force is permissible, Agents should assess whether its use creates a danger to third parties that outweighs the likely benefits to its use.”

The OIG concluded that if these three rounds were fired intentionally, they violated the Deadly Force Policy and the fire discipline requirements of the MIOG. There is no evidence, in the form of witness statements or the forensic evidence, to suggest that these three shots addressed an imminent threat of death or injury posed by a person located behind the door. There is also no evidence to suggest that these shots were “preceded by the acquisition of a known hostile target” behind the door. Based on the trajectory of the shots, as shown in Figure 12, the OIG concluded that these shots were not aimed at the kitchen window or inside the gated doorway, the locations from which Ojeda fired.

If the shots were unintentional they would not normally be analyzed in terms of the Deadly Force Policy. Instead, the FBI would evaluate whether the agent was negligent in firing the accidental shots. However, we do not have sufficient information regarding the circumstances under which these shots

were fired to make a determination as to whether the shots were intentional or unintentional or whether the agent or agents were negligent in firing the shots.

Because we cannot identify the agent or agents who fired these three shots, and cannot determine whether they were intentionally fired or the result of an unintentional press, the OIG has not recommended any disciplinary action with respect to these three shots. However, we recommend that after the conclusion of any criminal investigations into this matter – by either Department of Justice prosecutors or the Puerto Rico law enforcement authorities – the FBI should consider compelling the agents to provide follow-up interviews and determine who fired the shots through the front door, and their stated reason for doing so. Depending on the result of such an inquiry, disciplinary action could be warranted.⁸²

III. Assessment of the Perimeter Shots

The OIG also assessed the three shots that SA Brian fired into the kitchen window at approximately 6:08 p.m. (the “perimeter shots”). One of these shots struck Ojeda and resulted in his death. These shots were not part of the original exchange of fire but rather took place approximately 100 minutes later.

The OIG concluded that at the moment Brian fired the perimeter shots, he had a reasonable belief that Ojeda posed an imminent danger of death or serious injury to Brian and to other agents. We concluded that that these shots therefore did not violate the Deadly Force Policy. The OIG’s experts concurred with these conclusions.

In evaluating Brian’s assessment of the threat that Ojeda posed, we considered all of the events preceding the shots. Ojeda had already fired several rounds out the kitchen window, and had evidenced an intention to kill or injure the FBI agents attempting to arrest him. He had already shot three different agents. Brian was in an exposed position because the retaining wall that he was crouched behind was quite low and Brian’s head and shoulders were above the wall. Ken was in a similar exposed position to Brian’s left. Other FBI agents were also in exposed positions crouched behind the low concrete wall in front of the house.

⁸² As stated above, we also do not know whether the two rounds fired from George’s weapon were fired intentionally or how they were targeted. We therefore did not assess their compliance with the Deadly Force Policy or whether they were fired negligently. Accordingly, we did not recommend disciplinary action with respect to these shots. However, we believe the FBI should also pursue this inquiry, after all criminal investigations have concluded.

In light of Ojeda's conduct, Ojeda posed a continuing imminent threat to the agents throughout the standoff. Ojeda had already proved that he was armed and prepared to kill or injure the arresting agents. He had not surrendered his weapon or manifested an intent to do so. Brian was justified in assuming that Ojeda was still armed and dangerous. Put into the terms of the definition of "imminent danger" in the FBI's MIOG, throughout the standoff Brian had probable cause to believe that Ojeda possessed the weapon and that the circumstances indicated an intention to use it against the agents. See MIOG, Part 2, Section 12-2.1(3).

Brian told the OIG that he saw an individual in the kitchen window, illuminated by the interior light of the refrigerator. Brian stated that the individual was crouched down with a gun in his left hand pointing out the window. Brian said he could not see the Ojeda's eyes or tell where he was looking. Brian stated that Ojeda clearly had the weapon pointed in the direction of Brian and his teammates but he was unsure at whom in particular the subject was sighting the gun. Brian said that he concluded that Ojeda posed an imminent threat to him and other agents. Brian said he sighted his carbine where he believed the Ojeda's center mass to be and fired three rounds in rapid succession in single fire mode.

The statements of the other HRT agents are consistent with what Brian told us about his position at the moment of the perimeter shots – that he was on the hillside to the right of the house, behind the retaining wall. (See Figure 9.) No other HRT agent was in a position to see Ojeda in the window or to confirm or dispute what Brian saw at the moment he fired.

However, we reviewed the available forensic evidence to determine whether it was consistent with Brian's statement. The most significant forensic finding was the discovery of Ojeda's Browning 9 mm pistol on the floor at his side, loaded and cocked, confirming that Ojeda was holding the gun at the moment he was wounded.⁸³

The Puerto Rico Institute of Forensic Sciences concluded, on the basis of its trajectory and shooting reconstruction analyses, without knowing the content of Brian's statement, that the fatal round was one of three rounds fired from a location behind the retaining wall approximately 19 feet from the subject. According to the Institute, all three rounds entered the left side of the refrigerator (the side facing the kitchen window) and all three exited the front of the refrigerator. Two of the shots left impacts in the house, while the third struck Ojeda. These findings were consistent with Brian's description of his location when he fired the perimeter shots.

⁸³ To conclude otherwise would require us to assume that Ojeda had put the gun down on the floor before he was shot, which we did not find to be a plausible scenario.

Ojeda's wound did not contradict Brian's description of what he saw and his determination that Ojeda posed a threat. The autopsy report and photographs establish that the bullet entered Ojeda's body near his right clavicle and exited the middle of his back, also on his right side. The trajectory of the bullet wound thus establishes that Ojeda was facing toward Brian at the moment of impact – that his shoulders were rotated to the left relative to the kitchen window. In that stance, Ojeda could have very quickly fired out the window at Brian on the hillside.

The forensic evidence indicates that Brian's view of the right side of Ojeda's body was obscured by the refrigerator at the moment of impact, because the fatal shot passed through the side of the refrigerator and exited the front before it struck Ojeda near the right clavicle. We did not find this fact to be inconsistent with Brian's statement. Brian stated that from his position on the hillside he saw the side of a light colored refrigerator inside the window, and that the refrigerator took up about half of his field of view inside the window.⁸⁴ It is not surprising, therefore, that Brian's view of Ojeda was partially obscured by the refrigerator. Brian said that after the refrigerator light came on he sighted his gun where he "believed the subject's center mass to be." Brian could have aimed at Ojeda's "center mass" through the refrigerator.

The fact that Brian's view of Ojeda was partially obscured at the moment of impact does not mean that Brian did not see him. Taking into account the trajectory of the shot that struck Ojeda (including the location of the bullet holes in the refrigerator) and the fact that Ojeda was turned toward Brian's direction rather than facing directly forward, we determined that the left side of Ojeda's body, including his left hand, could have been visible to Brian at or immediately before the moment of impact.⁸⁵

Moreover, Brian stated that about three seconds elapsed between the time he saw the refrigerator light come on and the time he fired his weapon. Even if Brian's view of Ojeda was unobscured at the moment the light came on, three seconds would have provided Ojeda with ample time to move to his right behind the refrigerator, which would have been a logical reaction if Ojeda had

⁸⁴ Computer reconstructions of the scene from the shooter's standpoint prepared by the Puerto Rico Institute for Forensic Science confirmed Brian's description.

⁸⁵ We found Brian's statement about seeing Ojeda in the refrigerator light to be credible because it explained how Brian could see Ojeda inside a dark house clearly enough to take aim. To conclude otherwise would require us to believe that Brian took blind shots into a dark window and happened to hit a target he could not see.

spotted Brian and realized that he had been illuminated.⁸⁶ Brian stated that, given the three-second interval and the fact that the window was dark after he fired the rounds, Ojeda may have been closing the door when Brian was firing.⁸⁷ Scientists from the Puerto Rico Institute for Forensic Science told the OIG that the trajectory evidence was consistent with Ojeda moving to his right at the moment of impact, and that such movement would explain why only one of the three perimeter shots struck Ojeda.

We also found it significant that, without having seen the autopsy report or photographs, Brian stated that Ojeda was crouching at the moment Brian saw him. Dr. Rechani, the Director of the Institute, told the OIG that Ojeda was crouching at the moment the bullet struck him. A crouching posture would explain the trajectory of the wound, which indicated that the bullet entered near the clavicle but exited in the lower back.

We also considered the potential inconsistency between Brian's statement that he saw Ojeda holding the gun in his left hand and the fact that Ojeda was wearing a holster that was oriented for a right-hand draw. This holster is evidence that Ojeda's dominant or preferred shooting hand was his right hand. From press accounts and information provided by the Forensic Institute, however, there is second-hand evidence that Ojeda was left-handed. Moreover, when Ojeda "goose-necked" the pistol out the kitchen door and down the hallway, he most likely used his left hand, which would have maximized his ability to keep his body inside the kitchen and out of the line of Don's shots down the hallway. It therefore appears that Ojeda sometimes shot with his left hand, even if his dominant shooting hand was his right hand. Finally, the logical way for Ojeda to open the refrigerator door (which opened from left to right) while being concerned about the FBI agents out the kitchen window to his left, was to open the unit with his right hand, while holding the gun in his left hand. Thus, even if Ojeda was generally a right-handed shooter, this does not mean he would not hold the gun in his left hand. We therefore concluded that the orientation of the holster did not contradict Brian's statement that he saw Ojeda holding the gun in his left hand.

⁸⁶ As an HRT agent, Brian is a highly trained shooter. If Brian saw Ojeda moving behind the refrigerator while Brian was aiming, he could have tracked Ojeda in that direction without having to think about it. This is another plausible explanation for why Brian's shots went through the refrigerator.

⁸⁷ Two of the three shots (including the fatal shot) pierced the freezer door at the top of the unit in a trajectory indicating that the freezer door was closed. These trajectories do not reveal whether the refrigerator door (located below the freezer) was open when those shots passed through the freezer. The other round pierced the lower refrigerator door at a trajectory indicating that the door was closed at the moment of impact. We do not know, however, whether this shot occurred before or after the shot that struck Ojeda. In view of the fact that Brian fired the three shots in rapid succession, it appears likely that the refrigerator door was closed or was being closed at the moment Ojeda was struck.

We also considered whether it was reasonable for Brian to conclude that Ojeda posed an imminent danger at the moment Brian saw him. We recognize that Ojeda may have been looking for something to drink or eat when he opened the refrigerator door. However, this did not mean that the threat he presented was not imminent. Ojeda had his gun in his hand, and he could have fired at Brian and possibly Ken from his position very quickly. He also could have fired at the agents behind the wall in the front of the house from the window merely by moving slightly to his left.

We also considered the fact that Ojeda had engaged in a dialogue with FBI agents after the initial exchange of gunfire, and that Ojeda had stated he would discuss surrender if the FBI brought a particular reporter to the scene. Brian told us he had heard a discussion in Spanish between Ojeda and a San Juan agent while Brian was moving into position on the hillside, but Brian said he never heard anyone say that Ojeda was discussing the possibility of surrender. Brian and other witnesses also said these discussions seemed to have come to an end before the perimeter shots were taken.

We concluded that the discussions between Ojeda and the FBI did not mitigate the threat that Ojeda presented at the moment Brian fired. Ojeda had refused the FBI's instructions to come out of the house. He appeared at the kitchen window with a gun. Even if Brian had understood Ojeda's offer to discuss surrender if a reporter were brought to the scene, Brian would have been justified in believing that Ojeda could resume firing at the FBI agents at any instant. Given these circumstances, under the DOJ Deadly Force Policy, Brian was justified in using deadly force to address the threat.

For all of these reasons, the OIG concluded that the three perimeter shots fired by Brian at Ojeda at approximately 6:08 p.m. did not violate the Department of Justice Deadly Force Policy. The OIG's experts concurred with this conclusion.

IV. Lack of "Standard Load" of Ammunition

In the course of interviewing the HRT agents who discharged their firearms, the OIG learned that there is no "standard load" required for HRT weapons that would have permitted the FBI to establish precisely how many rounds had been fired from each weapon by determining how many magazines had been spent and how many rounds were left in the unspent magazines. As a result, the OIG attempted to reconstruct the number of rounds fired by each agent by relying on the agent's recollection and on the ability of the Puerto Rico Institute of Forensic Sciences to correctly match each spent .223 shell found at the scene to a particular HRT weapon.

As summarized above in Table 1, there were some differences between the findings of the Forensic Institute and the recollections of individual agents as to the number of rounds fired by each agent. For the most part, these discrepancies were minor and could be attributed to the imperfect recollection of agents who had experienced an intense gunfight, during which one FBI agent was seriously wounded, two other agents were hit, and Ojeda was killed. It may be the case that the forensic evidence provided more objective and reliable evidence than agent recollections as to the precise number of rounds fired by each weapon, but the reliability of the forensic evidence depended on the recovery of all spent shell casings by the evidence response team. In the rugged landscape surrounding Ojeda's residence, there can be no certainty that every casing was recovered.

In this case, the forensic evidence was consistent with the agent statements in most significant respects, and the minor discrepancies between agent recollections and the forensic evidence did not affect the OIG's central findings with respect to the Deadly Force Policy. However, if "standard load" procedures were in place, there would have been additional, reliable evidence regarding the number of rounds fired by each agent. This information might have assisted in determining whether any agents fired rounds that they did not realize they fired, due to an "unintentional press" in the heat of battle. Such information would also have been made it easier and faster for investigators to determine that two rounds had been fired from SA George's weapon, as described in footnote 66. Moreover, in other cases a precise accounting of how many rounds were fired by each agent could be critical to a shooting incident investigation.

Accordingly, the OIG recommends that the HRT adopt a standard load procedure that would enable accurate post-incident accounting of the number of rounds fired by each agent, and that other components of the FBI adopt such procedures to the extent they are not already in place. The experts consulted by the OIG concurred with this recommendation.

V. Conclusions Regarding FBI Use of Force

For the reasons stated in this Chapter, the OIG concluded that the vast majority of the rounds fired by the FBI during the initial exchange of fire were in compliance with the Deadly Force Policy and related requirements of fire discipline. We also concluded that the three rounds fired from the perimeter later in the afternoon, including the shot that killed Ojeda, were in compliance with the Policy.

We did not reach the same conclusion regarding three rounds fired through the front door, however. No agent has admitted firing these rounds, and we have insufficient evidence to attribute the rounds to a particular agent.

If the rounds were fired intentionally, they were not in compliance with the Deadly Force Policy. Even if fired accidentally, they could have been the result of negligence.

[BLANK]

CHAPTER SIX: OIG ASSESSMENT OF THE DECISION TO CONDUCT AN EMERGENCY DAYLIGHT ASSAULT

In this Chapter, the OIG analyzes the decision made by SAC Fraticelli, in consultation with HRT Deputy Commander Steve, to conduct an emergency daylight assault on the Ojeda residence. This decision was made in response to the report from the sniper-observers at approximately 2:36 p.m. on September 23 that their position in the woods near the residence had been discovered. As part of this analysis, we examine several issues, including: 1) the circumstances of the reported compromise; 2) the risky nature of the daylight assault plan; 3) the availability of other options for capturing Ojeda; and 4) whether a better assault route was available.

In conducting this assessment, the OIG relied extensively on input from its experts. The OIG also considered the assessments provided by the FBI agents involved in the matter, including the SAC, agents from CIRG, and senior agents from the Counterterrorism Division at FBI Headquarters.

In making our assessment, the OIG was mindful of the fact that the agents involved in deciding what action to take in response to the reported compromise were required to make decisions with imperfect information under circumstances that were tense and rapidly evolving, and that they had limited time for reflection or consultation. However, we concluded that the decision to conduct an emergency daylight assault was based on an inadequate assessment of the foreseeable risks of conducting such an operation under conditions in which the element of surprise had been lost. Because Ojeda was prepared for the FBI's frontal assault on the residence, the assault failed and an agent was seriously wounded. As explained below, we believe that the FBI should have given more consideration to other available options, such as surrounding Ojeda's residence and forcing him out with tear gas, or withdrawing without taking any further immediate action to arrest or surround Ojeda. We discuss both of those options below.

I. The Circumstances of the Reported Compromise

During the afternoon of September 23, the sniper-observers were positioned at the Mission Support Site, approximately 200-250 meters from the Site 1 residence, when they heard vehicles stop on the road near their position and heard the occupants get out and begin talking. One of the sniper-observers (Paul) saw a person gesturing with his hands and pointing at the ground and toward the trailhead. The sniper-observers concluded that their presence had been detected, and at 2:36 p.m. they requested by radio that the

TOC order a “deliberate” assault on the residence to prevent Ojeda from escaping.

SAC Fraticelli and other agents in the San Juan FBI subsequently told the OIG that they now believe that the sniper-observers were not in fact compromised and that the people who exited the vehicle or vehicles and who were overheard conversing in Spanish were in fact discussing matters unrelated to the operation. The agents told the OIG that FBI interviews with a person or persons at Site 2 at the time of the assault persuaded them that the people who had stepped out of the vehicles near the road were discussing matters unrelated to the sniper-observers. This information was passed on to FBI Headquarters in an informal report prepared by a CTD Intelligence Analyst shortly after the incident, which stated: “One of the individuals that exited the vehicle was the owner of [Site 2] and it is believed the other men with him were discussing the purchase of a horse. No arrests were made and it is believed that this vehicle and the three (3) individuals are total[ly] unrelated to this operation.”

The OIG was unable to locate any information to confirm or refute the information regarding the activities of the persons who were seen and heard by the sniper-observers. The Intelligence Analyst who wrote the informal report told us she could not recall who provided this information. The only formal written report produced by the San Juan FBI relating to this question was a memorandum of interview written by a San Juan FBI agent who had interviewed an individual who was detained at Site 2 during the arrest operation. The memorandum contains no information regarding the people who stopped near the sniper-observers, and the agent told the OIG that at the time of the interview he was unaware that anyone had been seen or heard by the sniper-observers near Site 2. None of the San Juan FBI agents interviewed by the OIG was able to provide any additional information regarding the circumstances of the compromise. We were therefore unable to determine with certainty whether the sniper-observers were actually compromised.

Yet, it is important to note that because none of the sniper-observers sent to the scene spoke Spanish, they were unable to determine the substance of the conversation that they overheard. If the individuals who stopped near the sniper-observers had in fact been discussing unrelated matters such as the purchase of a horse, there was no way for the sniper-observer team to know it. In light of the prevalence of Spanish as the primary language for most residents of this area, including Ojeda and his wife, and the need to identify Ojeda, it should have been anticipated that the sniper-observers might need to understand relevant conversations in Spanish. It clearly would have been useful to have had some Spanish-speaking agents on the sniper-observer team, particularly because one of their important objectives was to identify Ojeda.

However, during the afternoon of September 23, the information available to Fraticelli was that the HRT sniper-observers were convinced that their presence had been detected. Fraticelli had no basis to reject the sniper-observers' assessment that someone had detected them. At that point, Fraticelli had to select among several options for action, taking into account the risk that these persons might alert Ojeda to the presence of the sniper-observers or otherwise assist him in evading or resisting arrest.

In the next sections we examine Fraticelli's decision to respond to the reported compromise by ordering an emergency daylight assault on Ojeda's residence to effectuate an arrest, in light of the available alternatives.

