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### M E M O R A N D U M

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**To:** Mike Schmidt  
**From:** Nicole Hermann  
**Date:** August 13, 2021  
**Subject:** Officer Involved Protest Case Review

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Protests in the City of Portland that occurred in 2020 and 2021 resulted in a number of use of force complaints involving law enforcement. Some of the complaints alleged excessive force that could constitute criminal acts under Oregon law absent legal provisions allowing the particular use of force under the circumstances presented. Other complaints alleged the unlawful taking of personal property by police officers. The Multnomah County District Attorney's Office became aware of some of those incidents through complaints received directly, civil lawsuits filed against the City of Portland, social media posts, circulating videos, and referrals from plaintiff's attorneys. The Multnomah County District Attorney's Office sought to review and investigate those incidents to determine whether any police officer engaged in an unlawful use of force. The purpose of this memorandum is to document the review of those incidents, first discussing the applicable law and then addressing each of the incidents reviewed. The MCDA's review of these cases narrowly and objectively reflects an analysis of Oregon criminal law in line with MCDA's statutory authority. Notwithstanding, the MCDA also acknowledges the disturbing nature of a number of the complaints reviewed, particularly those featuring video of violent encounters, and the impact these images have on our community.

#### LAW

The following briefly summarizes the Oregon statutes governing the use of force by peace officers in connection with making an arrest or in self-defense and in defense of third parties. Generally, state law provides protections from criminal liability to peace officers when using force to effectuate an arrest or in self-defense, actions that are part of their sworn and authorized duty to the public. The law grounds those protections in the concept of reasonableness with respect to the use of force and the extent of force used. Statutory protections relating to the use of force in connection with making an arrest and in self-defense and defense of others are characterized as justification defenses under Oregon law. As such, when a defense relating to the use of force in either a justification defense or arrest event is raised, the burden is on the state to disprove the justification beyond a reasonable doubt. *State v. Waller*, 22 Or App 299 (1975).

In September of 2020, in the wake of the national George Floyd protests, the Oregon Legislature enacted House Bill 4301 which updated the statutory scheme concerning the justification defenses relating to the use of force generally and the use of force in connection with making an arrest. House Bill 4301 became effective in January of 2021 and, among other

relatively minor statutory changes, repealed ORS 161.235 and 161.239 regarding the use of force in making an arrest and replaced those statutes with new, modified standards. In large part, while the language concerning the use of force in connection with making an arrest has been modified, the substantive standards under which analysis for criminal liability must occur remain the same.

## **I. General Statutory Framework Regarding a Peace Officer’s Use of Force**

ORS 133.235 authorizes a peace officer generally to make an arrest for a crime and provides that “a peace officer may use physical force as justifiable under ORS 161.245 and sections 7 and 8 of this 2020 second special session Act”. ORS 133.235(4)<sup>1</sup>. The statute expressly authorizes the use of force in connection with an arrest, but limits that use of force as outlined in the statutes governing justification defenses. Justification defenses are governed by ORS 161.190–161.275.

ORS 161.209–161.219 govern the justification of the use of force in self-defense and in defense of others outside of the specific context of a peace officer’s making an arrest. Because the justification statutes apply generally, the self-defense and defense of others justifications are applicable to both citizens and peace officers equally.

ORS 161.195 further defines justification where not otherwise defined in statute, stating that “conduct which would otherwise constitute an offense is justifiable and not criminal when it is [...] performed by a public servant in the reasonable exercise of official powers, duties or functions.”

## **II. Protections Relating to the Use of Force in Connection with Making an Arrest**

ORS 133.235(4) specifically limits a peace officer’s justification for using force when making an arrest as outlined in sections 7 and 8 of HB 4301 and ORS 161.245. The pre-September 2020 version of the statute made specific reference to ORS 161.235 and 161.239 which were repealed by HB 4301. The statutory language is reproduced below. While the language may have changed, the substantive analysis remains consistent, though there are additional requirements applicable under the HB 4301 modifications.

ORS 161.239 and Section 8 of HB 4301 deal specifically with the use of *deadly* force in connection with making an arrest and have not been included below.

ORS 161.235 reads, in its entirety, as follows:

Except as provided in ORS 161.239, a peace officer is justified in using physical force upon another person only when and to the extent that the peace officer reasonably believes it necessary:

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<sup>1</sup> Pre-September 2020 versions of the relevant statutes referred to “ORS 161.235, 161.239 and 161.245”. ORS 161.235–239 were repealed and parts of the language of ORS 161.245 was changed by HB 4301.

