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M E M O R A N D U M

To: DA Mike Schmidt
From: Nicole Hermann
Date: July 9, 2021
Subject: Review of Protest Case – PPB Officer Thomas Clark

The following memorandum is a criminal legal analysis of the actions of Portland Police Officer Thomas Clark in regards to his use of force during the arrest of Tyler Cox on August 31, 2020. The video capturing this incident was widely shared and understandably has ignited community concern in the level of force used against Mr. Cox. The MCDA acknowledges the disturbing nature of the video and the impact these images have on our community. However, it is beyond the scope of this analysis to review or address other mechanisms in place for accountability. The narrow focus of this analysis is whether Officer Clark's actions were lawful under Oregon criminal law. Specifically, whether Officer Clark's subjective beliefs were objectively reasonable. The question at issue is not whether Mr. Cox actually intended to injure or assault Officer Clark, but instead, whether Officer Clark's belief that Mr. Cox posed a threat was objectively reasonable. Applying that narrow analysis, it is my conclusion that Officer Clark's use of force was justified and his actions cannot be charged as a crime. Therefore, I am declining to issue charges against Officer Clark.

Oregon 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. Peace officers have a legal right to arrest persons for criminal acts, including during an unlawful assembly and when a riot has been declared during a protest. Probable cause may exist for those committing the violent acts, as well as for those persons who remain unlawfully assembled. Officers are legally allowed to use physical force in order to effectuate those arrests under current state law.

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 [House Bill 4301]". ORS 133.235(4). 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. It is the state's burden to prove beyond a reasonable doubt the force was not justified.

House Bill 4301, Sec. 7, states that, among other reasons, a peace officer may use physical force upon another person only when it is objectively reasonable to make a lawful arrest when

there is probable cause to believe the person has committed a crime or when the officer believes a person poses an imminent threat of physical injury to the peace officer. A peace officer may only use a degree of force that the peace officer reasonably believes necessary to make an arrest or to prevent physical injury. House Bill 4301 further states if the peace officer has a reasonable opportunity to do so, the peace officer shall consider alternatives such as verbal de-escalation or give a verbal warning to the person that physical force may be used and provide the person with a reasonable opportunity to comply.

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 161.209 provides that a person is justified in using physical force in self-defense “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 unlawful force is being used against them and 2) the person reasonably believes the degree of force used was necessary to defend themselves.

The investigation in this case was conducted by Portland Police Detective Jeff Sharp. I have reviewed the investigation and in addition, all materials submitted by Mr. Cox. The reader is referred to the actual reports for a full account of the investigation, the following is a summary.

The night of August 31, 2020, Officer Thomas Clark was on duty as a member of the Portland Police Bureau's Mobile Field Force (MFF) in the area of NW 12th Ave & NW Glisan St where a protest demonstration was occurring involving a large crowd of people. Members of the crowd threw projectiles at police, including paint balloons and rocks, and shined high-intensity lights at officers. Several fires were started by protestors that had to be put out by the fire bureau, including members of the crowd lightening a fire in a dental office and then burglarizing the business. The Portland Police Bureau declared the protest event an unlawful assembly and riot. The PPB sound truck announced that declaration to the crowd and provided instructions for people to leave the area. The sound truck further warned the crowd that persons who remained in the area would be arrested and force may be used against them. This announcement was repeated at least eight times before police took any action was taken against the crowd.

Tyler Cox was in the intersection at NW 12th Ave & NW Glisan St with a group of people who remained in the street despite the sound truck’s warnings. Tyler Cox was dressed in a similar manner to the rest of the crowd, including all black clothing, black gloves, a black helmet, and black backpack. After close to twenty minutes had passed, providing ample time for people to leave the area, the MFF was ordered to move in and arrest the people who remained. Video evidence of the event shows Officer Clark begin to move forward towards the protestors still in the street. He initially focuses on a male carrying a skateboard. As Officer Clark approaches the male, video shows Mr. Cox begin running alongside Officer Clark in a paralleling motion that caught Officer Clark’s attention. Officer Clark then turns and moves towards Mr. Cox to arrest him for Interfering with a Peace Officer as Mr. Cox had failed to comply with police orders to disperse and leave the area. Mr. Cox attempts to run away from Officer Clark. Officer Clark grabs Mr. Cox by the shoulders and as he does so, Mr. Cox grabs the top of Officer Clark's vest. Officer Clark takes Mr. Cox to the ground. Once on the ground, the video shows Mr. Cox struggle with Officer Clark, kneeling him, and putting his hands up into Officer Clark’s face knocking Officer Clark's helmet off of his head. Once Officer Clark’s head is exposed, video shows Officer Clark delivering three to four punches to the area of Mr. Cox’s head (the exact point of impact is not visible on video), as Mr. Cox continues to resist arrest and use force against Officer Clark. Once Mr. Cox stops resisting, Officer Clark stops hitting him.