II. The Emergency Daylight Assault

The OIG concluded that a daylight assault of the kind implemented at the Ojeda residence was extremely dangerous and not the best alternative available to the FBI. Indeed, if Ojeda was more heavily armed, more casualties would likely have occurred. As HRT Deputy Commander Steve pointed out, if Ojeda had been firing a high-powered rifle, several FBI agents could have been killed in the operation.

The conclusion that the emergency daylight assault was not the best available option was shared by all of the OIG's experts who participated in this investigation.

Fraticelli told the OIG that he was concerned that in light of the compromise of the sniper-observers and the daylight conditions, the FBI would not have an element of surprise in a daylight assault. He stated that after Steve explained the speed with which the HRT agents would be transported by the helicopters and rope-dropped to the ground, he became convinced that an immediate assault on the house was the best option. Steve stated that he felt that even with a helicopter insertion the FBI had enough of an element of surprise to get into the house without a gunfight.

However, the assumption that the FBI still had the advantage of surprise was inconsistent with the reasons given for the emergency daylight assault. The FBI's primary reason for deciding that action was necessary was the concern that the persons seen by the sniper-observer near the trailhead were sympathizers who would warn Ojeda. If this risk was sufficient to justify ordering an immediate arrest operation, it should likewise have been sufficient to support an assumption that Ojeda would be ready for the FBI by the time the assault team arrived, two hours after the compromise was reported. The FBI also had reason to be concerned that the persons believed to have detected the sniper-observers or other Macheteros sympathizers might have joined

Ojeda to assist his resistance during the nearly 2-hour interval from the time the compromise was reported to the time the HRT agents arrived.⁸⁸

In addition, the FBI was aware that delivering the HRT agents by helicopter with a rope drop in a small field located in plain view of the front of Ojeda's residence would generate a great deal of noise and alert Ojeda. Even a perfectly executed rope drop would require several minutes for both helicopters to complete, because they could not have dropped their passengers into such a small target simultaneously. The HRT agents would also require additional time to assemble into the planned order of march and to ascend the steep hill between the banana field and the Ojeda residence. Any hovering or circling by the helicopters as they located the small landing zone would result in additional noise, further ensuring that Ojeda would be prepared. In light of these factors, it was not realistic to expect that Ojeda, a violent fugitive believed to be familiar with FBI tactics, would be surprised by the assault.

The FBI's plan for assaulting the house was quickly adapted from the plan being prepared for a surreptitious nighttime assault. However, it was poorly suited to daylight conditions in which Ojeda would very likely be prepared to offer violent resistance. Once he knew the FBI was coming, Ojeda had the advantage of high ground, superior cover, and superior visibility. As the FBI was also aware, Ojeda's house provided him with a highly defensible position with cement walls and limited entry points.

Moreover, the FBI's plan called for the assault team to follow a route of approach in plain view of the house through the front yard, up the front steps, and across the porch to two breach points. The selected route required the agents to approach the house and pass directly in front of the kitchen window to reach the breach points, exposing agents to close-range gunfire.⁸⁹ While this route may have been suitable for a surreptitious nighttime approach, in daytime conditions, with Ojeda alerted, the approach maximized the agents' exposure to gunfire.

⁸⁸ The sniper-observers were stationed at the Mission Support Site at the time of the alleged compromise because they were concerned that they could not maintain surveillance during the daytime without being detected. Because they did not have "eyes on" the residence, they could not be sure whether anyone had joined Ojeda.

⁸⁹ HRT training materials for "Law Enforcement Clears" state: "Try to avoid bypassing doors or windows to get an entry point. If the team must bypass doors or windows, treat them as danger areas and use operators to cover them while the entry team moves past. Sniper/observer teams can also be used to cover entry points while the entry team approaches them." The assault plan for the Ojeda arrest, which called for the agents to move up the steps toward the front door and then along the front porch to the breach points, was inconsistent with this recommendation.

Ojeda's positional advantage was demonstrated by the outcome of the initial assault. During the initial exchange of gunfire, Ojeda fired 19 times and struck Frank 4 times, Brian twice, and George once. If Ojeda had been armed with a higher-powered weapon that could penetrate FBI's armor or helmets, he likely would have killed at least two agents. The FBI agents fired their high-powered M4 carbines at least 107 times and did not strike Ojeda at all during the initial exchange.

In addition, if Ojeda had been armed with explosive devices, the casualties would have been great. The HRT had been specifically warned that explosives were a danger, given Ojeda's history and associations. After the initial exchange of gunfire, there were several agents in exposed positions on the bank below the balcony porch. A grenade tossed onto the bank from the front door, the gated doorway, or the kitchen window could have resulted in far more numerous and severe casualties.

These dangers were not unknown to the FBI. The San Juan FBI specifically recognized the difficulties inherent in a daylight assault to arrest Ojeda when they requested authority to execute the search warrant at any hour, without having to "knock and announce." The supporting affidavit signed by an agent from the Domestic Terrorism squad in the San Juan FBI on September 22 stated:

Ojeda-Rios has shown that he does not recognize law enforcement, particularly the FBI, as having any authority, and would likely refuse to comply with orders to surrender himself. This becomes a significant concern to the security of the arrest team if the arrest occurs during the daylight hours, because Ojeda-Rios, from the relative safety of his residence, will be able to see the arrest team approaching which puts them at greater risk. . . . As such, it is requested that the Court authorize the FBI to execute the Search Warrant at any hour of the day or night. . . .

Based on [Ojeda's] violent history, including the murders of the U.S. military personnel, the numerous bombings and his final act of shooting at the FBI during his [1985] arrest, the likelihood that Ojeda-Rios would again resort to violence is very great. History has shown that if Ojeda-Rios is notified of the FBI's intentions to search his residence and arrest him, he will have time to arm himself and fire upon the FBI arrest team. The element of surprise by not having to knock and announce would eliminate much of the risk of a violent confrontation between Ojeda-Rios and the arrest team.

The San Juan FBI agent-affiant was remarkably prescient in his description of the threat Ojeda would present in daylight conditions, under circumstances when he would have enough warning of the FBI's approach to arm himself.

When questioned about the risks inherent in the daylight entry, several HRT agents responded with words to the effect of "we are trained to handle these situations." However, the fact that HRT agents were trained to conduct risky operations and exhibited courage during the assault does not mean that clear and known risks to HRT agents should have been discounted in choosing a dangerous course of action.

The FBI Critical Incident Handbook, which is "designed to assist the FBI On-Scene Commander (OSC) in quickly organizing and executing an effective response to a critical incident," repeatedly emphasizes that assessment of risks and "risk effectiveness" is essential to selecting any planned action or tactical response in a crisis situation. The Handbook contains a discussion of emergency assaults that has particular relevance to this discussion:

An Emergency Assault Plan (EAP) is an immediate measure designed to regain control or stabilize a rapidly deteriorating crisis situation that poses imminent danger to the lives of innocent people. It generally lacks contingency planning, preparation, rehearsal, and full use of tactical capabilities. Consequently, execution of the EAP presents a high level of risk to all concerned.

By this definition (which we recognize is not a binding regulation), the circumstances presented to the FBI when the compromise was reported by the sniper-observers did not justify an "emergency assault." The only "crisis" was the FBI's concern that Ojeda would escape.⁹⁰ At that moment, he had no hostages and was not posing an imminent danger to the lives of innocent people. The implication of the Handbook is that unrehearsed, quickly devised emergency assaults are inherently risky and typically justified only by serious and imminent threats. While we recognize that decisions must be made quickly in the field, with imperfect information, we believe that the FBI should have given more careful consideration to alternative strategies.

It is important to note that the OIG is not suggesting that the decision to conduct an emergency daylight assault was the cause of Ojeda's death. Ojeda was not killed or injured during the assault. Ojeda was shot approximately 100 minutes after the assault because he presented a threat of imminent harm

⁹⁰ There was a potential threat to the sniper-observers as a result of the reported compromise, but an emergency assault was obviously not needed to address that threat. The sniper-observers could have been extracted by the Quick Reaction Force (at the time staffed by San Juan FBI agents) in a vehicle within minutes of reporting the compromise. Instead, the sniper-observers remained in place for almost two hours to assist with the assault.

to the agents at that moment, not because the FBI had selected the emergency daylight assault option.

III. The Surround and Call-out Strategy

The OIG's experts told us that they believe there was a superior strategy for arresting Ojeda that was available to the FBI after the sniper-observers reported that they were compromised. Specifically, the experts noted that another option available to the FBI was: (1) to establish a perimeter around the residence sufficient to prevent Ojeda from escaping, (2) demanding Ojeda's surrender with a short deadline for responding, followed by (3) the use of chemical agents, such tear gas and smoke. The experts concluded that this approach would have offered a superior strategy from the standpoint of agent safety and offered at least as good a chance to take Ojeda into custody without injury as did the emergency assault.

Under this plan, the arrest team could have established a perimeter from positions of cover permitting them to monitor Ojeda's potential escape routes. The arrest team could have demanded that Ojeda and his wife surrender, with a short deadline for compliance.⁹¹ If Ojeda and his wife refused to surrender by the deadline, chemical agents (tear gas) could have been fired into the residence to force them out of their positions inside the house. If the gas proved ineffective, the next step would have been to insert smoke into the house. Smoke cannot be filtered by a gas mask and would have forced Ojeda and his wife to exit the residence.

According to one OIG expert, chemical agents are fired in 37mm or 40mm rounds capable of penetrating doors (up to $\frac{3}{4}$ inch plywood) and windows. The rounds are accurate up to 50 yards from the target. The rounds are shot with an upward trajectory to decrease the chance an occupant is hit. The rounds ricochet inside the target and break, releasing the gas. There are three chemical agents that can be utilized, individually or in some combination: CN (chloracetophenone), CS (ortho-chlorobenzalmalononitrile), or OC (Oleoresin Capsicum). Our experts told us that no one has died from the use of CS, the most common chemical agent, and that chemical agents work

⁹¹ Under this scenario, the San Juan FBI SWAT could have moved to the scene within minutes after the compromise was reported and could have immediately established a perimeter from positions of cover to reduce Ojeda's opportunity to escape, pending the arrival of the HRT agents. At the moment of the compromise, the San Juan FBI SWAT was serving as the Quick Reaction Force because the HRT agents had returned to Aguadilla to rest and prepare for the planned nighttime assault. As a result, it took nearly two hours after the compromise for the HRT arrest team to arrive. For most of this period, there were no agents covering potential escape routes from the house, although San Juan FBI agents were positioned at choke points to intercept Ojeda's car.

90 percent of the time when deployed properly. One expert noted that the use of CN in a pyrotechnic form has resulted in death by oxygen deprivation in a couple cases.⁹²

We believe that Ojeda's positional advantage would have been reduced or neutralized in this scenario. We also believe that the FBI had enough information regarding the residence to adopt, or at least consider, this plan. In particular, the sniper-observers had already reported that there were no exit points on the Black or Red sides, and that there were windows but no doors on the Green side. Ojeda's only true exit points were the front door and the gated doorway, both on the White (front) side of the house. Finding positions of cover from which to guard the available exit points would not have been an impossible problem; indeed, the assault team retreated to such positions shortly after the dynamic assault failed and Frank was wounded and evacuated.

Given Ojeda's history, the likelihood that this scenario would have ultimately resulted in a gunfight with Ojeda cannot be excluded. But if Ojeda began shooting after he had been forced outdoors by gas, with the agents in positions of cover, the danger to the agents would have been far less than an exchange with Ojeda firing from a dark window at agents exposed on the porch, at very short range.

We concluded that the reasons given by the FBI witnesses for rejecting or not considering a surround and call-out strategy were not persuasive and were in some cases troubling. Fraticelli claimed that he proposed the surround and call-out when the compromise was reported by the sniper-observers. He said that although he originally wanted to avoid a standoff, he felt the calculation changed when the element of surprise was lost. However, Fraticelli said that after Steve pointed out that Ojeda had previously used a barricade situation to resist arrest, Fraticelli became convinced that an assault was the best option.

Steve told us, however, that "no consideration" was given to a surround and call-out option. The OTU agents (Kevin, Andy, and Jason) who participated in developing an assault plan told us that the surround and call-out option was excluded because Fraticelli had previously said he wanted to avoid a barricade situation. We found a significant conflict between the statements of Fraticelli and the other witnesses on this point, which we were not able to reconcile. At a minimum, it appears that there was no significant

⁹² The MIOG, Part 2, Section 12-14.2(5), permits the use of pyrotechnic munitions in connection with chemical agents only in outdoor situations. An OIG expert stated that non-pyrotechnic methods of delivering chemical agents by projectile into a target such as the Ojeda residence were available.

reconsideration or discussion of the surround and call-out option after the reported compromise of the sniper-observers.

We also believe that the reported compromise of the sniper-observers and the need to deliver the arrest team by helicopter changed the circumstances so significantly that the relative merits of a surround and call-out option as compared to an emergency daylight assault should have been given more consideration. Although we recognize that the ultimate decision was made under conditions of great stress, we note that the final determination to conduct an emergency assault was not made until approximately 3:45 p.m., over an hour after the compromise was reported. We believe that there was adequate time to revisit the surround and call-out option at this stage.⁹³

We believe that the mindset of avoiding a barricaded subject scenario caused the FBI to make inadequate preparations in advance for contingencies under which such a scenario might arise. This mindset also prevented the agents from revisiting the surround and call-out strategy when circumstances changed as a result of the reported compromise.

We also acknowledge that the surround and call-out option was not a perfect one. If the agents attempting to establish a perimeter could not establish positions of adequate cover, they might be exposed to gunfire from the residence, particularly if the subject was armed with a rifle. The agents also faced uncertainty regarding whether they could establish a safe perimeter in an area believed to be populated with sympathizers. (As it happened, the agents were required to establish such a perimeter after Frank was wounded, and they were able to do so successfully.) If it had been necessary to launch chemical agents into the house, the agents doing so might have also been exposed to fire during that operation.⁹⁴

⁹³ As a related matter, the OIG's experts commented on the CONOP. They expressed the opinion that, although the operation plans for the Ojeda nighttime arrest were generally thorough and well reasoned, there appeared to have been little advance planning for dealing with any contingency that might result in a barricaded subject scenario. We agree that although Fraticelli clearly and reasonably articulated a preference for avoiding such a scenario, it was foreseeable, in light of the totality of the circumstances, that a standoff with Ojeda could occur, just as it did during his 1985 arrest. The only planning that appears to have occurred to deal with this scenario was the decision by Fraticelli to have two trained negotiators from the San Juan FBI available. We address the inadequacy of the FBI's planning and execution of negotiations with Ojeda in Chapter Eight.

⁹⁴ According to FBI records, a gas mask was recovered during the search of the Ojeda residence. If the mask was operational and Ojeda was able to use it, gas might not have been effective in this instance, and it would have been necessary to utilize smoke. The OIG expert said that the insertion of smoke would have required an agent to approach the house closer than the insertion of gas because smoke cannot be fired into a residence the same way as gas. This would have potentially exposed the agent to fire from Ojeda, although the risk would be no greater than the one that the agents faced in attempting a frontal assault. At worst, the agents (continued)

We also recognize that during his 1985 arrest, Ojeda had apparently used the time after the agents called him out to prepare for his violent resistance. However, in this case the assault option did not eliminate this problem, because it took almost two hours for the HRT agents to arrive at the scene after the compromise was reported. During this interim, Ojeda had ample time to prepare for a gunfight.

In sum, we concluded that the surround and call-out option presented significantly less risk to the agents and at least as great a likelihood of success as did the emergency daylight entry that was advocated by Steve and ordered by Fraticelli. We recognize that the advantages may not necessarily have been obvious to the commanders in Puerto Rico, and that we are making this finding with the benefit of hindsight. But at the very least, we believe that the surround and call-out option should have been considered and revisited with greater attention, which the FBI never did.

IV. Whether the FBI Gave Adequate Consideration to Extracting the Sniper-Observers and Withdrawing

We also are concerned that the FBI gave little or no consideration to the option of extracting the sniper-observers without taking immediate action to arrest or surround Ojeda at the residence. In raising this concern, we are not making a finding that the “extract and withdraw” option should have been selected in this case. As we explain below, there were several valid reasons for the FBI to decide that immediate affirmative steps should be taken to capture or contain Ojeda. However, we believe that when a subject is not creating a crisis situation that poses imminent danger to innocent people, and the available options for immediately arresting or containing the subject present major risks to agents or others, FBI incident commanders should at least consider seriously the possibility of withdrawing. In this case, we do not believe this option was given more than cursory consideration.

As noted above, we determined that when the potential compromise was reported, the TOC asked the sniper-observers by radio if they could exit the area by the same route they came in. The sniper-observers – who were urging immediate action by the FBI to “hit the house” to arrest Ojeda – reported that they did not have adequate supplies to exit the area by the same route. Fraticelli and Steve told us that in order to extract the sniper-observers the FBI would have had to send a vehicle up the road that runs alongside Ojeda’s residence to pick up the sniper-observers near the trailhead. They said they

would have found themselves in a standoff situation similar to the one that occurred after the assault plan failed.

rejected this option because sending a vehicle up the road near the residence would alert Ojeda to the FBI's presence.

When we asked Steve to describe the deliberations regarding what action to take in response to the reported compromise of the sniper-observers, he stated that “[w]e gave no consideration to options other than a direct assault on the house.”

It is not clear that a vehicle extraction would have alerted Ojeda or exposed the HRT agents to danger.⁹⁵ In any event, the incident commanders should have weighed the risk of that outcome against the foreseeable risk to the agents or other persons posed by the more aggressive alternatives.

The OIG's experts told us that they did not believe that an “extract and withdraw” strategy should have been selected in this case. Among other things, they pointed out that Ojeda was a high priority fugitive who had eluded capture for 15 years and who was considered a threat. They noted that allowing Ojeda to escape may have resulted in his disappearance for many more years. They also noted that there was no assurance that the FBI would get a future opportunity to arrest Ojeda under circumstances offering a greater tactical advantage. The experts felt that Ojeda's isolated location and limited resources gave the FBI a tactical advantage if exercised properly and with adequate law enforcement manpower (including sufficient resources to control potential crowds of sympathizers).

The FBI was justifiably concerned that Ojeda would elude apprehension again. While Fraticelli had no specific information regarding the identity or sympathies of the persons who were seen and heard by the sniper-observers, he knew that the Ojeda house was one of six residences on a property owned by a known Machetero. Given all of these circumstances, we concluded that it was not inappropriate for the FBI to reject an “extract and withdraw” strategy after due consideration.

However, we are not persuaded that such consideration actually took place in this case. We believe that Fraticelli and Steve started from the unexamined assumption that affirmative steps had to be taken immediately to arrest Ojeda. We concluded that one lesson to be learned from the Ojeda incident is that in the absence of a crisis situation involving an imminent danger to FBI employees or innocent people, incident managers should at least

⁹⁵ The road rises steeply above Ojeda's residence as it passes by and the residence has no windows on the Black or Red sides facing the road. In addition, there was a newly constructed or under-construction house further up the road at Site 2, so vehicular traffic on that road was probably not an unusual event. Therefore, although Ojeda might hear a vehicle traveling up the road or briefly glance at it from the White side, he would not inevitably conclude that it was an FBI vehicle.

seriously consider the “withdraw” or “no action” option along with other, more aggressive options.