- (1) To make an arrest or to prevent the escape from custody of an arrested person unless the peace officer knows that the arrest is unlawful; or
- (2) For self-defense or to defend a third person from what the peace officer reasonably believes to be the use or imminent use of physical force while making or attempting to make an arrest or while preventing or attempting to prevent an escape.

Section 7 of HB 4301 reads, in its entirety, as follows:

- (1) A peace officer may use physical force upon another person only when it is objectively reasonable, under the totality of circumstances known to the peace officer, to believe:
  - (a) That the person poses an imminent threat of physical injury to the peace officer or to a third person; or
  - (b) That the use of physical force is necessary to:
    - (A) Make a lawful arrest when the peace officer has probable cause to believe the person has committed a crime; or
    - (B) Prevent the escape from custody of the person when the peace officer has probable cause to believe the person has committed a crime.
- (2) A peace officer may use physical force upon another person under this section only to the degree that the peace officer reasonably believes necessary to prevent physical injury under subsection (1)(a) of this section or to carry out a purpose described in subsection (1)(b) of this section.
- (3) Prior to using physical force upon another person, if the peace officer has a reasonable opportunity to do so, the peace officer shall:
  - (a) Consider alternatives such as verbal de-escalation, waiting or using other available resources and techniques if reasonable, safe and feasible; and
  - (b) Give a verbal warning to the person that physical force may be used and provide the person with a reasonable opportunity to comply.

With respect to the use of force in connection with making an arrest, the standards articulated between HB 4301 and ORS 161.235 are largely the same. Both require that an officer subjectively believe that force is necessary to make an arrest. Both require that the degree of force used is objectively necessary. And both require that the arrest being made is lawful (i.e., pursuant to at least probable cause).

The primary difference between ORS 161.235 and HB 4301 is that the latter includes additional language requiring an officer to take preliminary steps—where there is “reasonable opportunity to do so”—before the protections from liability apply. Specifically, before using force to make an arrest, section 7 of HB 4301 requires that an officer 1) consider alternatives such as de-escalation and 2) provide verbal warnings that physical force may be used.

“Reasonable belief” in the context of the statutes governing the use of force in connection with making an arrest is described in ORS 161.245. Specifically, ORS 161.245(1) provides that “a reasonable belief that a person has committed an offense means a reasonable belief in facts or

circumstances which, if true, would constitute an offense.” ORS 161.245(2) provides that the justification laid out in HB 4301 section 7 and ORS 161.235 does not apply if “the arrest is unlawful and is known by the [peace] officer to be unlawful.”

**III. Protections Relating to the Use of Force in Self-Defense and Defense of Others**

ORS 161.209 provides that a person is justified in using physical force in self-defense or in defense of another person “from what the person reasonably believes to be the use or imminent use of unlawful physical force” and limits the amount of force that a defender may use to “the degree of force which the person reasonably believes to be necessary for the purpose.”

That is, under the statute, a person’s use of force is justified as self-defense if 1) the person holds an objectively reasonable subjective belief that the unlawful force is being used against them and 2) the degree of force used to defend is no greater than what a reasonable person would deem necessary under the circumstances.

**INCIDENT REVIEW**

MCDA initiated a review of 21 cases. Review of these cases started after MCDA was either contacted directly by a plaintiff’s attorney, became aware of a civil complaint that had been filed against the City of Portland alleging assaultive conduct by a Portland Police officer, or received information regarding social media or circulating video accounts of use of force incidents during protests. Four of the 21 cases were identified as incidents involving “Officer 67.” MCDA referred these four cases to the Oregon Department of Justice (ODOJ) for review and investigation. Four of the remaining 17 cases are still pending further investigation and prosecutorial review. Of the remaining 13 cases reviewed, eight cases were closed without further investigation and five cases were referred for investigation and reviewed by MCDA.