V. Modification of the Approach Route

Even assuming an immediate assault was justifiable, there were ways that the HRT could have modified the assault plan to reduce the additional risks to the arresting agents associated with the daytime conditions. The approach route – through the front yard, up the steps and laterally along the porch to the breach points – was originally part of a plan for a clandestine nighttime assault, when the occupants were expected to be sleeping. As noted above, during the daytime this route maximized the visibility and exposure of the agents to fire from inside the house.

An alternate approach route was available. Earlier that day, during deliberations regarding plans for the deliberate nighttime assault, the sniper-observers suggested a route to the house from the direction of the Black/Red corner, which would have required the agents to go further up the road adjacent to the house before going over a fence and down a slope toward the Red/White corner. The agents could not be seen or fired on from inside the house on this route, because there were no windows or doors on the Black or Red sides. An approach from this direction would have reduced the exposure of the agents to fire from the house as they approached it from the road.⁹⁶

We recognize that this route would not have eliminated all risk to the agents. Frank was wounded as he attempted to breach the gated doorway, a maneuver that would have been required no matter what route the agents took to get to the house. But the other agents (including SAs Brian and George, both of whom were shot by Ojeda) might not have taken the route along the porch or bank that exposed them to fire from the kitchen window.

The OIG experts also pointed out that there was an opportunity to adjust the emergency assault plan when the helicopters missed the intended landing zone. The emergency assault was premised on a very short amount of time between the arrival of the helicopters and entry of the house, to minimize Ojeda’s opportunity to prepare resistance. After the helicopters failed to find the banana field landing zone, circled near the target, and delivered the agents

⁹⁶ According to the TOC Log, when presented with this recommendation, Red Squad Supervisor Doug responded that he “wanted to avoid dogs on route.” We are not certain why Doug perceived that the dogs would be a greater problem on the Black/Red corner than on the White side during a nighttime assault, although it may be that the approach by this route would be slower, giving the dogs more time to detect the presence of the agents. In any event, the advantage would not seem to apply to a daylight assault, given that the agents would be inserted by helicopters in full view of the residence.

to the wrong location, the leader of the assault team should have recognized that any remaining element of surprise had been lost and halted the assault in order to regroup and adjust the plan.

Instead, the 10 HRT agents boarded an SUV driven by a San Juan FBI agent who was positioned at a choke point, drove to the Ojeda residence, crashed the gate, and began running up the front steps of the house in the face of fire from the kitchen window. According to the TOC Log, at least 10 minutes elapsed from the time the helicopters could be heard by the sniper-observers near the Ojeda residence and the time the HRT assault team arrived on the SUV. We agree with the OIG experts that at that stage it should have been clear that a daylight assault on the White side would be unduly dangerous to the agents, given Ojeda's known history of violence and the additional opportunity he had to prepare an ambush.

VI. The Decision to Conduct the Assault on El Grito de Lares

The FBI's decision to conduct the assault on September 23, El Grito de Lares, a holiday of great significance to the independence movement, has also been questioned by many people in Puerto Rico. Some have alleged that the FBI chose this day intentionally to send a message of intimidation to the independence movement.

We found no evidence to suggest that the FBI wanted to arrest Ojeda on El Grito de Lares because of the symbolic significance of that day. It is true that the FBI perceived the holiday as a potential opportunity to arrest Ojeda if he left his house to attend the festival and that HRT considered a car stop of Ojeda to be the safest means to arrest him. The consideration was one of opportunity, not symbolism or intimidation.

When Ojeda did not travel on the morning of September 23, the FBI began making plans to arrest him at his residence before dawn the next day, September 24. It was only because the sniper-observers reported that they were compromised during the afternoon of September 23 that the operation was conducted that day. Absent the compromise, the operation would not have taken place on the holiday. We found no support for the allegation that the FBI was attempting to intimidate or demoralize supporters of independence through its selection of the holiday as the day to arrest Ojeda.

VII. Conclusions Regarding the Decision to Conduct an Emergency Daylight Assault

In sum, we believe that the decision to conduct an emergency daylight assault was a flawed decision and not the best option available. However, we do not believe that Fraticelli and Steve's selection of this option constituted misconduct. Rather, their actions raise performance issues that we believe the FBI should address.

More importantly, this case should provide important lessons for the FBI in the future. These include:

- The importance of anticipating and preparing for contingencies that may reflect lesser preferred outcomes but that may nevertheless occur for reasons outside the control of the arresting agents – in this case compromise of the sniper-observers and the possibility that a barricaded subject scenario might arise. The FBI should guard against allowing a mindset for or against a particular strategy to prevent it from preparing for foreseeable contingencies.
- The importance of adequately considering all options in emergency situations, as time permits, including revisiting options that may have been discarded in prior planning. In this case, Fraticelli told the OIG that he suggested a surround and call-out option, but Steve and his subordinates from the OTU stated that they assumed that Fraticelli still would not consider this option because it might result in a barricaded subject situation. And it appears that the withdrawal option was given only cursory consideration. At the very least, it does not appear that the communication between Fraticelli and the OTU/HRT agents was clear or effective.
- The importance of considering how changed conditions affect the viability of a plan intended for different circumstances. In this case, the FBI adapted a plan that was being developed for a surreptitious nighttime assault as the basis for an emergency daylight assault, under circumstances in which the planners should have foreseen that the element of surprise would be lost. The planners did not adequately account for how the change in circumstances would affect the viability of the original assault plan.
- The importance of having Spanish language capability on the sniper-observer team in cases in which the subject of surveillance and other relevant individuals are likely to communicate in Spanish.

- The dramatic advantages that high ground, superior cover, and superior visibility can provide to a subject. In this case, these factors contributed significantly to enabling Ojeda, using a single pistol, to shoot three agents and to hold off a coordinated assault of 10 agents armed with high-powered carbines.
- The importance of considering a “withdraw” or “no action” option as well as more aggressive options for dealing with a subject when there is no crisis situation posing imminent danger to innocent people and when the alternatives involve significant risks to agents or others.

[BLANK]

CHAPTER SEVEN: OIG ASSESSMENT OF THE FBI'S DECISIONS REGARDING ENTRY OF THE RESIDENCE

In this Chapter, the OIG assesses the FBI's decision not to enter the Ojeda residence until 12:35 p.m. on September 24, over 18 hours after the agents at the scene reported that they believed Ojeda had been shot. This decision has been criticized because Ojeda bled to death from his bullet wound. Some individuals have alleged that the FBI's failure to provide medical assistance to Ojeda during this 18-hour period reflected negligence, poor planning, or an intent on the part of the FBI to allow Ojeda to die. The controversy may have been further fueled by the FBI's failure to make any public statements regarding the operation until 7:00 a.m. on September 24, even though reports that Ojeda had been shot and wounded or killed had begun to circulate widely in the media during the evening of September 23.

The OIG found that the decision by the FBI to delay entry of the residence until September 24 was motivated by considerations of agent safety and not by an intent to let Ojeda die. In the hours after 6:08 p.m. on September 23, when the agents at the scene reported that Ojeda had likely been wounded, the primary concern of the FBI commanders in Puerto Rico was that Ojeda might not have been disabled and that there might be an additional armed subject inside the residence posing a continuing deadly threat to agents who might enter the house. Accordingly, the agents in Puerto Rico took deliberate and reasonable steps in preparation for a "clear" of the residence after dark, when the agents believed they would have a significant tactical advantage. If control of the operation had remained in Puerto Rico, the clear would likely have begun shortly after 8:09 p.m., when electric power to the residence was cut off.

At approximately 8:05 p.m., however, Counterterrorism Division (CTD) AD Hulon in FBI Headquarters informed Fraticelli that any deliberate entry of the residence would require CTD approval. AD Hulon, in consultation with EAD Bald, ultimately decided that no entry would take place until relief units from HRT in Quantico arrived at the scene the next morning. Again, we found that the decision was motivated by concerns for agent safety because of the unsuccessful assault earlier on September 23 and because of uncertainty regarding the continuing threat posed by Ojeda and any other occupants of the house.

We did not find CTD's decision to assume control over the entry decision improper and believe the decision to postpone the entry until the next day reflected a good-faith balancing of the available information. We also found, on the basis of expert forensic analysis, that by the time CTD assumed control and made the decision not to enter the residence that evening, Ojeda had very

likely already died. Therefore, the decisions made by CTD after assuming control at 8:05 p.m. likely had no impact on the outcome of the operation.

However, we did find troubling aspects in the entry decisions regarding the clarity in the chain of command in Puerto Rico and the accuracy of information Bald and Hulon relied upon in making their decisions. We believe the FBI can learn important lessons from this incident that will benefit future operations.

I. Assessment of FBI Entry Decisions in Puerto Rico from Approximately 6:08 p.m. to 8:05 p.m.

From the time that Ojeda was shot until 8:05 p.m., SAC Fraticelli and HRT Deputy Commander Steve were responsible for decisions relating to whether to enter the residence. We concluded that their decisions during this period were reasonable under the circumstances.

At approximately 6:13 p.m., immediately after Ojeda was hit, Red Squad Supervisor Doug requested permission to conduct a “clear” of the residence. Steve rejected this request because of the uncertainty about Ojeda's condition and whether he was still a viable threat to the HRT agents. In addition, the reporting from the scene following the exchange of gunfire between Ojeda and HRT suggested the possibility that a second armed subject was in the residence. Moreover, Ojeda's wife, Rosado, refused to answer FBI questions when she surrendered about the number of people inside the residence, as did Ojeda when asked by San Juan FBI agents Rodger (the negotiator) and Ron.

Steve, with Fraticelli's apparent consent, elected to proceed slowly and methodically. As described in Chapter Three, this strategy involved making a limited breach of the gated door on the residence to try seeing inside, calling out to Ojeda for a response, assessing alternative entry points to the residence, and assembling an entry team and ensuring it was properly equipped. The strategy was also designed to provide HRT the tactical advantage of operating under cover of darkness by waiting for nighttime and shutting off the electricity to the residence.

The OIG's experts agreed that a cautious, deliberate approach was the appropriate one, even considering the likelihood that Ojeda was wounded and needed medical care. In their judgment, the agents were not required, legally or ethically, to place themselves at risk by immediately entering a residence to provide medical aid to a person who still could present a threat and who had demonstrated a propensity for violence that day, and in the past. They said

that the incremental steps taken by HRT to assess the situation and ensure agent safety were entirely appropriate for the circumstances.⁹⁷

II. Differing Accounts Regarding the Chain of Command from 6:08 until 8:05 p.m.

Before assessing the decisions made by CTD after it assumed control of the situation, we comment here on the differing accounts that the OIG received regarding the chain of command during the period from 6:08 p.m., when Ojeda was wounded, until 8:05 p.m., when Hulon told Fraticelli that CTD approval would be required for any entry into the residence.

Our conclusion that San Juan FBI and HRT approached the entry decision cautiously but reasonably credited Fraticelli's and Steve's accounts that they were in fact planning to enter Ojeda's residence that night. As we set out in Chapter Five, however, their accounts directly conflicted with HRT Commander Craig's statement to us that he ordered Steve not to enter the residence after the limited breach, which took place at approximately 7:00 p.m. In contrast, Steve told us Craig did not give him any orders at all during their conversations and Fraticelli told us that he thought Steve's conversations with Craig were limited to providing situation reports. We did not find evidence of any communications between Steve and Fraticelli or between the TOC and the scene suggesting otherwise.⁹⁸ In effect, what Craig considered at the time, and asserted to us as an order, evidently was a non-factor in San Juan FBI and HRT's entry decisions between 6:08 and 8:05 p.m.

⁹⁷ We identified two issues relevant to San Juan FBI's and HRT's decisions that relate to the level of preparedness and include them here for the FBI's consideration in future operations. First, one of the OIG's experts questioned whether HRT had equipment available that could have been used to see inside the residence, such as fiber optic video equipment. He thought this should be standard equipment for an operation such as this and considered it a mistake that it was not brought. None of the experts believed that having the equipment would have changed the FBI's obligation to enter the residence, but using it might have provided intelligence that could have hastened the decision to enter.

Second, regarding the significant delay shutting off the electricity to the residence, the experts questioned whether more thorough intelligence gathering before the operation began could have hastened this process. Of course, one possible explanation for this not being done was that neither San Juan FBI nor HRT anticipated a barricaded subject scenario and therefore did not consider in advance how the utilities could be shut off. However, we found in Chapter Six that there should have been contingency planning for this scenario. As we discuss in Chapter Eight, the FBI's failure to anticipate a barricaded subject scenario also affected its negotiations preparedness.

⁹⁸ In fact, on the subject of Craig sending HRT reinforcements to Puerto Rico, Steve said he told Craig that they would not be needed if the situation was resolved that night (September 23), suggesting that entry that evening was still considered a viable option.

The conflict between the versions of events provided by Craig and Steve is troubling for several reasons. Apparently, Steve misinterpreted or ignored what his superior considered an order, indicating a significant lapse in either communication or command. Alternatively, Craig did not communicate the order to Steve at all. Just as troubling is the fact that Craig, although Steve's superior, was not the tactical advisor to the SAC for this operation. We do not believe Craig had authority to make tactical decisions at that time. Thus, whatever Craig intended to convey in his discussions with Steve, its proper status was that of a recommendation. Assuming it was in fact made to Steve, the recommendation should have been passed along to Fraticelli for his consideration, and it apparently was not.

We do not believe this circumstance occurred because the FBI's chain of command policies lacked clarity. Chain of command responsibilities were set forth in the FBI's Crisis Management Program guidelines and were clearly defined in the CONOP for this operation, which provided that Fraticelli was at the top of the chain of command, followed by San Juan FBI ASAC Leslie, HRT Deputy Commander Steve, and Red Squad Supervisor Doug. Therefore, to avoid a repeat of this situation in future operations, we recommend that CIRG and HRT management review and discuss the miscommunication described here and the discrepancy in the chain of command that Craig's order demonstrates.

III. Whether the FBI Ignored Bloodstains on the Front Doorstep

One allegation made in the Puerto Rico press was that the FBI knew Ojeda was seriously injured and bleeding because a large amount of blood came out under the front door, making a large stain on the front step and the balcony porch door. Several Puerto Rico newspapers published photographs similar to Figure 11 as support for this allegation. Some individuals suggested that because the agents at the scene would have seen the blood stain on September 23, the FBI's delay in entering the house must have reflected an intention to let Ojeda bleed to death.

The OIG found no evidence to support this inference. To begin with, the dramatic bloodstain photographs published in the newspapers reflected the appearance of the doorstep on or after the afternoon of September 24, by which time Ojeda's body had been turned over and pulled out onto the porch to check for explosive devices. (See Figure 11.) Before the body was turned over, the appearance of the doorstep was very different. As shown in Figure 10, there was a thin stream of blood at one corner of the doorstep. A substantial amount of blood gradually accumulated on the floor of the balcony porch.

None of the agents at the scene said they saw a blood stain on the doorstep before the FBI entered the house on September 24. We found the

agents' statements that they did not see a stain to be credible for several reasons. First, as noted above, before Ojeda's body was moved the stain was not nearly as dramatic as suggested in the newspaper photographs.

Second, many of the agents covering the Ojeda residence after Ojeda was shot were positioned at locations below the elevation of the balcony porch and therefore could not have seen the doorstep or the floor. The agents' view of the porch also was significantly obscured by heavy foliage. The newspaper photographs were taken after the foliage was removed, giving the impression that the doorstep was much more visible than it in fact was during the operation. Figure 8, a photograph taken from a position in the front yard before the foliage was removed, gives a more accurate illustration of how the porch would have looked to many of the agents on September 23.

The agents positioned on the hillside behind the retaining wall (Brian and Ken) also may not have had a clear view of the area of the porch where the bloodstain formed. As shown in Figure 9 – a view of the residence from the approximate location where Brian was positioned when he fired at Ojeda – the view of the doorstep and the porch floor near the front door was obscured by the balcony railing.

Third, the blood on the porch floor would have accumulated gradually as blood flowed from Ojeda's body under the door. Ojeda was shot at 6:08 p.m. Sunset on that day was around 6:30 p.m. There was no light on the porch. Therefore, it likely was dark before blood would have been present in an amount visible to the agents from their positions of cover, even assuming that their views had not otherwise been obscured.

Finally, we found it significant that most of the agents who were present at the scene on September 23 told us that they believed that Ojeda was wounded on the basis of hearing him cry out and fall, even without seeing any blood under the door. Most notably, the two agents in the best position to view the blood stain – Don and Scott, who breached the gated door at 6:49 p.m. and remained in the alcove for some time after – strongly advocated entering the residence and therefore would not have had any reason to disregard the significance of the blood stain. To the contrary, the presence of the stain would have made their argument for entering the residence that night more compelling.

IV. Assessment of FBI Entry Decisions at FBI Headquarters

In this section, we assess separately two aspects of the entry decisions made at FBI Headquarters: first, the reasons for requiring CTD approval for any entry, and second, the explanation for not entering the residence the night of September 23. We also address how removing the entry decision from the

San Juan FBI Command Post affected the accuracy of the information available to the CTD decision-makers.

A. Decision to Require Counterterrorism Division Approval of any Plan to Enter the Residence

CTD's authority to require, as it did at 8:05 p.m. on September 23, that Hulon approve any plan to enter the residence is undisputed. The Macheteros investigation, which included the arrest operation for Ojeda, was classified as a terrorism case and therefore fell under Hulon's authority as the Assistant Director for CTD. In addition, following the September 11 terrorist attacks, the FBI mandated that FBI Headquarters, instead of the field division with primary investigative responsibility, would be the lead in all FBI counterterrorism cases and their related operations.

The issue for the OIG, therefore, was to assess the reasons CTD exercised its authority in the manner it did in this particular case. We interviewed the FBI Headquarters officials most closely involved in the matter – EAD Bald, AD Hulon, and DAD Lewis. Based on these interviews, we found that Bald decided to require CTD approval for any entry plan because he thought that Fraticelli was “overwhelmed” and lacked confidence in his own ability to manage the situation, a perception Bald felt was confirmed by what he believed were indications of command confusion between San Juan FBI and HRT. The decision was made in the context of a shared belief among all three Headquarters officials that FBI Headquarters' involvement was needed to provide balance and perspective, and to ensure sound decision-making.

For the reasons explained below, although we did not find this explanation entirely satisfying, we did not conclude that the decision was improper.

1. Perception that the SAC lacked confidence

Bald's perception that Fraticelli felt overwhelmed by the situation and lacked the confidence to manage it was based on what he was told about Fraticelli's demeanor in calls with Hulon, and the significance of what Bald considered Fraticelli's premature request for the help of another SAC. The fact that Fraticelli requested a specific SAC with whom he had previously worked and that he made “repeated” follow-up inquiries about the status of the request reinforced Bald's perception.

It is difficult for us to assess Bald's perception that Fraticelli lacked confidence. Bald had years of experience overseeing and supervising crisis situations that informed his response to Fraticelli's request. In addition, Hulon – who as the person actually talking to Fraticelli was in a position to assess his demeanor – told us that he thought it was fair for Bald to form the perception

he did based on what Hulon related about his conversations with Fraticelli. Hulon told us that Fraticelli seemed excitable and stressed during their calls.

However, the agents we interviewed who were at the scene, the TOC, and the Command Post did not tell us anything that supported the perception that Fraticelli lacked confidence or was overwhelmed during the period after 6:08 p.m. when the perimeter shots were fired. In addition, we did not find unreasonable Fraticelli's explanation for requesting that another SAC be sent to Puerto Rico. Fraticelli told us that while he did not know how long the situation was going to last, he wanted to ensure that he had a counterpart available who could speak Spanish and had experience working in Puerto Rico.

2. Indications of confusion between San Juan FBI and HRT regarding who was in charge

Bald also told us that he felt his perception of Fraticelli's lack of confidence to manage the situation was confirmed when Hulon told him at approximately 7:00 p.m. that an HRT agent had gotten close enough to the residence to look inside through a window. This suggested to Bald that HRT was making decisions independent of Fraticelli because the agent's alleged activity was inconsistent with the earlier guidance Hulon had given Fraticelli to hold the perimeter.

This aspect of Bald's decision is also problematic. Hulon told the OIG that he does not believe he could have been the person who reported this information to Bald because he did not recall hearing that any agent got close to the window. Fraticelli, who was Hulon's primary contact in Puerto Rico, also told us that he did not recall anything about an agent getting close to a window. And we concluded, on the basis of our interviews with the HRT agents who were at the scene, that no one got close to the window at or near the time Bald recalled it being reported to him. Therefore, the particular activity that Bald said confirmed his perception of Fraticelli's lack of confidence never actually occurred.⁹⁹

Nevertheless, it was apparent from Bald's contemporaneous notes that some event prompted Bald to question who was in charge of the operation. Some of the concern apparently resulted from a statement made by Craig, the HRT Commander in Quantico. Hulon called Craig – we believe at about 7:25 p.m. – to discuss the situation. Craig told Hulon that HRT had the lead at

⁹⁹ We believe it likely that the incident described by Bald was actually the limited breach of the residence. Agents at the point of the breach reported that they were able to look into the hallway behind the wooden gate but could not see Ojeda.

the scene.¹⁰⁰ When this statement reached Bald, he consulted EAD Ashley, who agreed with Bald that CTD, through the SAC, had the lead. This resolved in Bald's mind that he needed to act to ensure there was a proper chain of command in place before any further deliberate action was taken.

Yet, here too, the information Bald relied on did not accurately portray the situation at the scene. Craig, who Bald incorrectly believed was in Puerto Rico, was not at that time in the chain of command. Moreover, whatever authority Craig believed he was exercising apparently was not registering in Puerto Rico, where Steve and HRT were preparing for a nighttime entry under Fraticelli's authority. Therefore, the chain of command problem in Puerto Rico that Bald believed was indicated by Craig's comment about who had the lead did not actually exist.

We recognize that Bald had to rely on the information he was given, and we do not believe he was required to verify everything he was told. However, we also observed that Bald did not consult with Hulon regarding the chain of command implications of the agent reportedly looking in the window or Craig's statement that HRT had the lead. In fact, while Hulon told us that he agreed with Bald's ultimate decision because he felt Fraticelli needed support, he said he was not personally concerned with the management of the operation up to that point.

3. Belief that FBI Headquarters would provide balance and perspective, and ensure sound decision-making

The context of Bald's decision to require CTD approval for any entry plan was his view of the appropriate role for FBI Headquarters in circumstances like those in Puerto Rico after the emergency assault failed: to force the managers and agents in the field to step back from the action, carefully review the situation, and methodically assess the next possible courses of action. The goal, as Bald told us, was to avoid making a bad situation worse.

Hulon and Lewis shared Bald's view of FBI Headquarters' role. Hulon told us that while he considers HRT an exceptionally well-trained unit capable of taking dynamic action upon command, he believes there are circumstances where it is appropriate and even necessary for FBI Headquarters to provide an additional, broader-based perspective. Similarly, Lewis told us that in his experience SWAT agents, like those on HRT, are action-oriented and sometimes

¹⁰⁰ Craig told the OIG that when Hulon asked him who was in charge of the scene, he replied HRT was unless Hulon ordered otherwise. In fact, that was incorrect – according to the CONOP and FBI policies, SAC Fraticelli was in charge.

inclined to be aggressive in barricaded subject scenarios.¹⁰¹ He said that while there are limited circumstances when quick action is required, he felt the situation in Puerto Rico called for stepping back from the earlier violent encounter. Lewis also explained that FBI Headquarters gets involved in situations such as the one in Puerto Rico because ultimately Headquarters is responsible for the outcome.

These officials' views have significant implications for many FBI operations, and it was beyond the scope of this review to analyze their effect and ramifications on FBI operations generally. We believe, however, that after Ojeda was shot the FBI commanders in Puerto Rico were doing precisely what Headquarters would expect of them: cautiously and methodically planning the next course of action.

On the other hand, as we discussed in Chapter Six, we found that HRT had earlier persuaded the SAC to approve an extremely aggressive and risky daylight assault by helicopter, in which the element of surprise was foreseeably absent. The failure of the assault to that point would have been a reasonable explanation for Bald's concern that further aggressive action be planned carefully and justified.

However, Bald told us that his decision to require CTD approval for any entry did not reflect a judgment about the earlier daylight assault because he did not have sufficient information at that point to assess the action. Rather, he said the fact that HRT agents had been shot indicated the severity of the situation and impressed on him the importance of having someone in firm control of the operation. Based on the considerations we discussed above, Bald said he concluded Fraticelli was not the right person.

4. Conclusion regarding the decision to require CTD approval for any entry

We were troubled by Bald's explanation for requiring CTD approval for entry because we determined that two of the purported factual predicates for the decision – an agent's activity near a window and the command confusion suggested by Craig's statement that HRT had the lead – did not reflect what was actually happening at the scene. In addition, we believe that at the time CTD assumed control over the decision, the commanders in Puerto Rico were exercising caution and deliberation in preparing for a nighttime entry to be conducted after the power was cut.

¹⁰¹ The OIG's experts likewise told us the dynamic approach designed to overwhelm a subject through confrontation and force is very popular in law enforcement training today and that, as a result, HRT-type units are most comfortable in environments requiring that approach.

The most important reason for CTD's decision to assume control was Bald's perception that Fraticelli was overwhelmed and lacked the confidence to manage the situation. Bald's perception was largely based on Hulon's characterization of Fraticelli's demeanor during their phone conversations, and it is difficult for us to assess this subjective judgment after the fact. While we found Fraticelli's explanation for requesting assistance from another SAC to be objectively reasonable, Hulon believed, based on his conversations with Fraticelli, that Fraticelli was stressed and that the request for another SAC was an unusual request under the circumstances. Bald believed the request indicated a lack of confidence. While we are not completely persuaded by the evidence supporting these judgments, we cannot say that Bald's decision, based primarily on Fraticelli's perceived demeanor, was improper.

Finally, there was an additional aspect of the requirement that CTD approve any entry decision that warrants comment. When Hulon called Fraticelli at 8:05 p.m. to tell him that CTD must approve any entry, Hulon initially left open the possibility of a nighttime entry and told Fraticelli and Steve that the proposal should be put in writing and sent to Headquarters for review.

The FBI's Manual of Investigative Operations and Guidelines states: "It is recommended that whenever possible, written arrest plans be prepared prior to conducting law enforcement activities that may result in the arrest of a potentially dangerous subject." It also provides that: "Certain situations may necessitate an oral briefing in lieu of a written plan in exigent circumstances."

In our view, Hulon's requirement that the plan be in writing was unnecessary and unduly bureaucratic, particularly in light of the fact that Hulon had been told that Ojeda was believed to be wounded and on the floor. Hulon told us that he asked for the plan in writing because he considered it standard procedure under the circumstances and because it would allow FBI Headquarters to carefully review the proposed action. However, Bald told us that although written plans should be done if time permits, there would have been nothing wrong in this case with HRT presenting the plan orally to the SAC and then to Hulon. We concluded that the fact that Ojeda was believed to be wounded and on the ground created an "exigent circumstance" that justified an oral briefing in lieu of a written plan. We recognize that Hulon ultimately rejected the plan for a nighttime entry before it was submitted in writing, so that the writing requirement had a limited practical impact on the outcome. While we believe Hulon still would have rejected the plan, allowing Fraticelli or Steve to present it orally might have accelerated the decision and avoided the confusion between Fraticelli and Steve and the agents at the scene, who were preparing until 11:33 p.m. that evening to enter the residence, long after Hulon had decided that the entry would be delayed until the next morning.

B. Decision Not to Enter the Residence the Night of September 23

We found that CTD's decision not to approve entry of the residence on the night of September 23 was motivated by a concern for agent safety and a desire to avoid additional casualties. We found no evidence that Bald, Hulon, or Lewis was motivated by a desire to withhold medical assistance from Ojeda. Rather, the decision reflected a good-faith balancing of the available information regarding circumstances at the scene.

As we discussed in detail in Chapter Three, CTD ultimately rejected a nighttime entry based on its belief that there might be a second shooter in the residence; the lack of certainty regarding Ojeda's condition and whether he was still a threat; the belief that Ojeda's intimate knowledge of the interior of the residence mitigated HRT's nighttime tactical advantage; and the fatigue of the HRT agents at the scene. Hulon also told us that he believed there was a risk based on the history of Ojeda and the Macheteros that the residence contained improvised explosive devices. In Hulon's judgment, these considerations outweighed concerns that Ojeda might need medical treatment.

Hulon recognized that, in addition to Ojeda's possible need for medical attention, there were other considerations that favored resolving the situation on September 23. For example, delaying the entry until the next day meant that the already fatigued HRT agents would have to hold the perimeter overnight. Hulon told us that he felt the San Juan FBI SWAT agents and POPR officers would be available to assist on the perimeter, which in fact is what happened (San Juan FBI SWAT on the inner perimeter, POPR on the outer perimeter). Hulon was also aware of the potential security risk posed by the crowds at the scene but believed this, too, could be managed by San Juan FBI and POPR personnel. With the assistance of a rainstorm that induced much of the crowd to disperse, San Juan FBI and POPR personnel were in fact able to control the crowd.

The theme that the FBI Headquarters officials stressed in our interviews was that there was no compelling reason to rush the entry and that the information available indicated a sufficient level of risk to warrant delay. We did not find that this consideration reflected indifference for Ojeda's medical condition. While there was reporting in the SIOC log indicating that Ojeda was "on the floor" and "possibly injured," the officials told us that they did not know for certain Ojeda had been shot or what his condition was, although the perception of the agents at the scene was that Ojeda had been killed or was seriously wounded, as we discuss in the next subsection.

Although the CTD officials took into account Ojeda's possible need for medical care, they concluded that the continuing potential threat to the agents posed by Ojeda or others inside the house was a more important consideration.

We do not believe the FBI was required to enter a residence under circumstances that it had reason to believe constituted a continuing threat to its agents.

We recognize a legitimate argument can be made that the FBI should have entered the residence that evening, as some of the HRT agents at the scene advocated. This argument relies on HRT's significant tactical advantage in nighttime operations; the near certainty – based on his screaming “ay, ay, ay,” followed by sounds from the residence suggesting a fall – that Ojeda had been seriously wounded and was “on the floor;” the deteriorating security environment on the outer perimeter; the possibility that delay would give Ojeda and any other occupant time to fortify their positions; and the interest in rendering medical care to Ojeda. In retrospect, given our current knowledge regarding Ojeda's condition at the time, it would have reduced (but surely not eliminated) the criticism of the FBI if the agents had entered the house on September 23, as Fraticelli and Steve initially recommended. However, Hulon did not have this knowledge at the time and knew only that Ojeda might have been hit but that his precise condition was unknown. We found that the decision Hulon made with the information then available to him was not improper.

C. The Informational Consequences of CTD Assuming Control of the Entry Decision

We described above how Bald's decision to require CTD approval for any entry was based in part on inaccurate information regarding what was occurring at the scene. We saw a similar problem regarding the decision not to enter the residence on the night of September 23. In our view, the information available to Hulon and Bald was somewhat inaccurate because of their distance from the scene, their lack of continuous communication with the San Juan FBI Command Post, and the filtering of information through at least two levels of reporting. As a result, the CTD officials' perception of the threat to the agents entering the residence was different in important respects from HRT agents' perception of that threat. The agents at the scene who were closest to the action said they were virtually certain, based on what they saw and heard, that Ojeda had been killed or very seriously wounded by the perimeter shots at 6:08 p.m. The agents' certainty on this point, and their increasing confidence in the belief that there were no other subjects in the house, was reinforced by the lack of any response to the partial breach and the absence for several hours of any noise from inside the house except for the sound of a radio playing.

In contrast, the CTD officials were operating throughout the evening of September 23 under the assumption that there may have been a second armed subject in the house and the belief that Ojeda may have been wounded but that his condition was essentially unknown. We believe that this difference is

one reason (but not the only reason) the agents at the scene were so much more eager to conduct an entry that night than CTD.

Fratlicelli told us that he was not aware of the HRT agents' growing certainty as time passed that the threat from the residence was minimal. In our view, this was because the HRT agents anticipated that the nighttime entry plan would be approved by CTD and therefore did not report their evolving perception of the threat. Further, Fraticelli did not solicit the information because he understood, based on his earlier call with Hulon, that CTD had made a decision to conduct the entry the next day with the relief HRT team from Quantico. In fact, in his later call to Lewis to persuade him that a nighttime entry was the better course of action, Fraticelli said he told Lewis that Ojeda might still be alive.

The evident disconnect in the assumptions underlying the entry deliberations troubled us. CTD was making decisions based on assumptions about the threat from inside the residence that were not entirely supported by the observations of the HRT agents at the scene. Yet, because the agents at the scene believed it was only a matter of time before the entry would be approved, they did not report their evolving perception of the threat to the TOC. And because Fraticelli believed that CTD already had made its decision relatively early in the evening – for reasons that he told us he found reasonable – he did not solicit from HRT its assessment of the threat as time passed and then report this information to Hulon.

We asked Hulon whether a different decision might have been made if CTD had been informed during the night of September 23 that the HRT agents at the scene were virtually certain Ojeda had been seriously wounded, if not killed, and were increasingly confident there were no other subjects in the house. Hulon told us that this information would have prompted additional discussion with Bald, and possibly input from Lewis and Craig as well, but that he could not state whether this would have changed his decision about delaying entry. Hulon said they likely would have assessed the basis for the agents' judgment and considered that together with the other relevant factors, such as agent fatigue and the possibility of explosives in the residence.

We concluded that the distance and multiple layers of reporting between the agents at the scene and the FBI Headquarters officials in Washington D.C. affected the information that was the basis of the decision not to enter the house during the evening of September 23. However, we cannot say with certainty that the decision in this case would have changed if the more immediate assessment of conditions at the scene had been available to the CTD officials.

The OIG's experts were critical of the command and control structure where tactical decisions are made from a location other than the scene of the

operation. As one expert explained, circumstances in crisis incidents like that in Puerto Rico are frequently changing and the tactical decision-maker must be at the scene to keep pace with what is happening and to best appreciate the relevant risk factors. In the expert's view, remote management that relies on intelligence being accurately reported through multiple layers is problematic.

In contrast, the FBI Headquarters officials we interviewed told us there are circumstances where Headquarters' involvement in a crisis incident is important. In this case, for example, Hulon felt Bald's decision to require CTD approval for any entry plan was appropriate because it eliminated any command confusion and provided additional support to the operation. Hulon also told us that the involvement of senior managers from Headquarters brings significant operational experience to crisis incidents and provides perspective regarding how decisions in one incident might impact FBI operations more broadly. Headquarters' involvement can also bring a measure of deliberation and caution to crisis incidents where, as Lewis told us, stepping back from a violent encounter is a preferable strategy to the quick, aggressive tactics sometimes favored by action-oriented agents such as those on HRT.

It is beyond the scope of our review to determine generally the relative merits of our experts' opinion (that any command and control structure where FBI Headquarters makes tactical decisions is a poor model for crisis incidents) versus the desire to vest ultimate decision-making authority in a senior manager who while removed from the scene has a broader perspective. However, this case demonstrates how an information disconnect can affect the decisions of remote managers. In considering when, and how, to vest decision-making authority for crisis situations in FBI Headquarters, we believe that the FBI should take this consequence into account in assessing the conditions under which Headquarters will assume control over a crisis incident. And when FBI Headquarters assumes such operational control, the FBI should ensure that adequate information flows to the Headquarters officials who must approve operational decisions and that Headquarters officials adequately communicate with on-scene commanders.

V. The Tension Between the FBI's Aggressive Strategy Before the Gunfire Exchange and its Cautious Strategy after Ojeda Was Wounded

There was an obvious change in the degree of aggressiveness in the FBI's strategy during the course of the operation. When the sniper-observers reported that they had been compromised, Fraticelli approved the extremely aggressive immediate assault strategy recommended by Steve. After three HRT agents were shot and one was seriously wounded, the agents at the scene still wanted to immediately enter the residence, but the FBI adopted a far more cautious approach. CTD's decision not to approve a nighttime entry after

Ojeda was wounded clearly reflected a greater emphasis on caution and safety than informed the selection of the emergency assault plan.

This change in emphasis subjected the FBI to harsh criticism, ranging from the suggestion that the FBI was not prepared to finish what it had started to the accusation that the FBI's decisions were part of an intentional plan to assassinate a symbol of the Puerto Rican independence movement.

We determined that the change in emphasis toward a more cautious approach was not the result of malicious intent, but rather FBI Headquarters' adjustment from the initial strategy that had failed.¹⁰² As we discussed in Chapter Six, we concluded that HRT's decision to conduct an emergency daylight assault was extremely risky in comparison to available alternatives. The selection of a more cautious approach after Ojeda was shot was, in significant part, an understandable reaction to the results of the more aggressive approach, which had resulted in three agents being shot and one seriously wounded. Thus, in our judgment, the contrast in approaches was the result of an overly risky assault as opposed to an overly cautious entry afterwards.

In addition, the circumstances had changed by the time the nighttime entry decision had to be made. The emergency assault, in theory, required rapid action so that Ojeda did not have time to prepare any resistance. After the assault failed and Ojeda was believed shot, there was a wholly different scenario to contend with: the apprehension of a barricaded, potentially wounded subject who had shot at law enforcement, with the possibility of a second shooter in the residence. The OIG's experts concluded, and we agreed, that this scenario supported the FBI's cautious approach.

VI. Consequences for the Outcome

It is critical to note that, although the decision to put off entry into the residence until the next day was one of the most controversial aspects of the operation, we found that it likely had no impact on Ojeda's death. As we discussed in Chapter Four, the Forensic Pathologist who performed the autopsy told us that based on the size of the wound and reasonable assumptions about Ojeda's heart rate and blood pressure, he estimated that

¹⁰² The OIG experts also told us that, based on their review, HRT did not send enough agents to Puerto Rico to conduct the operation. It is possible that, with an additional shift of agents available the fatigue factor might not have been as persuasive a reason for CTD to reject a nighttime entry. In this sense, it could be said that the change to a cautious approach reflected inadequate preparation. But in light of the outcome of the emergency assault, we believe that CTD would have selected a more cautious approach even if more HRT agents had been available at the scene.