Of the eight cases closed without further investigation, five cases were closed after efforts were made to contact the plaintiff’s attorney and no responses were received. An additional three cases were closed after the plaintiff’s attorney or person injured declined to participate in the criminal investigation. These eight cases include the following incidents: complainant

Incident #	Approximate Incident Date	Allegation	Complainant	Civil Court Jurisdiction	Civil Court Case #	Plaintiff’s Attorney(s)	MCDA Case Status	Case Outcome
01	May 31, 2020	The allegations include injuries caused by impact munitions used by an unnamed officer.	Mason Lake	Multnomah County Circuit Court	20CV19838	Michael Fuller	Closed	Attorney indicated to MCDA a willingness to participate in a criminal investigation but was non-responsive when PPB reached out to conduct

								investigative follow-up.
02	June 2, 2020	The allegations include injuries caused by a baton strike and push by an unnamed officer.	Philip Elias	Multnomah County Circuit Court	20CV19783	Michael Fuller	Closed	Attorney indicated the plaintiff's desire to decline participation in a criminal investigation.
03	June 5, 2020	The allegations include injuries caused by a flash bang grenade thrown by an unnamed officer.	Julia Leggett	Multnomah County Circuit Court	20CV19842	Michael Fuller	Closed	Attorney indicated to MCDA a willingness to participate in a criminal investigation but was non-responsive when PPB reached out to conduct investigative follow-up.
04	June 5 – June 6, 2020	The allegations include injuries caused by a rubber bullet shot by an unnamed officer.	Dominique Bouchard	Multnomah County Circuit Court	20CV21115	Gregory Kafoury	Closed	MCDA received no response from plaintiff's attorney.
05	June 6, 2020	The allegations include injuries caused by projectiles launched by an unnamed officer.	Daniel Michaels	Michael Fuller	20CV19840	Michael Fuller	Closed	Attorney indicated the plaintiff's desire to decline participation in a criminal investigation.
06	June 7, 2020	The allegations include injuries caused by a baton strike and push by an unnamed officer.	Lydia Fuller	Multnomah County Circuit Court	20CV20062	Michael Fuller	Closed	Attorney indicated the plaintiff's desire to decline participation in a criminal investigation.
07	June 13, 2020	The allegations include injuries caused by a rubber bullet shot by an unnamed officer.	Alexandra Montgomery	Multnomah County Circuit Court	20CV21297	Michael Fuller	Closed	Attorney indicated to MCDA a willingness to participate in a criminal investigation but was non-responsive when

								PPB reached out to conduct investigative follow-up.
08	July 18, 2020	The allegations include injuries caused by being knocked to the ground by unnamed officers.	Michael Weisdorf	Multnomah County Circuit Court	20CV28964	Gregory Kafoury		MCDA received no response from plaintiff's attorneys.

The remaining five cases identified by MCDA were referred to the Portland Police Bureau's Detective Division for criminal investigation (and in one case, ODOJ<sup>2</sup>) for further investigation and then later reviewed by MCDA for prosecution consideration upon completion of the law enforcement investigation. A discussion, analysis, and reviewing conclusion of each incident, applying the scope of Oregon criminal law described on pages 1-3 of this memorandum, is detailed below. Of the five incidents reviewed, four of the cases resulted in a determination that the incident did not involve criminal use of force or other criminal action by the involved PPB officer.

**Teri Jacobs**

This incident involves allegations surrounding the actions of PPB Officer Corey Budworth that caused physical injury to Teri Jacobs the night of August 18, 2020. The allegations were assigned to PPB for investigation and a completed case was presented to MCDA for review. The case was presented to a Multnomah County grand jury in June 2021 and the grand jury returned an indictment for Assault IV. This case remains pending.

**Erica Christiansen**

As a result of my prosecutorial review, I concluded that PPB Officer Brent Taylor acted in defense of others at the time he deployed less lethal munitions, specifically the FN303<sup>3</sup>, against Erica Christiansen on the night of August 9, 2020 near 2045 North Kilpatrick Street in Portland, Oregon. As a result, Officer Taylor's actions were not criminal in nature.

The reader is referred to the police reports for a full account of Portland Police Detective Brent Christensen<sup>4</sup> and ODOJ Special Agent Matt Hingston's investigation and to applicable law. Partial video of the incident, taken by the Portland Police Bureau's Forensic Evidence Division (FED), was reviewed during the investigation. Interviews with Erica Christiansen and officers present during the incident confirmed the identities of the parties visible in the footage. Collateral officer and witness reports and the partial video footage detail that the demonstrations on the night of August 9, 2020 had been deemed unlawful. Having declared an unlawful

<sup>2</sup> August 09, 2020 incident involving Erica Christiansen.