Ojeda died from loss of blood approximately 15 to 30 minutes after being shot, which would place the time of death at between 6:23 and 6:38. In addition, when the OIG asked the Office of the Armed Forces Medical Examiner whether Ojeda could have survived longer than two hours (the period during which Fraticelli was in charge of the entry decision), the Medical Examiner responded that it was unlikely.

If these medical opinions are accurate, Ojeda died from blood loss before the agents at the scene conducted a partial breach of the gated doorway at 6:49 and well before CTD took control of the entry decision at 8:05 p.m. Indeed, if the estimates from the Forensic Institute are accurate, the only chance to save Ojeda's life would have been for the agents to enter the residence some time before 6:38 p.m. and evacuate Ojeda immediately. At 6:38, the partial breach had not yet been conducted. Given the result of the earlier effort to enter the residence, the uncertainty regarding Ojeda's condition, and the belief that more than one weapon had been fired from inside the house during the gunfight, an immediate effort to enter the house would have been a risky action and we cannot fault the FBI for taking a more cautious approach.

VII. Conclusions Regarding the FBI's Entry Decisions

In this Chapter, we considered the entry decisions made by the FBI commanders in Puerto Rico and the officials at FBI Headquarters. We concluded that the decisions were motivated by considerations of agent safety and not by any desire to withhold medical treatment from Ojeda. The FBI's primary concern was the threat posed to agents entering the house by the uncertain condition of Ojeda and the possibility of an additional armed subject in the residence. Early in the evening of September 23, this concern justified the cautious and deliberate approach taken to preparations for entering the residence after dark. Later in the evening, after CTD assumed control over the entry decision, this concern was the reason for CTD's decision that no entry would take place until the relief team of HRT agents from Quantico arrived the next day, on September 24. Additional reasons for CTD's decision included agent fatigue and the possibility of explosives in the residence. We concluded that CTD's decision reflected a good-faith balancing of the information known at the time, and we found no evidence that the decisions made by the FBI commanders in Puerto Rico or the CTD officials were based on any desire to withhold medical attention from Ojeda.

We also assessed in this Chapter the decision to require that SAC Fraticelli obtain CTD approval before entering the residence. This decision was primarily based on the perception at FBI Headquarters that Fraticelli appeared overwhelmed and lacked the confidence to handle the situation. Although we found that CTD's decision to assume control was based in part on a

misperception of events at the scene, we could not conclude the decision was improper.

We concluded that there were troubling aspects to the entry decisions in terms of the clarity in the chain of command in Puerto Rico and the accuracy of information used by the CTD officials in making their decisions. A clear chain of command is critical in operations where HRT is deployed in support of an FBI field division. In this case, Fraticelli was in charge of the operation and Steve served as his tactical advisor and was the ranking HRT manager in the CONOP's chain of command. Yet, according to Craig, he gave Steve a tactical order not to enter the residence after the limited breach of the gated door. In our view, Craig's order was troubling because we do not believe he had authority to make tactical decisions at that time, and because Steve – who told us Craig did not give him any advice or recommendations at all – either misinterpreted or ignored what Craig considered an order. Craig also incorrectly told Hulon that HRT was in charge, which caused Bald to question Fraticelli's leadership. In fact, Fraticelli was in charge, contrary to Craig's statement. This apparent discrepancy in the chain of command should not occur, and we recommend that HRT management take measures to ensure it does not happen in the future.

There also was an evident lack of clarity between Fraticelli and Steve regarding CTD's decision not to enter Ojeda's residence on September 23. Based on the statements of Fraticelli and Hulon, CTD's final decision was conveyed to Fraticelli sometime before 9:00 p.m. However, the decision apparently was not conveyed to Steve because HRT continued to draft a nighttime entry plan, which was finally faxed to FBI Headquarters for approval at 11:25 p.m. By that time Hulon had already left for the night. According to Steve, he did not learn CTD had made a final decision until he and Fraticelli called Lewis to try to persuade him – in the hope that he could then persuade Hulon – that HRT should conduct a nighttime entry. Although the recollections of those involved were imperfect as to the exact timing of the calls, we believe this call and Lewis's return call occurred after 11:15 p.m., when Hulon and Lewis had already left FBI Headquarters for the night. When Fraticelli told Steve that Lewis said there would be no entry, the decision was conveyed for the first time to the HRT agents at the scene. According to the TOC Log, this occurred at 11:33 p.m. While we could not determine precisely why Steve and HRT believed a nighttime entry was a possibility nearly three hours after CTD decided against that course of action, this demonstrated a troubling lack of communication between Fraticelli and Steve concerning the most significant tactical decision left to be made.

Finally, in this Chapter we also highlighted the significant informational consequences of CTD's decision to assume control of the entry decision. A disconnect existed between CTD's assumptions regarding the threat from inside the residence and the HRT agents' assessment of that threat as time

passed. Although we could not conclude that the decision in this case would have changed if the more immediate assessment of conditions at the scene had been available to CTD, we believe that the FBI should take into account the potential adverse informational consequences when assessing the conditions under which Headquarters will assume control over a crisis incident and in ensuring that adequate information flows to and from Headquarters officials who must approve operational decisions.

CHAPTER EIGHT: ASSESSMENT OF THE PREPARATION FOR AND CONDUCT OF NEGOTIATIONS

After the emergency daylight assault failed to apprehend Ojeda, the FBI was confronted with the barricaded subject scenario it had sought to avoid. The Crisis Negotiation Unit (CNU) agents who typically are deployed with HRT as its crisis negotiators were not included in the CONOP for this mission. Instead, two San Juan FBI negotiators were assigned to the operation, and only one of them was sent to the scene to communicate with Ojeda following the failed assault. In this Chapter, the OIG assesses the FBI's level of preparedness for the scenario that occurred here. This Chapter also assesses the conduct of the negotiations between the FBI and Ojeda, including the decision to reject Ojeda's demand that a specific reporter be brought to the scene.

I. The FBI's Preparation for Negotiations in a Barricaded Subject Scenario

CNU Unit Chief Dennis told the OIG that when he learned on September 19, 2005, about the operation to apprehend Ojeda, he immediately contacted HRT Commander Craig to ask if he needed CNU to organize a full complement of negotiators to deploy with HRT. He said Craig told him it was unnecessary because the operation was primarily a reconnaissance and surveillance mission. Dennis told us that this was the first occasion in his experience that Craig declined to include CNU negotiators on an HRT deployment.¹⁰³

Craig said that he told Dennis he did not believe negotiators were needed because the deployment was primarily a surveillance mission and he felt the chances of making a positive identification of Ojeda were remote. Craig was skeptical the mission would succeed in light of the difficult terrain around the residence, the presence of sympathizers in the neighborhood, and the fact that no one had seen Ojeda in at least 10 years. Craig told us that he expected a course of action would be drawn up for an arrest if HRT made a positive identification.

HRT Deputy Commander Steve also told us that he declined Dennis's assistance because he did not believe there was sufficient information at the

¹⁰³ Dennis told us that CNU did not have any Spanish-speaking negotiators at the time, but said all the negotiators are trained to negotiate through interpreters. In addition, he said the CNU negotiators could have worked with the Spanish-speaking negotiators from the San Juan FBI negotiation team.

beginning of the operation to justify bringing CNU negotiators to Puerto Rico. He said HRT normally uses CNU negotiators when a barricaded subject scenario is anticipated from the beginning of the operation. He said he also knew that San Juan FBI had negotiators available if such a scenario arose and that CNU negotiators could be flown to the scene if necessary.

In our view, HRT should have deployed with a CNU crisis negotiation team to Puerto Rico. Craig's statement that CNU negotiators were unnecessary because the operation was primarily a surveillance mission was inconsistent with the CONOP's stated purpose of the mission – "[t]his CONOP supports the surveillance and arrest plan for the subject [Ojeda]" – and the fact that the CONOP included several arrest scenarios. Craig's skepticism about the likelihood of success in identifying Ojeda, and belief that there would be an opportunity to send down negotiators if and when Ojeda was identified, also seemed inconsistent with the planning reflected in the CONOP. We believe Craig's skepticism led to inadequate consideration of the possible scenarios that could result from any attempted arrest of Ojeda. One foreseeable scenario, given Ojeda's history, was violent resistance and a potential standoff. The ability to timely deploy CNU negotiators to the scene is one important option for resolving such a situation.

Steve's claim that HRT uses CNU only when a barricaded subject scenario is anticipated from the beginning of an operation is inconsistent with FBI guidelines. The FBI's Manual of Investigation Operations and Guidelines (MIOG) states that negotiators should deploy with field office SWAT teams "if and when" the potential exists for the use of negotiation resources. MIOG, Part 2, Section 30-2.3. The FBI Critical Incident Handbook provides similar guidance: "Involve the [Crisis Negotiation Team] in the planning stages of a high-risk situation where negotiation may be required." We did not find any FBI policies or regulations exempting HRT from these guidelines or establishing a different standard for it.

In this case, negotiation contingency planning was warranted under the MIOG and Critical Incident Handbook guidance. HRT recognized when drafting the CONOP that Ojeda likely would violently resist any attempted apprehension, that Ojeda had previously created a stand-off situation with HRT, and that HRT would be operating in a challenging environment where compromise and the loss of the element of surprise were distinct possibilities. A barricaded subject scenario, while undesirable to Fraticelli, certainly fell within the range of reasonable possibilities and should have merited contingency planning in HRT's CONOP. In this scenario, the use of negotiators may have been required.

We also found unsatisfying Steve's statement that he knew San Juan FBI negotiators would be available if the situation called for negotiations. Dennis told us that the San Juan FBI negotiators were relatively

inexperienced and that he told at least Craig that he should not rely on inexperienced negotiators with a subject like Ojeda. We do not know if Steve was also told this, but if he was not, it merely highlights the point that negotiations contingency planning was an afterthought in the tactical planning of the operation.

Moreover, leaving the negotiations to San Juan FBI effectively removed negotiators from HRT's tactical planning of the operation. The OIG's experts believed this was a significant mistake. In their judgment, HRT should have brought its own negotiators and integrated them into the tactical operation. Because this was not done, there was no plan or even discussions regarding how the San Juan FBI negotiators would be used or how they would communicate with HRT. This scenario is incompatible with the FBI Critical Incident Handbook, which recommends that negotiators be involved in the planning stages of high-risk situations where negotiation may be required. The Handbook also states that "[n]egotiation and tactical strategies should complement/parallel each other. Utilize each in synchronization to affect the safest outcome as possible for law enforcement personnel." HRT failed to follow this guidance in the planning for this operation.

In contrast to HRT, Fraticelli did consider the need for negotiators. He told us that even though he wanted to avoid a barricaded subject scenario, he recognized its possibility and therefore arranged for two negotiators to be available during the operation. Fraticelli's decision adhered to the FBI regulations described above. The two negotiators assigned to the operation – SAs Larry and Rodger – deployed to the San Juan FBI Command Post near Aguadilla on September 21, where they were briefed on the mission. They also discussed with each other how they would handle various scenarios if called upon.

Fraticelli's planning for negotiations fell short, however, in two important respects. First, we found no evidence that Larry or Rodger had any meaningful interaction with the HRT agents with whom they would be working if called to the scene. The negotiators simply were not part of any phase of HRT's planning process.

Second, the negotiation component of the operation was not organized and did not function as FBI regulations provide. According to the FBI's Crisis Management Program guidelines, a negotiation team deployed by a field office should have three negotiators: a primary, a coach, and a crisis negotiation coordinator. Dennis told us that the primary and the coach work together at the scene as a team during negotiations with the subject. The crisis negotiation coordinator is the advisor to the on-scene commander regarding negotiation-related matters and should be co-located with him to provide expert assessment and recommendations. As we discuss further in the next subsection, these negotiation team guidelines were not followed in this case:

only Rodger was sent to the scene to conduct negotiations, and the San Juan FBI's crisis negotiation coordinator was not at the Command Post during the operation and did not even arrive at the scene until after the shots from the perimeter were fired.

II. The FBI's Conduct of Negotiations and Rejection of Ojeda's Demand for a Reporter

The FBI's lack of negotiation preparedness described above was evident in the conduct of the negotiations with Ojeda. Even though we cannot determine whether these failings affected the operation's outcome, we discuss them here as lessons learned so they are not repeated in future operations.

To begin with, the FBI failed to follow its own guidelines at the very outset by sending in only one negotiator to talk to Ojeda. Dennis told us that the FBI has a two-negotiator standard to account for the reality that even a well-trained primary negotiator will not always be able to think of everything that should or could be said to keep the subject engaged. Negotiations can be stressful and the primary negotiator must concentrate on listening and talking. The second negotiator – the coach – is there to keep the primary focused and provide suggestions about how to handle issues that arise during talks. The coach is also there to provide the primary updates on the crisis situation.

In this case, there were two unsuccessful efforts to get a second negotiator to the scene to assist Rodger. First, Rodger himself requested through an HRT agent with him in the storage shed that a second negotiator be sent to the location for support. Rodger told the OIG that he thought this would facilitate the negotiation process.¹⁰⁴ Rodger said the HRT agent simply responded that he could not leave his post. The second effort was made by a San Juan FBI ASAC who is also a certified negotiator. He told us that the FBI normally requires the use of two negotiators and that he requested permission to join Rodger at the site when he learned Rodger had been escorted there. The ASAC said HRT refused his request based on safety considerations.¹⁰⁵

The FBI's lack of negotiations preparedness was also evident in two aspects of its response to Ojeda's demand that a reporter be brought to the scene. First, Steve did not take any action when he learned of Ojeda's demand

¹⁰⁴ Dennis told us that Rodger told him several times later that night that "he was so alone" during the negotiation and wanted a second negotiator brought to the scene to act as coach.

¹⁰⁵ Although we appreciate HRT's safety concerns, we were skeptical that the introduction of a second negotiator – himself an armed FBI agent – presented an unacceptable risk, especially in light of Rodger's statement to us that he proceeded to the residence unescorted after receiving instructions from an HRT agent at the driveway entrance.

and mention of surrender. As the operation's tactical advisor to the SAC, we would have expected Steve, at a minimum, to discuss the possible avenue for surrender with Fraticelli. In our view, Steve's silence on the subject highlighted the lack of coordination between the tactical and negotiation sides throughout the operation. Indeed, judged by Steve's failure to confer with Fraticelli regarding Ojeda's demand for a reporter, HRT appeared disengaged from the ongoing negotiations.

The second significant aspect of the FBI's response to Ojeda's demand was that Fraticelli immediately rejected it. Fraticelli said he made this decision as soon as Rodger called and told him about the demand. Fraticelli told Rodger to convey this decision to Ojeda and tell him to come out with his hands up.

According to Dennis, Fraticelli's handling of Ojeda's demand for a reporter was contrary to CNU training, which teaches that a negotiator should never reject a demand outright. Dennis told us that even if there is no intention to consider a subject's demand, the negotiator should not communicate this fact to the subject because doing so can cause the subject to stop talking. Dennis also said it is important to keep all options available because a prolonged stand-off might at some point present an appropriate opportunity to use a third-party intermediary, such as a reporter, to resolve the situation.¹⁰⁶

This is the type of expert guidance the crisis negotiations coordinator is expected to provide, and it is why the FBI Critical Incident Handbook recommends that the on-scene commander "consult with the crisis negotiation coordinator as to the status of negotiations, as well as the [crisis negotiation team's] assessment and recommendations." In this case, Fraticelli did not consult with his crisis negotiations coordinator, who was not even at the Command Post. The situation gave one of our experts the impression there was no plan to deal with Ojeda's request; another felt Fraticelli should have called an expert for advice. We agree with these assessments and believe the preparation and handling of the negotiations was contrary to FBI policies and significantly flawed.

III. Impact of Negotiations on the Outcome

Although we are critical of certain aspects of the FBI's preparation for and conduct of negotiations with Ojeda during the standoff, we cannot conclude that they affected the outcome. A Spanish-speaking negotiator was

¹⁰⁶ To Rodger's credit, he adhered to his negotiations training by not telling Ojeda that the FBI had rejected his demand for a reporter.

in fact sent to the scene and negotiated with Ojeda for over half an hour. Ojeda had reason to know that his peaceful surrender would be accepted, as evidenced by his wife's safe surrender. We do not believe his decision to remain barricaded in his residence, much like he did in 1985 when he shot it out with HRT, was a consequence of the way the FBI's negotiations were conducted.

There have been suggestions in the media that Ojeda would have surrendered if the FBI had acceded to his demand to bring a reporter to the scene. While we criticized Fraticelli for the process by which he rejected Ojeda's demand, we could not find that the decision itself was improper, and we have no basis to conclude that better preparation or the use of more experienced negotiators would have resulted in a different outcome. The OIG's experts agreed that using a third-party intermediary is a risky course of action, particularly where the subject has demonstrated a propensity for violence, and they did not find fault with Fraticelli's decision to reject using one in this case.

Moreover, even if the FBI had acceded to Ojeda's demand, it would have taken hours to bring the reporter to the scene and to prepare him. At 6:08 p.m., long before any reporter could have been brought to the scene, Ojeda was seen in the kitchen window with a weapon, and the fatal shot was fired. Ojeda presented a threat at that moment, and we cannot conclude that a different decision regarding the reporter would have likely altered the outcome.

IV. Conclusions Regarding the Conduct of Negotiations

We concluded that because a barricaded subject scenario was a reasonable possibility given the information available to HRT during its mission planning, HRT should have deployed with a crisis negotiation team from CIRG's Crisis Negotiation Unit. This conclusion is consistent with the guidance provided in the FBI's MIOG and the Critical Incident Handbook. We did not find Craig's and Steve's explanations for departing from this guidance persuasive.

We also concluded that although Fraticelli properly anticipated the need for negotiators, he inadequately implemented the negotiation component into the operation. The two negotiators used for the operation did not have any meaningful interaction with the HRT agents next to whom they would be working, and the San Juan FBI negotiation team was not organized and did not function as FBI regulations provide. The FBI failed to adhere to its two-negotiator standard by sending only Rodger to talk with Ojeda, a mistake compounded when two attempts to get a second negotiator to the scene were rebuffed. In addition, Fraticelli's handling of Ojeda's demand for a reporter was contrary to CNU training, a misstep that might have been avoided if the San

Juan FBI crisis negotiation coordinator had been in the Command Post with Fraticelli to provide expert guidance.

We believe it is unlikely these mistakes would have occurred if HRT had deployed with a CNU negotiation team it has experience working with, or had at least coordinated its tactical planning with the San Juan FBI negotiation team. While we cannot conclude that the outcome would have changed if the negotiations had been handled differently, we believe this case demonstrates the importance of integrating negotiations contingency planning into the tactical planning of operations where the potential exists for the use of negotiators.

[BLANK]

CHAPTER NINE: MISCELLANEOUS ISSUES

I. The FBI's Communications with Commonwealth of Puerto Rico Government Officials Before and During the Ojeda Arrest Operation

The FBI was criticized in the aftermath of the Ojeda arrest operation for failing to notify Commonwealth of Puerto Rico government officials in advance of the operation in Hormigueros and for failing to provide timely and accurate information concerning the situation after the emergency daylight assault failed. In this Chapter, we address separately the FBI's communications with Puerto Rico government officials before the operation commenced and after the assault failed. We did not conclude that the approach the FBI took regarding communications with Puerto Rican officials was improper, and we do not have any reason to believe that a different approach would have significantly affected the conduct or the public's criticism of the operation. However, we found that the explanations that the FBI provided local officials for delaying the entry failed to include details that might have given the officials a greater appreciation of the circumstances driving the entry decision.

A. FBI's Communications with the Commonwealth of Puerto Rico before the Arrest Operation

The FBI's Manual of Investigative Operations and Guidelines (MIOG) provides the following guidance for arrest operations:

Special concern should be given to the utilization, or at least the alerting, of local authorities in instances where it may logically be anticipated that resistance could be forthcoming from the subject(s) or member of the community. Although the time of notification to local authorities concerning arrests made within their jurisdictions by FBI Agents is being left to the discretion of the SACs, concern must be given to the sensitivity of our associates in local law enforcement to know what is transpiring in their jurisdictions and we must respect their responsibility to the people in their communities.

MIOG, Part 2, Section 11-2.1.2 (Authority to Serve Arrest Warrants).

This guidance was applicable to the operation in Puerto Rico, where the FBI anticipated Ojeda would violently resist efforts to apprehend him. However, SAC Fraticelli did not notify POPR Superintendent Toledo of the surveillance and arrest operation or even of the San Juan FBI's belief that it had located Ojeda's residence in Hormigueros. Fraticelli told us that he wanted

to keep the operation secret and limit the possibility of leaks that might compromise the operation. POPR was only generally aware that the FBI had been attempting to locate Ojeda, and had provided some assistance to the FBI in this effort. Fraticelli told us that he had informed Toledo in June 2005 that the FBI was close to locating Ojeda and that POPR assistance would be needed for perimeter security during any arrest operation.

Restricting who is aware of or involved in an operation where success depends on the element of surprise is a legitimate precaution, and we did not find Fraticelli's exercise of the discretion the MIOG discusses improper in this case. In addition, we reviewed FBI documents from September 2005 indicating that information about the Macheteros investigation was supplied by someone from the POPR to members of the Macheteros. One of the documents we reviewed stated, “[i]t has long been known that the Macheteros have friends within the Puerto Rican Police Department.”¹⁰⁷

However, the San Juan FBI's concern about POPR's ability to maintain secrecy is significant because of its potential impact on operations. Local law enforcement is a valuable asset to FBI field offices because it expands the resources available for an operation and can provide important intelligence regarding the environment where an operation will be conducted. In this case, for example, POPR might have been able to provide insight regarding the neighborhood where Ojeda's residence was located, such as the resident population, the construction of the homes, and access to utilities. In addition, earlier POPR involvement and its availability to provide perimeter security might have made a surround and call out a more viable option to the San Juan FBI. While we have no basis to conclude that advance notice of the operation to POPR, or using POPR officers earlier in the operation, would have caused the FBI to make different decisions or changed the result, Fraticelli's decision not to notify POPR had significant consequences.

¹⁰⁷ The FBI's concern regarding the POPR was evident 20 years earlier when, in 1985, it simultaneously executed arrest warrants for members of the Macheteros (including Ojeda) at multiple locations in connection with the 1983 Wells Fargo bank robbery in West Hartford, Connecticut. According to one account of the arrest operation,

[T]he FBI consciously opened itself to charges of abuse of power when it failed to notify local authorities about the impending arrests. With closet nationalists behind so many Puerto Rican government desks, agents understandably argued that to tell the locals was to tell Los Macheteros.

Ronald Fernandez, *Los Macheteros – The Wells Fargo Robbery and the Violent Struggle for Puerto Rican Independence* (Prentice Hall Press 1987).

B. The FBI's Communications with the Commonwealth of Puerto Rico after the Emergency Assault Failed

In letters to the U.S. Department of Justice and the FBI, top Puerto Rico officials criticized the FBI for not providing sufficient information about the status of the operation immediately after the assault failed and for providing incomplete and unsatisfying information when it did discuss the matter. For example, Governor Aníbal Acevedo Vilá explained this frustration to Attorney General Alberto Gonzales in a September 26, 2005, letter, which stated:

While the FBI undertook their activities at the site, the Secretary of Justice, the Superintendent of Police, and my staff were given contradictory and incomplete information by both the representatives of the FBI and the U.S. Attorney's Office.

At about 6:00 p.m. on Friday evening [September 23], the Secretary of Justice was notified by the U.S. Attorney's Office in Puerto Rico that Mr. Ojeda Ríos was probably either dead or injured by gunfire, and was asked to send local prosecutors to the perimeter of the scene. Later that night, however, federal agents at the scene stated that they would not enter, nor allow anyone to enter, Mr. Ojeda Ríos's residence until the next day. At that point, we were informed that there was not the necessary equipment to secure the scene in light of a perceived risk that explosive traps might have been set. In the end, it was not until approximately 2:00 p.m. on Saturday afternoon that the FBI and the U.S. Attorney's Office notified us that Mr. Ojeda Ríos has been killed in the gunfight and allowed our personnel to enter Mr. Ojeda's scene.

The reason that I have been given for the delay in allowing the local authorities access to the scene is that the FBI did not have sufficient personnel, nor the necessary technical equipment in order to complete the operation and enter Mr. Ojeda Ríos's residence. However had basic precautions been taken, essential personnel and technical assistance would have been present at the site well before Friday afternoon, and the mentioned delay in entry would have been unnecessary. For this reason, I am not satisfied with the explanations for the delay that have been shared with me.

Furthermore, I would like to share with you that the preliminary results of our ongoing investigation of this matter show that Mr. Ojeda Ríos's life would have probably been spared had he received immediate medical attention. Consequently, the issue regarding the timing of the entry to his house is of paramount importance.

While we believe our report provides a detailed review of the substantive issues Governor Acevedo highlights in his letter, we did not as part of our investigation reconstruct the exact timing or content of the communications between FBI and Puerto Rico officials, or assess how the historical relationship between the two might have affected those communications. However, we believe it important to make several points in response to Governor Acevedo's concerns.

In our view, Governor Acevedo fairly questioned the FBI's preparedness for the operation based on the explanations he was apparently provided for the delayed entry. A lack of personnel and technical equipment would not have been compelling reasons for delaying entry when balanced against Ojeda's need for medical attention. However, as we found in Chapter Seven of this report, the delay was attributable to good faith concerns for agent safety, not a lack of sufficient personnel or technical equipment. Specifically, the FBI believed that there might be a second shooter in the residence and that Ojeda might still be a threat. While there were also concerns about agent fatigue and the presence of explosives in this house, we did not find these indicated a lack of preparedness.¹⁰⁸ In fact, the commanders at the scene and the officials at FBI Headquarters believed HRT was capable of entering the house on September 23, but decided it safer to wait until the next day when fresh HRT agents could be used and any explosives would be detected more easily.

In retrospect, the FBI could have provided Puerto Rico officials a better, more complete explanation for the delayed entry. SAC Fraticelli talked to POPR Superintendent Toledo several times during the night of September 23, and also provided a summary of the operation to Governor Acevedo's Chief of Staff. The FBI also issued two press releases on September 24, and Fraticelli held a news conference that afternoon. Therefore, the FBI had several opportunities to adequately explain its safety concerns. Instead, by highlighting things such as a need for police dogs and specialized equipment – neither of which were actually used in the entry – the FBI exacerbated criticism that, in our view, was based on its lack of adequate disclosure regarding the reasons the entry was delayed.

¹⁰⁸ For example, some local officials pointed out that the FBI's explanation that the agents were fatigued suggested a lack of adequate preparation for the September 23 assault. The FBI apparently did not explain to local officials that the assault was conducted on an emergency basis because of the reported compromise of the sniper-observers. As a result, and because of the double shift ordered for the Quick Reaction Force earlier that morning, the FBI agents were less rested than they would have been if the assault had been conducted the next night, as originally planned. With this context, the Puerto Rico officials might have appreciated that the "fatigue" factor was not a product of inadequate preparation but rather the result of the reported compromise.

II. Whether the FBI Bypassed Prior Opportunities to Apprehend Ojeda Safely

The OIG investigated rumors that were reported in the press that the FBI had sufficient information regarding Ojeda's whereabouts and habits over a period of years to permit it to establish surveillance at a public location and safely arrest Ojeda away from his home. For example, a report published in the New York Daily News on October 6, 2005, stated:

A former naval intelligence officer says he knows for a fact that Puerto Rican nationalist fugitive Filiberto Ojeda Rios didn't have to die in a shootout with the FBI.

He says he knows this because he told FBI agents a year ago where they could find Ojeda – even telling them where he liked to eat.

“What they did was an injustice,” the former Navy officer told me last week. “No matter what Ojeda did, he was still a human being.... They could easily have taken him alive.”

The informant, who asked not to be identified, has given his account to the Justice Department's Inspector General's Office, which opened an independent review of the shooting last week.

Similarly, while questioning FBI Director Mueller at a House Appropriations Committee hearing on March 28, 2006, Representative Jose Serrano stated:

I took a call in my office from a very distraught person who said, “I'm a former Marine. I am pro-statehood for Puerto Rico. You can't get any more American than that,” he told me. “And I'm very distraught because I've been an FBI informant for the last couple of years, and I told the FBI where Ojeda Rios was, at every step of the way for the last couple of years. I told them when he was in church. I told them when he was at the supermarket. I told them when he went for a jog. I told them, and I feel somehow responsible that he was killed because he could have been gotten somewhere else, and yet they chose to do it this way.”

The OIG reviewed the FBI's investigative files and interviewed members of the San Juan FBI Domestic Terrorism Squad and Special Operation Group responsible for locating Ojeda. We found no support for the statements attributed to the “former naval intelligence officer” described in the Daily News article or the “former Marine” who provided information to Representative Serrano. Moreover, the statement in the Daily News report that the purported

informant had given an account of these matters to the OIG was also incorrect. No such person has ever approached or been interviewed by the OIG.

However, we found that the FBI's investigative files contain records of many leads and tips collected over the years relating to Ojeda's whereabouts at various locations in Puerto Rico. In September 2005, after the San Juan FBI identified the house in Hormigueros as possibly being Ojeda's residence, the San Juan FBI conducted an internal case file review to determine whether any prior investigative efforts had linked Ojeda to Hormigueros. This review revealed that information had previously been developed that potentially linked Ojeda to Hormigueros and to a property known as "Finca Viram" or "Finca Byran." There was also a tip from several years earlier that Ojeda had been seen at a particular restaurant in the Hormigueros area.

On the basis of our review of the file, we concluded that these investigative leads did not ultimately lead to any documented sighting of Ojeda. In retrospect, it appears that these leads could have led the FBI to Ojeda sooner. It was beyond the scope of our review, however, to assess the quality of the FBI's earlier investigation of the leads regarding Ojeda and Hormigueros. For the purpose of this report, we found that the quality and detail of these leads also did not resemble the information attributed to the anonymous sources who spoke to the New York Daily News or to Representative Serrano after the Ojeda operation took place. In particular, we found no basis for the reports that a former marine or naval intelligence officer was providing the FBI with information regarding Ojeda's daily whereabouts "every step of the way."

We also found that, in contrast to the allegation that the FBI had known about his location and habits for a year or more, the FBI San Juan expended intensive effort and significant commitment of resources to finding Ojeda for more than a year. Put simply, if the FBI already knew where Ojeda was living, worshipping, eating, or jogging, the San Juan FBI would not have needed to expand the scope of its effort to locate Ojeda, as it did, from less than two full-time agents to an entire Domestic Terrorism Squad supported by the entire Special Operations Group. In fact, we found that the San Juan FBI mounted an intensive and expensive effort to locate Ojeda, which was inconsistent with the claims that the FBI was told repeatedly where Ojeda could be located but ignored that information.

III. The Landing Zone Error

During the emergency arrest operation on September 23, the Tactical Helicopter Unit (THU) helicopters were unable to locate the intended landing zone in the banana field adjacent to Site 1. Instead, after the helicopter pilots circled near the residence, the agents were rope-dropped into a different landing zone in a field to the south of the target. They encountered a surprised

San Juan FBI agent who was positioned at a “choke point” near their landing zone. The noise of the helicopters likely led to Ojeda being alerted to the presence of the assault teams and gave him more time to prepare for the assault. The San Juan FBI agent then drove the assault team to the residence, where they encountered gunfire from Ojeda. In this Section, the OIG assesses the causes and consequences of the failure of the THU pilots to locate the correct landing zone.

A. Causes of the Error

The banana field landing zone presented a challenging target for the THU pilots to locate in order to deliver the HRT agents to Site 1 to conduct the emergency arrest operation. The intended landing zone was a small oblong field surrounded by extremely steep terrain and a thick, high canopy of trees. These conditions made it difficult for the pilots to see the landing zone from a distance.

The OIG found that, despite these difficult conditions, the pilots’ failure to locate the correct landing zone was an error that could have been avoided with better contingency planning and communications.

The helicopter pilots told the OIG that to locate the banana field they were relying on an aerial photograph (Figure 3) and on GPS coordinates for Site 1 that were provided to them by the San Juan FBI. Three pilots told the OIG that they had been told that the photograph had been taken from the south of Site 1, facing north, but that they later discovered that the photograph had in fact been taken from the west, facing east. They stated that this misunderstanding prevented them from orienting themselves with visual cues that could have enabled them to find Site 1 and the nearby banana field.

The pilots were uncertain who provided the incorrect information regarding the orientation of the photograph, although two of them thought the source of the information may have been the San Juan FBI Aviation Coordinator. The Aviation Coordinator told the OIG, however, that he did not recall seeing the aerial photograph (Figure 3) prior to his interview with the OIG, and that he did not provide information regarding the orientation of this photograph to the helicopter pilots. One of the pilots told the OIG that he heard that the orientation information had been provided by the sniper-observers, but he had no firsthand information. The OIG was ultimately unable to determine the source of the incorrect orientation.

The OIG concluded, however, that whatever the source of the inaccurate information regarding the orientation of the aerial photograph, the error could have been caught by comparing the aerial photograph with any of several street maps and a satellite image that were already being used to brief the HRT agents in preparation for the operation. These maps clearly showed that

Camino Fondo del Saco runs in a northwest direction and that Camino Mon Segarra (the small road on which Site 1 is located) runs to the southeast from Fondo del Saco. A comparison of the satellite image and maps to Figure 3, the aerial photograph (on which Camino Fondo del Saco and Mon Segarra are labeled), plainly reveals that the aerial photograph was not taken from the south looking north but rather from the west or northwest, looking east or southeast. If the pilots had attempted to confirm their information regarding the orientation of the aerial photograph with available maps or by questioning San Juan FBI agents familiar with the area, they would have realized that their understanding of the orientation of the photograph was wrong.¹⁰⁹

Despite these omissions, it still would have been possible for the helicopters to drop the HRT agents in the correct landing zone if the sniper-observers had been able to communicate with the helicopters as they approached Site 1. Paul, the sniper-observer primarily responsible for communications, told the OIG that he attempted to make contact with the helicopters as they approached the location, but was unable to because the UHF antenna he had on his radio was not working and he did not have a longer VHF antenna. He stated that he might have brought his VHF antenna with him if the original plan had called for inserting the arresting agents by helicopter. Ray, the Unit Chief for the THU and the lead pilot on the Bell 412 helicopter, told the OIG that as he approached what he thought were the GPS coordinates for the Ojeda residence he asked for assistance from the sniper-observers by radio but did not hear anything. Ray stated that the communications systems on the helicopters have since been upgraded to prevent a recurrence of the communications failure that occurred in this case.

The THU helicopters were inadequately prepared to find the banana field landing zone because the FBI did not originally anticipate that the helicopters would be used to transport arresting agents to the scene for an emergency assault. Ray stated that the planned function of the helicopters in the operation was to provide medical evacuation services in case of an injury, to be prepared to evacuate Ojeda quickly after he was arrested, and to assist in command and control by relaying information or transporting the commander if needed. This plan did not contemplate the helicopters attempting to approach the landing zone in a manner intended to preserve the element of surprise. In performing any of the originally planned functions, the helicopters

¹⁰⁹ The OIG also found that there was a discrepancy between the GPS coordinates for the residence that appear in the Aviation Annex prepared by one of the pilots and the coordinates that appear in the PowerPoint presentation given on September 15 and the coordinates that appear in the CONOP that was signed on September 21. We have not been able to determine which set of coordinates was the most accurate. It appears that the discrepancy between the GPS coordinates corresponded to a distance of approximately 200 yards. In light of the heavy vegetation and hilly terrain, the discrepancy may have contributed to the pilots' inability to locate the banana field.

could have relied on overt visual signals from the ground, such as a smoke bomb or signals from agents, without concern regarding whether the signal would alert the subject to law enforcement activity.

When the sniper-observers reported they were compromised, the decision was made to use the helicopters to transport the arrest team. At that point it was too late to take any significant additional steps to assure that the helicopters would be able to find the banana field landing zone accurately and with minimum noise.

B. Consequences of the Failure to Locate the Landing Zone

Fratlicelli told the OIG that one of the reasons he was persuaded to approve the emergency assault was the assurance he received from Steve that the assault team could execute a rope drop from the helicopters and enter the residence very quickly. Fraticelli said that Steve told him the helicopters would approach the landing zone at a low altitude so that Ojeda would not hear or see them until very shortly before the arrest team reached the residence.

Yet, as discussed above, the helicopters were not adequately prepared to locate the small banana field landing zone. However, we concluded that the helicopters' failure to make the rope drop in the correct location likely did not have a major impact on the outcome of the operation. The banana field was located immediately adjacent to the front yard of Site 1 residence but down a steep slope. Even if the helicopters had found the banana field they would have made a significant noise and would have been visible from Ojeda's front porch or windows as they executed the rope drop. The two helicopters could not have executed the rope drop in this small area simultaneously; they would have had to take turns and the agents from the first helicopter would have had to wait for the second rope drop to be completed in order to assemble for the assault. The agents would then have had to scale a steep hill to reach the front yard of the residence. Under these circumstances, Ojeda would have had ample time to detect the presence of the helicopters and to arm himself in preparation for a confrontation.

Indeed, the central premise of the emergency assault was that the operation had been compromised and that Ojeda was likely to be tipped off by sympathizers. The helicopters did not arrive at the scene until 4:28 p.m., nearly two hours after the sniper-observers reported the compromise. By that time, San Juan FBI agents had already established a visible presence at "choke points" near the residence, another fact that could have been relayed to Ojeda by sympathizers. When Ojeda was found, he was wearing a "flak jacket" vest, combat boots, camouflage pants, and a holster. Ojeda was likely prepared for the assault substantially in advance of 4:28 p.m., and the relatively short delay caused by the helicopters dropping the agents in the wrong landing zone was not a major factor affecting the outcome of the assault.

However, in a future case, similar errors could significantly harm an FBI operation. We believe that pilots should make a standard practice of checking the orientation of any aerial photographs on which they will depend to find landing zones. In addition, we believe the Ojeda operation offers a useful case study of the utility of pilot reconnaissance operations and of the difficulty of implementing tactics that require rapid and error-free helicopter insertions in conjunction with an effort to maintain the element of surprise.