<sup>3</sup> A less-lethal impact launcher powered by compressed air capable of delivering a variety of different types of ammunition to including marking rounds and a Pava round.

<sup>4</sup> Officer Brent Christensen is no relation to Erica Christiansen.

assembly and based additionally on the violent nature of the large crowd including use of weapons, items being throw, and fires started by the crowd, PPB declared a riot. PPB officers were staged near 2045 North Kilpatrick Street and were in the process of leaving the area when Erica Christiansen began interacting with officers. Erica Christiansen first approached PPB Officer Lino Pavon from behind and threw a lit cigarette at him, striking him underneath his helmet. Officer Brent Taylor observed Erica Christiansen approach Officer Pavon and watched her throw the cigarette. In response to Erica Christiansen's actions, Officer Taylor used his hand to push Erica Christiansen back, moving her away from Officer Pavon. Erica Christiansen continued to advance toward Officer Pavon who was unaware of her approach. Erica Christiansen continued to move toward Officer Pavon despite commands from Officer Taylor and other officers, to back up and leave the area. In response to the second advancement by Erica Christiansen, Officer Taylor deployed his FN303 three times, striking Erica Christiansen as she continued to advance. FED video shows Officer Taylor, who is partially visible, raising his FN303 and shooting three times (off-screen) in quick succession. The available view of the FN303 shows that it is level and shouldered while being fired and not angled down towards the ground.

As outlined above, ORS 161.209 provides that a person's use of force is justified as self-defense if 1) the person believes that unlawful force is being used against themselves or another person and 2) the degree of force used to defend is no greater than what a reasonable person would deem necessary under the circumstances. Officer Taylor's first use of force to stop Erica Christiansen's advance on Officer Pavon was a push that moved her backwards but did not fully halt her movement. When that first use of force does not deter Erica Christiansen's advancement, nor do the repeated warnings of other officers to stop and leave, Officer Taylor uses additional, non-lethal force by deploying the FN303. The use of the FN303 stops Erica Christiansen's movement and officers are able to disengage and move safely away. Officer Taylor's use of the FN303 pursuant to ORS 161.209, use of force used in defense of Officer Pavon, was in response to a reasonable assessment that Erica Christiansen would continue to use force against Officer Pavon and was a reasonable and necessary degree of force. Although Erica Christiansen was injured and is seeking remedy through a civil lawsuit, for the above reasons, criminal charges are not warranted in this incident.

### **Tyler Cox**

This incident involved the use of force by PPB Officer Thomas Clark against Tyler Cox on August 31, 2020. The reader is referred to the specific memorandum addressing this incident for a full account of my prosecutorial review.

### **Thomas Dreier**

This incident involved an allegation that PPB Officer Stephen Perry committed theft by taking the guitar of Thomas Dreier during a protest on August 15, 2020 near the Penumbra Kelly Building at East Burnside and Northeast 47th Avenue. The guitar was later located in a PPB property room by PPB Detective Daniel Andrew on December 3, 2020 and returned to Thomas Dreier. After review of the associated video, police reports, and interview of Officer Perry, I agree with the conclusion of investigating PPB Detective Daniel Andrew that there is no evidence to support a charge of theft (in any degree). Detective Andrew determined from associated reports

and an interview with PPB Officer Perry that Thomas Dreier's guitar was seized after Thomas Dreier approached Officer Perry from behind while Officer Perry was addressing another individual. Thomas Dreier was present during an unlawful assembly while officers were actively working to clear the streets and defend themselves against the continuous use of unconventional weapons. The guitar was held with other seized items until located by Detective Andrew and returned to Thomas Dreier. There is no evidence that Officer Perry intended to permanently deprive Thomas Dreier of his guitar and criminal charges are not warranted in this incident.

### **Evan Henshaw-Plath**

This incident involved an allegation that PPB officer(s) committed theft by taking the speaker system of Evan Henshaw-Plath during a protest event on August 20, 2020. PPB Detective Daniel Andrew located the speaker system in a PPB property room and associated reports documenting its seizure pursuant to a noise violation. Any crime of theft requires proof that a person intended to deprive another of their property as defined by ORS 164.005 and 164.015. There is no evidence to prove an intent to deprive or any action other than a seizure of evidence pursuant to a violation. As a result, no criminal charge for theft can be proven against the associated officers.