CHAPTER 10: RECOMMENDATIONS

The OIG reviewed the FBI's attempted arrest of Ojeda and found that the shot that killed Ojeda was fired in compliance with the DOJ Deadly Force policy. We found that the FBI delayed entering the house after Ojeda was shot for legitimate reasons of agent safety, not because the FBI wanted to allow Ojeda to bleed to death. However, our detailed review found several problems in the conduct of the FBI operation. For example, we concluded that the emergency daylight assault that preceded the exchange of gunfire was extremely dangerous to the agents and not the best choice available. Similarly, while we concluded that the FBI's decisions regarding the entry of the residence were not improper, we determined that some of the decisions were based on inaccurate or incomplete information about what was happening at the scene.

We also found deficiencies in the FBI's preparations for the operation. For example, we determined that the FBI failed to adequately prepare for the possibility that negotiators would be needed.

In this chapter, we make ten recommendations stemming from these and other aspects of the operation. Most of our recommendations are intended to highlight lessons that we believe should inform the planning and related training of future FBI operations. Other recommendations address specific policy or tactical issues.

I. Recommendations Regarding Compliance with the DOJ Deadly Force Policy and Related Issues

Recommendation No. 1: Conduct an inquiry relating to the three rounds fired by an unidentified FBI agent and the two unreported rounds fired by SA George.

Several FBI agents reported that they perceived that several shots came from inside the house through the front door during the initial exchange of gunfire, a perception that contributed to their belief that there was more than one weapon being fired from inside the house. The Puerto Rico Institute of Forensic Sciences found, however, that the three bullet holes in the front door all were made by shots from outside the house. Because there were no bullets or bullet fragments found in the house that could be attributed to these particular holes and impacts, it was impossible to determine from the forensic evidence which of the FBI agents fired the three rounds through the front door. When we interviewed all of the agents who recalled firing their weapons, none reported having fired any rounds at or through the front door.

Based upon the available forensic evidence and testimony, we determined the agents who we believe were in a position to have fired these shots. However, these agents declined to provide voluntary follow-up interviews to the OIG. Because we were unable to determine which agent fired shots through the front door or to determine whether the agent was targeting a particular threat in firing these shots, we could not conclude whether they were fired in compliance with the Deadly Force Policy.

In addition, the Forensic Institute recovered outside the residence two .223 shells that did not match any of the weapons carried by the eight FBI agents who recalled firing during the operation. The Institute subsequently matched these shells to the weapon carried by SA George, who did not tell us in his interview that he had fired his weapon. The trajectories and impact points of these two rounds are unknown, although neither round struck Ojeda. Because George, through counsel, declined our request for a follow-up interview, we also do not know whether he fired these two rounds intentionally or how they were targeted.

We recommend that after criminal investigations into this incident have been concluded, the FBI conduct an inquiry relating to the three rounds fired by an unidentified FBI agent through the front door of the residence and the two unreported rounds fired from SA George's weapon, in order to determine whether these rounds were fired in compliance with the Deadly Force Policy.

Recommendation No. 2: Review the use of flash bangs in outdoor operations.

We concluded that Ojeda opened fire on the FBI agents as they attempted to approach and enter the residence before any agents discharged their weapons at him or at the residence. The evidence did not support the allegation made by Ojeda's wife in public speeches and media interviews subsequent to Ojeda's death that the FBI fired first. We observed, however, that it was possible that Ojeda and his wife got the impression that the FBI opened fire first as the result of the detonation of a flash bang by one of the sniper-observers at the moment the FBI vehicle pulled up to the house.

Our experts commented that using a flash bang outdoors to create a distraction is not nearly as effective as using it indoors, where the noise, pressure waves, and extremely bright light all work to the advantage of the arrest team. They also believed that using a flash bang outdoors creates a firecracker effect and risks alerting the subject rather than distracting or confusing him.

We recommend that the FBI review the use of flash bangs in outdoor environments and under circumstances in which their use could have the

unintended effect of alerting the subject or providing the mistaken impression that the FBI is opening fire on a subject before seeking his surrender.

Recommendation No. 3: Adopt a “standard load” procedure for HRT agents.

In Chapter Five, we explained that there is no “standard load” required for HRT weapons that would have permitted the FBI to establish precisely how many shells had been fired from each weapon by determining how many magazines had been spent and how many rounds were left in the unspent magazines. As a result, the number of rounds fired by each agent had to be reconstructed by relying on the agent’s recollection and on the ability of the Puerto Rico Institute of Forensic Sciences to correctly match each spent .223 shell found at the scene to a particular HRT weapon. Although the forensic evidence was consistent with the agent statements in most significant respects, if “standard load” procedures were in place there would have been additional, reliable evidence regarding the number of rounds fired by each agent.

We therefore recommend that HRT adopt a standard load procedure that would enable accurate post-incident accounting of the number of rounds fired by each agent, and that other components of the FBI adopt similar procedures to the extent they are not already in place.

II. Recommendations Regarding the Decision to Conduct an Emergency Daylight Assault

Recommendation No. 4: Adequately consider all available options in emergency situations as time permits.

We examined whether other options were available to the FBI following the reported compromise of the sniper-observers near Ojeda’s residence, and whether the FBI commanders in Puerto Rico gave adequate consideration to alternatives other than a daylight emergency assault. We, along with our experts, concluded that a surround and call-out strategy was an available, superior option and that the FBI had sufficient information regarding the exterior of the residence to adopt it, or at least consider it seriously. We also reviewed the strategy of extracting the sniper-observer team as a possible alternative to an immediate course of action that posed foreseeable and significant risks to the agents.

SAC Fraticelli told the OIG that he suggested a surround and call-out option when the compromise was reported by the sniper-observer team. However, HRT Deputy Commander Steve and his subordinates from the HRT’s Operations and Training Unit stated that they assumed, even after the reported compromise of the sniper-observers, that Fraticelli still would not consider this option because it might result in the barricaded subject situation he wanted to

avoid. We also found that the extraction option was given only cursory consideration.

HRT Deputy Commander Steve told the OIG that after the sniper-observers reported the compromise, no consideration was given to options other than a direct assault on the residence to arrest Ojeda.

We were troubled by the lack of consideration given to alternative courses of action. Despite the change in circumstances that dramatically increased the risk associated with an assault of the residence – that is, assaulting the front of the residence in broad daylight instead of surreptitiously at night – the commanders chose not to deviate from an approach that was established early in the planning process for the arrest operation and that was based on conditions that no longer existed.

We believe this case highlights the importance of adequately considering options in emergency situations, including revisiting options that may have been discarded in the initial plan. In addition, operational commanders should be prepared to consider how changed conditions affect the viability of their original plans in light of changed circumstances.

Recommendation No. 5: Enhance the Spanish language capability of HRT's sniper-observer teams.

In Chapter Six, we examined the circumstances of the reported compromise of the HRT sniper-observer team that led to the decision to conduct a daylight emergency assault. We found it significant that SAC Fraticelli and other agents in the San Juan FBI told us that they now believe that the sniper-observers were not in fact compromised and that the people who were overheard conversing in Spanish near the sniper-observers were discussing matters unrelated to the FBI's presence. Because none of the sniper-observers sent to the scene spoke Spanish, they were unable to understand the substance of the conversation that they overheard or to determine whether their presence was in fact compromised.

In light of the prevalence of Spanish as the primary language for most residents in Hormigueros, including Ojeda and his wife, and the need to identify Ojeda, we believe the FBI should have anticipated that the sniper-observers might need to understand conversations in Spanish. It therefore would have been useful to have had some Spanish-speaking agents on the sniper-observer team. We recommend that HRT consider this need in future operations and enhance the Spanish language capability of its sniper-observer teams.

III. Recommendations Regarding the FBI's Entry Decisions

Recommendation No. 6: Ensure that, if decision-making in critical incidents is assigned to FBI Headquarters, there is adequate communication between the field and Headquarters concerning the situation at the scene and the decisions that are made in Headquarters.

In Chapter Seven, we highlighted several significant examples of the consequences associated with FBI Headquarters' involvement in the incident after the emergency assault failed. With respect to Bald's decision to require CTD approval for any entry decision, we found that this decision was based primarily on a perception that Fraticelli was "overwhelmed" by the situation. However, we determined that information reported to Bald that he said confirmed his concerns about Fraticelli's command did not necessarily reflect what was actually happening at the scene. Bald told us that the report of an HRT agent getting close enough to Ojeda's residence to look inside through a window suggested to him that HRT was making decisions independent of Fraticelli. But we concluded that this incident did not occur and noted that even if the reporting actually related to the limited breach of the residence, the activity was taken with the SAC's approval.

Bald was also told that the HRT Commander made a statement that HRT had the lead at the scene. This statement, which suggested a chain of command that violated FBI policy, reinforced Bald's concerns because he knew that the chain of command placed CTD, through the SAC, in charge. Yet, we determined that the HRT Commander's statement – made from Quantico, Virginia – did not reflect the situation at the scene in Puerto Rico, where HRT was cautiously preparing for a nighttime entry under the SAC's authority.

The consequences of FBI Headquarters' involvement were also evident in the decision to delay entry until the next day. As, we explained in Chapter Seven, Headquarters was operating throughout the evening of September 23 under the assumption that there was a second armed subject in the house and on the belief that Ojeda may have been wounded but that his condition was essentially unknown. By contrast, the HRT agents at the scene who were closest to the action told us they were virtually certain as time passed that Ojeda had been killed or very seriously wounded. The agents' evolving perception of the lessening of the threat was never communicated to officials at FBI Headquarters.

FBI Headquarters' involvement apparently also affected the clarity of communications between SAC Fraticelli and HRT Deputy Commander Steve concerning CTD's rejection of the nighttime entry. As we described in Chapter Seven, while CTD's final decision was conveyed to Fraticelli sometime before 9:00 p.m., the decision apparently was not shared with Steve at that point because HRT continued to draft a nighttime entry plan, and the HRT agents

continued to prepare to enter the residence that evening. Steve only learned of CTD's decision much later, when he and Fraticelli called DAD Lewis to try to persuade him that HRT should conduct a nighttime entry. When Fraticelli told Steve that Lewis said there would be no entry, the decision was conveyed for the first time to the HRT agents at the scene – at 11:33 p.m. We found this lack of communication between Fraticelli and Steve troubling and believe it was in part a consequence of adding another level of management to the operation.

In our view, these examples demonstrate how the quality of decision-making – both the substance and the process – can be affected by managers' remoteness from the scene of a crisis incident. Through regular and continuous communication, FBI managers must protect against the information disconnects we identified in this case. We recognize that FBI Headquarters' involvement brings significant operational experience to crisis incidents and can provide perspective regarding how decisions in one incident might impact FBI operations more broadly. Headquarters' involvement can also bring a measure of deliberation and caution to crisis incidents that might not otherwise exist. In response to the Ojeda operation, we believe the FBI should carefully consider the conditions under which it will assume control over a crisis incident. The FBI should also evaluate how it ensures that adequate information flows to the Headquarters officials who must approve operational decisions, and how the FBI will ensure continuous communication between FBI Headquarters and the on-scene commanders.

Recommendation No. 7: Ensure that the apparent miscommunication between the HRT Commander and Deputy Commander and the lack of adherence to the proper chain of command are not repeated.

Following the FBI's limited breach of the gated door to Ojeda's house, HRT Commander Craig, who was in Quantico, Virginia, told us that he gave an order to HRT Deputy Commander Steve in Puerto Rico that HRT not enter the residence. However, Steve told us that Craig did not give him any orders at all during their conversations on September 23. This discrepancy was troubling. Steve either misinterpreted or ignored what his superior considered an order, indicating a significant lapse in either communication or command. But just as problematic was Craig's issuance of any tactical order at all. Although Craig was Steve's superior as the CIRG ASAC for the Tactical Operations Branch, Craig was not the tactical advisor to SAC Fraticelli, who was the commander for this operation. Under FBI policies that placed the SAC in charge of the operation, Craig did not have authority to make tactical decisions at that time. Chain-of-command responsibilities are set forth in the FBI's Crisis Management Program guidelines and were clearly defined in the CONOP for this operation, which identified Fraticelli as the on-scene commander.

We therefore recommend that CIRG and HRT management review the chain of command discrepancies that Craig's order demonstrated, as well as

the apparent miscommunication between Craig and Steve, and take appropriate steps to ensure this situation is avoided in future HRT operations.

Recommendation No. 8: Provide guidance regarding the exigent circumstances under which operational plans from the field may be presented to Headquarters for approval orally rather than in writing.

When AD Hulon called SAC Fraticelli at 8:05 p.m. to tell him that CTD must approve any entry plan, Hulon initially left open the possibility of a nighttime entry and told Fraticelli and the HRT Deputy Commander that the proposal should be put in writing and sent to Headquarters for review. Hulon told us that he asked for the plan in writing because he considered it standard procedure under the circumstances and because it would allow FBI Headquarters to carefully review the proposed action.

We questioned Hulon's requirement that the proposal be put in writing and believed it was unduly bureaucratic in light of the circumstances. We also noted that Bald told us written plans should be done if time permits, but that there would have been nothing wrong in this case with HRT presenting the plan orally to the SAC and then to Hulon. While we believe Hulon still would have rejected the plan, we also believe presenting it orally would have accelerated the decision and avoided the disconnect we described between Fraticelli, the HRT Deputy Commander, and the agents at the scene about whether a nighttime entry was going to be approved. As we explained in Chapter Three, CTD's decision was not conveyed to the agents at the scene until 11:33 p.m., several hours after Hulon had decided that the entry would be delayed until the next morning.

FBI policy allows the use of an oral briefing in lieu of a written arrest plan "in exigent circumstances." We recommend that the FBI consider providing further, more specific guidance regarding what circumstances may be considered "exigent."

IV. Recommendations Regarding the FBI's Preparations for and Conduct of Negotiations

Recommendation No. 9: Adequately assess whether an arrest operation could result in a scenario requiring negotiations.

In Chapter Eight, we examined HRT's decision not to deploy to Puerto Rico with a CIRG negotiation team from the Crisis Negotiation Unit. We concluded that this decision reflected inadequate consideration of a barricaded subject scenario that could result from any attempt to arrest Ojeda. The lack of a negotiation team was caused by the HRT Commander's narrow view of the goal of the operation and skepticism about the operation's chances for success,

and the Deputy Commander's understanding that the SAC wanted to avoid a barricade or hostage scenario. We found unpersuasive these explanations for the decision not to include a negotiation team.

HRT recognized during its planning for the operation that Ojeda likely would violently resist apprehension, knew that he had previously created a stand-off situation with HRT, and understood that the operation was being conducted in a challenging environment where compromise and the loss of the element of surprise were distinct possibilities. We do not believe that skepticism about an operation's chances for success or a SAC's tactical preferences were adequate reasons not to prepare for the foreseeable possibility of negotiations.

We also found that applicable FBI guidelines supported the deployment of negotiators with HRT under the circumstances in this case. The Manual of Investigation Operations and Guidelines states that negotiators should deploy with field office SWAT teams "if and when" the potential exists for the use of negotiation resources. The FBI Critical Incident Handbook states, "[i]nvolve the [Crisis Negotiation Team] in the planning stages of a high-risk situation where negotiation may be required." HRT failed to adhere to this guidance.

It is important to anticipate and prepare for contingencies that may reflect lesser preferred outcomes but that may nevertheless occur for reasons outside the control of the arresting agents – in this case, compromise of the sniper-observers and the possibility that a barricaded subject scenario might arise. The FBI should use this case in future operations planning and training to illustrate the importance of carefully considering whether negotiators should be deployed under circumstances where a scenario requiring negotiations is reasonably foreseeable, even if undesirable.

Recommendation No. 10: Ensure that negotiators are integrated into the tactical planning where there is a potential need for negotiations.

Recognizing that negotiators might be needed in an operation is only the first step in planning for their potential use. Effective negotiation requires that the negotiators be integrated into the tactical planning of an operation. The FBI Critical Incident Handbook states that "[n]egotiation and tactical strategies should complement/parallel each other. Utilize each in synchronization to affect the safest outcome as possible for law enforcement personnel." Effective negotiation also relies on organizing the negotiators to enhance communication with the subject and provide expert guidance to the on-scene commander. Under FBI guidelines, this is accomplished with three negotiators: a primary and a coach who work together at the scene as a team, and a crisis negotiation coordinator who is co-located with the on-scene commander to serve as the negotiations advisor.

In this case, while Fraticelli anticipated the possible need for negotiators and arranged for two San Juan FBI negotiators to be available, he did not integrate the negotiators into the tactical planning for the operation. HRT shares responsibility for this deficiency, because even though HRT Deputy Commander Steve told us that he knew San Juan FBI negotiators would be available if needed, he did not take any steps to integrate them into HRT's tactical planning. In our view, the consequence of this lack of integration was that once negotiations were needed, the negotiators were not organized and did not function as FBI guidelines instruct. Specifically, only one negotiator was allowed at the scene and the crisis negotiation coordinator was not at the Command Post with Fraticelli to serve as an advisor. As we discussed in Chapter Eight, Fraticelli might have handled Ojeda's demand for a reporter differently if FBI guidelines had been followed.

While we could not find that the outcome in Puerto Rico would have changed if negotiators were involved in the planning of the operation, we believe this case highlights the importance of adhering to the guidelines the FBI has developed to make negotiations an effective tool for resolving crisis situations. The FBI should use this case to reinforce the importance of integrating negotiators into the tactical planning of operations where negotiations might be needed.

[BLANK]

CHAPTER 11: CONCLUSIONS

After an intensive investigative effort, the San Juan FBI located Ojeda's residence on a rural hillside near Hormigueros, Puerto Rico. An HRT sniper-observer team from Quantico, Virginia, conducted surveillance on the residence and confirmed Ojeda's presence. The FBI began planning for a surreptitious arrest operation to take place during the pre-dawn hours of September 24. However, the HRT sniper-observer team reported on the afternoon of September 23 that their presence had been detected by several persons who stopped a vehicle near Ojeda's residence and began speaking in Spanish. A sniper-observer saw one of these individuals gesture with his hands and point at the ground and toward the trailhead that led to the location of the sniper-observer team. Approximately two hours later, because of the belief that its agents' presence was compromised, the FBI conducted an emergency daylight assault on Ojeda's residence by dropping the arrest team from helicopters near the residence and conducting an emergency assault up the front steps of the house in an attempt to arrest Ojeda.

Ojeda was prepared for the assault and fired on the agents as they approached the residence. The FBI returned fire. Ojeda shot three agents during the gunfight, wounding one of them seriously. A standoff ensued, and subsequently Ojeda's wife came out of the residence. An FBI negotiator called out to Ojeda, but Ojeda responded that he would not negotiate unless a particular reporter was brought to the scene.

Approximately 100 minutes after the initial assault, an HRT agent saw Ojeda in the kitchen window when he was illuminated by a refrigerator light. The HRT agent observed Ojeda holding a gun and fired at Ojeda three times. Agents heard Ojeda cry out and fall. The agents at the scene began preparing to enter the residence and cut the electricity as darkness approached. However, FBI Headquarters assumed command of the entry decision at approximately 8:05 p.m., and subsequently ordered the agents at the scene not to enter the residence that evening. Instead, the FBI sent another HRT team to Puerto Rico, and this new team entered the residence the next day at approximately 12:34 p.m., 18 hours after Ojeda was shot. They discovered Ojeda on the floor of the residence, dead from a gunshot wound.

Our review evaluated the arrest operation and several issues relating to it. First, we examined whether the HRT agents' use of deadly force during the gunfight with Ojeda violated the DOJ Deadly Force Policy. We concluded that it did not. We determined that Ojeda opened fire on the FBI agents as they attempted to approach and enter the residence before any agents discharged their weapons at him or at the residence. Once Ojeda began firing, and then

continued firing when the agents were on or below the porch, he clearly posed an imminent threat to the agents, justifying their application of deadly force.

We concluded that the three shots fired by the HRT agent at Ojeda through the kitchen window, one of which struck Ojeda and caused his death, did not violate the Deadly Force Policy. At the moment the agent fired these shots, he had a reasonable belief that Ojeda posed an imminent danger of death or serious injury to himself or to other agents.

The exceptions to our conclusions regarding the Deadly Force Policy concern the three rounds fired by an unidentified FBI agent or agents through the front door of the residence and two unreported rounds fired from SA George's weapon. Because we were unable to conduct follow-up interviews concerning these shots, we were unable to determine whether they were fired in compliance with the Deadly Force Policy.

We also examined the FBI's decisions to delay entry into the residence until 18 hours after Ojeda was believed shot. We assessed separately the entry decisions made before and after FBI Headquarters required CTD approval for any entry plan. We concluded that the decisions were motivated by considerations of agent safety and not by a desire to deny medical care to Ojeda. The FBI managers in Puerto Rico who made the decision were not certain that Ojeda had been incapacitated and, based on the information they had been provided, were legitimately concerned there was an additional armed subject in the residence. As a result, the cautious, deliberate approach taken by the FBI in response to these potential threats was reasonable.

We also found that the decision made by officials at FBI Headquarters to delay the entry until the next day reflected a good-faith balancing of the information known to them concerning these threats, although we determined that the officials' perception of the threats differed significantly from the perception of the agents at the scene.

Other aspects of the operation that we examined included the assault on the residence and the FBI's negotiations with Ojeda. We found problems in the decision-making in both areas and concluded that these decisions suffered from a common deficiency: an inadequate consideration of and preparation for a foreseeable barricaded subject because it was an undesirable scenario. We found that this mindset adversely affected critical decision-making relating to tactics and contingency planning. These findings figured prominently in our recommendations that FBI managers should prepare for foreseeable contingencies, including whether an arrest operation likely could result in a scenario requiring negotiations.

We also examined in this review several of the criticisms of the FBI operation made by members of the public, the media, and elected officials of

Puerto Rico. For example, some people alleged that the FBI intentionally conducted the arrest operation on El Grito de Lares (September 23) to intimidate supporters of Puerto Rican independence. We found no support for his allegation. We determined that the FBI actually planned to arrest Ojeda early on September 24, and conducted the emergency assault on September 23 only because of the reported compromise of the sniper-observers.

In addition, we examined the criticism that the FBI failed to notify Puerto Rico government officials in advance of the operation and inadequately communicated with them during the operation. We determined that the FBI made the decision not to notify Puerto Rico officials of the operation because of concerns about leaks that could compromise the operation, which was a reasonable consideration under the circumstances. However, we concluded that the explanations the FBI provided local officials for delaying entry after Ojeda was shot failed to include important details – such as the perceived threat to the entry team and the exigent nature of the assault – that would have given the Puerto Rico officials a greater understanding of the circumstances surrounding the decision not to enter the residence until the next day.

We evaluated whether any of the actions taken by FBI personnel constituted misconduct warranting disciplinary action. We concluded that they did not. However, we were critical of SAC Fraticelli's and Deputy HRT Commander Steve's decision-making regarding the emergency assault. We also questioned their, and HRT Commander Craig's, reasoning regarding the preparations for and conduct of the negotiations. In making these criticisms, we were mindful of the fact these managers had to make decisions based on imperfect or incomplete information. This was particularly the case after the reported compromise of the sniper-observers, when the circumstances were tense and rapidly evolving, and the managers had limited time for reflection and consultation. Nevertheless, we found several of their decisions deficient because they reflected an inadequate assessment of the known circumstances, or were either contrary to or inconsistent with applicable FBI guidelines. For these reasons, we highlighted several of their decisions as performance issues we believe the FBI should examine.

In this report, we make ten systemic recommendations relating to problems we found in the Ojeda arrest operation. Our systemic recommendations are intended to improve the planning and conduct of future FBI arrest operations. We believe that, if implemented, they may help the FBI avoid some of the problems that occurred in the Ojeda arrest operation.

[BLANK]

APPENDIX A

APPENDIX A

PSYEUDONYM LIST FOR FBI AGENTS IDENTIFIED IN OIG REPORT
LISTED ALPHABETCALLY¹¹⁰

Pseudonym	Position	First appearance in report (page no.)
Adam	Assistant Special Agent in Charge, San Juan FBI	60
Alan	Member, Gold Squad Assault Team, HRT	50
Andy	Supervisor, Operations and Training Unit	22
Bill	Assistant Team Leader, Gold Squad Assault Team, HRT	45
Brian	Member, Red Squad Assault Team, HRT	50
Bruce	Member, Red Squad Sniper-Observer Team, HRT	29
Craig	Assistant Special Agent in Charge, Critical Incident Response Group; HRT Commander	24

¹¹⁰ The OIG provided pseudonyms for all FBI personnel except the following senior executive officials: Executive Assistant Directors Grant Ashley and Gary Bald; Assistant Director Willie Hulon; Deputy Assistant Director John Lewis; and Special Agent in Charge Luis Fraticelli.

Dale	Pilot (Bell 412), Tactical Helicopter Unit	43
Dan	Member, Gold Squad Sniper-Observer Team, HRT	29
Dennis	Unit Chief, Crisis Negotiations Unit	24
Don	Team Leader, Red Squad Assault Team, HRT	50
Doug	Supervisor, Red Squad	25
Eric	Member, Red Squad Sniper-Observer Team, HRT	29
Frank	Breacher, Red Squad Assault Team, HRT	50
Gary	Member, Gold Squad Sniper-Observer Team, HRT	29
George	Member, Gold Squad Assault Team, HRT	50
Jason	Acting Unit Chief, Operations and Training Unit	39
Ken	Member, Gold Squad Assault Team, HRT	50

Kevin	Supervisor, Operations and Training Unit	39
Larry	Crisis Negotiator, San Juan FBI	56
Leslie	Assistant Special Agent in Charge, San Juan FBI	25
Paul	Member, Gold Squad Sniper-Observer Team, HRT; Acting Supervisor, Communications Squad, HRT	18
Peter	Team Leader, Red Squad Sniper-Observer Team, HRT	19
Ray	Unit Chief, Tactical Helicopter Unit	41
Robert	Pilot (MD-530), Tactical Helicopter Unit	43
Rodger	Crisis Negotiator, San Juan FBI	55
Ron	Assistant Team Leader, SWAT Blue Team, San Juan FBI	43
Scott	Assistant Team Leader, Red Squad Assault Team, HRT	50
Steve	Deputy Commander, HRT	22

Todd	Pilot (MD-530), Tactical Helicopter Unit	43
Tom	Team Leader, Gold Squad Assault Team, HRT	50
Victor	Supervisor, Blue Squad	76

APPENDIX B

DEADLY FORCE POLICY
TRAINING MATERIAL - 7/29/2004

DEPARTMENT OF JUSTICE DEADLY FORCE POLICY¹

Law enforcement officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.

- A. Deadly force may not be used solely to prevent the escape of a fleeing suspect.
- B. Firearms may not be fired solely to disable moving vehicles.
- C. If feasible and to do so would not increase the danger to the officer or others, a verbal warning to submit to the authority of the officer shall be given prior to the use of deadly force.
- D. Warning shots are not permitted²
- E. Officers will be trained in alternative methods and tactics for handling resisting subjects which must be used when the use of deadly force is not authorized by this policy.

This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

¹Department of Justice Policy Statement Use of Deadly Force (07/01/2004) in pertinent part (Language relating to Custodial Situations has been intentionally omitted pursuant to FBI policy. See, 66F-HQ-1312253, EC from the Director's Office to All Divisions, titled "REVISIONS TO THE DEPARTMENT OF JUSTICE DEADLY FORCE POLICY", dated 07/07/2004).

²Not included in the above description is the policy relating to the use of deadly force to prevent the escape of a prisoner committed to the custody of the Attorney General or the Bureau of Prisons. Because Agents will seldom find themselves in a position to apply the custodial aspect of the policy, the FBI will adhere to the policy decision set forth in the Airtel from the Director to All Field Offices, titled "Deadly Force Policy Matters," dated 1/5/95, which states "A policy decision has been made that except in cases of prison unrest which would principally involve HRT and/or SWAT, FBI Agents should adhere to the policy and training principles governing the use of deadly force in non-custodial situations.

07/29/2004

INSTRUCTIONAL OUTLINE

I. INTRODUCTION

The following general principles shall guide the interpretation and application of this policy:

- A. This policy shall not be construed to require Agents to assume unreasonable risks to themselves.
- B. The reasonableness of an Agent's decision to use deadly force must be viewed from the perspective of the Agent on the scene without the benefit of 20/20 hindsight.
- C. Allowance must be made for the fact that Agents are often forced to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving.

II. DEFINITIONS

- A. "DEADLY FORCE": Is force that is reasonably likely to cause death or serious physical injury.
- B. "REASONABLE BELIEF": Is synonymous with "Probable Cause". It is determined by a totality of the facts and circumstances known to Agents at the time, and the logical inferences that may be drawn from them.
- C. "NECESSARY": The necessity to use deadly force based on the existence of a reasonable belief that the person against whom such force is used poses an imminent danger of death or serious physical injury to the Agent or other persons.
- D. "IMMINENT DANGER": "Imminent" does not mean "immediate" or "instantaneous", but that an action is pending. Thus, a subject may pose an imminent danger even if he is not at that very moment pointing a weapon at the Agent. For example, imminent danger may exist if Agents have probable cause to believe any of the following:

1. The subject possess a weapon, or is attempting to gain access to a weapon, under circumstances indicating an intention to use it against the Agents or others; or,
2. The subject is armed and running to gain the tactical advantage of cover; or,
3. A subject with the capability of inflicting death or serious physical injury--or otherwise incapacitating agents--without a deadly weapon, is demonstrating an intention to do so; or,
4. The subject is attempting to escape from the vicinity of a violent confrontation in which the subject inflicted or attempted the infliction of death or serious physical injury.

III APPLICATION OF DEADLY FORCE

In assessing the necessity to use deadly force, the following practical considerations are relevant to its proper application:

A. Inherent Limitation on Abilities to Assess the Threat and Respond.

1. Limited Time (Action v. Reaction) - there will always be an interval of time between a subject's action and an Agent's ability to perceive that action, to assess its nature, and to formulate and initiate an appropriate response. The inherent disadvantage posed by the action/reaction factor places a significant constraint on the time frame within which Agents must perceive, assess and react to a threat.
2. Limited Means (Wound Ballistics) - When the decision is made to use deadly force, Agents have *no guaranteed means of instantaneously stopping the threat*. The human body can sustain grievous - even ultimately fatal - injury and continue to function for a period of time (from several seconds to several minutes) depending on the location, number, and severity of the wounds. The lack of a reliable means of instantaneously stopping the threat, may extend the time that imminent danger can persist. This factor further constrains the time frame within which Agents must respond to a perceived threat.

B. Achieving Intended Purpose.

1. Deadly force may only be applied for the intended purpose of bringing an imminent danger of death or serious physical injury to a timely halt either through the surrender of the subject or through physiological incapacitation.

If the subject does not surrender, the only reliable means of achieving that goal is to cause physiological incapacitation of the subject(s) as quickly as possible. Attempts to do anything else - such as shooting to cause minor injury - are unrealistic and can risk exposing Agents or others to continued danger of death or serious physical injury.

2. When the circumstances justify the use of deadly force, Agents should continue its application until the imminent danger is ended through the surrender or physiological incapacitation of the subject(s).

C. Consideration of Risk to Other Parties.

Even when deadly force is permissible, Agents should assess whether its use creates a danger to third parties that outweighs the likely benefits of its use.

SCENARIO #1: ARMED, RESISTING

Agents approach a residence at night to arrest a bank robbery subject. The robbery occurred six weeks earlier, and the robber threatened bank personnel with a handgun. Agents go to the front door of the house while others cover from their assigned positions. One Agent gains a view of the lighted interior of the house through an uncurtained window. When the Agents at the front door knock and announce their identity and purpose, the Agent watching through the window sees a man matching the description of the subject pick up a rifle and approach the door with gun in hand. The Agent fires through the glass, striking the subject in the back and side.

DISCUSSION: The use of deadly force is permissible

Deadly force is necessary to eliminate the imminent danger to the other Agents. The subject armed himself with a deadly weapon after the Agents had announced their identity and purpose; it is reasonable to believe that he has armed himself in preparation for violent resistance. Verbal warnings are not feasible due to the imminent nature of the threat.

SCENARIO #2: ARMED, RESISTING

An undercover Agent purchases three kilos of cocaine from two subjects seated in an automobile in a deserted parking lot at about 3:00 A.M. Through a pre-arranged signal, the Agent alerts a nearby team of Agents to move in and arrest the subjects. As the arrest team approaches on foot and the Agents on the team identify themselves as law enforcement officers and demand that the subject's place their hands where they can see them, the subjects' car suddenly veers toward them with the apparent intent to strike them. The Agents open fire, striking the driver.

DISCUSSION: The use of deadly force is permissible

It is reasonable for the Agents to believe the subjects pose an imminent danger to the Agents by using the vehicle as a deadly weapon, rather than just as a means of escape. Unlike the situation where a subject is using a vehicle merely to escape, the vehicle in this scenario is being used as a weapon to attack the Agents. A vehicle used in this manner poses no less an imminent danger than a firearm or other weapon, and deadly force is permissible to protect the Agents and others in the vicinity. Furthermore, Agents would not be required to permit the subjects to escape from the vicinity of a violent confrontation in which they have just attempted to inflict death or serious physical injury on the Agents. Verbal warnings were given before the Agents opened fire, but were ignored. Obviously, Agents confronted with a threat from an approaching vehicle should take evasive action to avoid getting killed or seriously injured; but the same may be said when Agents are confronted by subjects with knives or firearms. Because the vehicle was being used to attempt to kill or injure the Agents, it is not necessary that there be another threat or danger before the use of deadly force is permissible. Attempting to counter the danger by disabling the vehicle is impractical and contrary to policy. Thus, when deadly force is deemed necessary, it must be directed at the person or persons who pose a danger. As in all other instances where the use of deadly force is at issue, consideration must be given to whether its use creates a danger to third parties that outweighs its benefits.

SCENARIO #3: NON-DANGEROUS, ESCAPING

Agents possess an arrest warrant for a man who is wanted for Bank Fraud & Embezzlement. As they approach his residence to make the arrest, they observe a man matching the subject's description standing on the front porch. When the Agents are within about 20 yards of the residence, the man looks in their direction and immediately jumps from the porch and runs down the sidewalk away from them. One of the Agents shouts, "FBI! Stop!" When the man ignores that command, the Agent shouts a second time, "FBI! Stop or I'll shoot!" The man continues running, increasing the distance between himself and the pursuing Agents. Realizing that they are not going to be able to overtake the him, the Agent fires a shot, striking the man in the back.

DISCUSSION: The use of deadly force violates policy

Deadly force may only be used when necessary, that is when Agents have a reasonable belief that the subject of the force poses an imminent danger of death or serious physical injury. In this scenario, it is not reasonable to believe that the subject poses an imminent danger to the Agents or to others. If the Agents are unable to seize the subject without resort to deadly force, the subject will avoid arrest for the time being.

SCENARIO #4: ARMED, ESCAPING

Agents approach a residence during the day to arrest a bank robbery subject who threatened bank personnel with a handgun during the robbery. Before the Agents are able to fully establish a perimeter, a person matching the description of the subject bursts from the back door of the residence with what appears to be a pistol in his hand and runs through the back yard towards adjacent homes. Agents shout, "FBI! Stop! Or we'll shoot!" Ignoring the commands, the subject continues to run. An Agent fires a shot from a distance of about 15 yards, striking the subject in the back.

DISCUSSION: The use of deadly force is permissible

The Agent has probable cause (reasonable belief) that the subject, who has armed himself with a firearm, has done so to resist arrest and poses an imminent danger to the Agents in the immediate vicinity. The subject ignored commands to stop. As long as the fleeing armed subject remains within gunshot range of the Agents, he has the ability to turn and fire upon them before they can effectively respond by taking cover or returning fire. Attempting to pursue an armed subject increases that danger. In addition, the subject poses an imminent danger to those Agents who are trying to form the perimeter and whom the subject is likely to encounter as he continues his flight.

In deciding whether to use deadly force in this scenario, Agents should also consider that the subject is fleeing in a neighborhood setting. Accordingly, Agents should assess whether its use creates a danger to third parties that outweighs the likely benefits of its use.

SCENARIO #6: UNARMED, RESISTING

Agents attempt to execute an arrest warrant on a Fraud by Wire subject in the break room of a manufacturing plant where he works. The subject, a man of average size with no history of violence, is wearing pants and a shirt, and there is no indication that he is armed. When the Agents identify themselves and approach the subject, he suddenly exercises a precise karate kick, striking one of them in the groin and temporarily disabling him. One of the Agents backs away, draws his handgun, and orders the subject to surrender. The subject ignores the commands, adopts a martial arts fighting stance, and moves toward the Agent. The Agent fires.

DISCUSSION: The use of deadly force is permissible

It is reasonable for the Agents to believe that the subject is posing an imminent danger of death or serious physical injury to the Agents by his attack. The subject is not only capable of inflicting death or serious physical injury through his martial arts skills, but he also has the capacity to render the Agents incapable of defending themselves. The subject's refusal to comply with the Agent's command to surrender, his disabling attack upon one Agent, and his apparent intention to attack another, creates a reasonable belief that he poses an imminent threat of death or serious physical injury, justifying the use of deadly force to eliminate that threat. In the face of the imminent danger, Agents are not required to assume the risk of being incapacitated as a result of a physical confrontation with the subject, rendering the Agents incapable of protecting themselves and making their firearms accessible to the assailant.

SCENARIO #7: UNARMED, RESISTING

Agents attempt to execute an arrest warrant for an Unlawful Flight to Avoid Prosecution (UFAP) - Murder subject in the break room of the manufacturing plant where the subject works. They approach the subject and announce their identity and purpose. There is no reason to believe that he is presently armed with a deadly weapon. However, as soon as the Agents attempt to effect the arrest, the subject spits in the face of one of Agents, then grabs a nearby supporting column, wrapping it with his arms and legs. The Agents try to peel the man away from the column, but without success. The subject continues to spit and curse at the Agents. One Agent draws his handgun and informs the subject that if he doesn't let go of the column and surrender by the count of ten, he will be shot. The subject ignores the commands and continues cursing the Agents. At the count of ten the Agent fires.

DISCUSSION: The use of deadly force violates policy

It is not reasonable for the Agents to believe that the subject poses an imminent threat of death or serious physical injury to the Agents at present. Policy requires that they use non-deadly force to resolve this situation. This does not suggest that they should view the subject as harmless or as one who could not become a threat. As with any suspect or arrestee, Agents must be alert to the possibility that an imminent danger of death or serious physical injury may arise; but until such time as it does, deadly force is not an option.