Additional officers arrive to assist taking Mr. Cox into custody. While Mr. Cox is still on the ground, video shows Officer Clark attempt to remove Mr. Cox's helmet by pulling on it, but Mr. Cox's helmet does not come off. Once in custody, Mr. Cox was taken to OHSU for medical evaluation and then was released to the police. From this incident Tyler Cox reports the following injuries: Concussion; hematoma to the left side of his head; several cuts, scrapes, and bruises to his head, face, and arms; soreness of his head, neck, and back; and sprains of his left elbow and left shoulder. Mr. Cox submitted photographs of himself following the incident which showed some abrasions along his hairline and in the center of his forehead and a scrape to his elbow.

In this case, there are three points where Officer Clark uses force against Mr. Cox in this incident. The first use of force is Officer Clark grabbing Mr. Cox and taking him to the ground. The second, is Officer Clark punching Mr. Cox in the head. The third, is Officer Clark attempting to remove Mr. Cox's helmet. The analysis in this case focuses on whether Officer Clark's subjective beliefs were objectively reasonable. As such, the question at issue in this case is not whether Mr. Cox actually intended to injure or assault Officer Clark, but instead, whether Officer Clark's belief that Mr. Cox posed a threat was objectively reasonable.

Regarding the first incident of force used against Mr. Cox, Officer Clark had probable cause to arrest Tyler Cox for Interfering with a Peace Officer as Mr. Cox had failed to comply with police orders to disperse and leave the area. Officer Clark decided to arrest Mr. Cox based on that probable cause. As Officer Clark tried to arrest Mr. Cox, Mr. Cox attempted to run away from Officer Clark. As Officer Clark grabbed onto Mr. Cox, Mr. Cox grabbed onto Officer Clark in return and continued to try to get away. At that point, Officer Clark was interacting with a resistant individual. He took him to the ground to gain control over Mr. Cox and effectuate the arrest as quickly as possible. Mr. Cox asserts that Officer Clark picked him up and body slammed him intentionally onto the curb. The video does not support this assertion. The video shows Officer Clark grabbing and turning Mr. Cox before pushing him backwards to the street next to the curb. There is no evidence to suggest Officer Clark acted intentionally to harm Mr. Cox, or that Mr. Cox was intentionally thrown down onto a curb. Under these circumstances, Officer Clark's use of force on Mr. Cox was reasonable to stop Mr. Cox and take him into custody.

Once Officer Clark and Mr. Cox were on the ground, the second incident of force used against Mr. Cox occurred. On the ground, Mr. Cox continued to resist Officer Clark. Mr. Cox kneed Officer Clark, and pushed his hands up into Officer Clark's face. This action knocked Officer Clark's helmet off of his head. Mr. Cox asserts that Officer Clark's helmet was not secured properly, suggesting he used little force to knock the helmet off. Video shows Officer Clark running before taking Mr. Cox to the ground, and then bending his head forward in an attempt to gain control of Mr. Cox. Through all of this significant movement, Officer Clark's helmet remains secured firmly in place. The helmet does not move until Mr. Cox's hands knock it off. Once his head is exposed, Officer Clark then delivers three to four punches to Mr. Cox, striking him on the side of his helmet. When Mr. Cox stops resisting, Officer Clark stops hitting him.

Mr. Cox has asserted that Officer Clark punched him directly in the face at least five times while wearing gloves with plastic reinforced knuckles. However, the videos, medical records, statements of Officer Clark and Mr. Cox, and photographs taken both after Mr. Cox's arrest by law enforcement, and those provided by Mr. Cox himself, do not support that assertion. The available evidence directly refutes that claim. Officer Clark said he was not wearing that type of gloves that day. The video evidence from that night does not show him wearing that type of gloves. Medical records and photographs of Mr. Cox following the incident show that he suffered a single hematoma to the left side of his head in an area covered by both his hairline and

his helmet. Small visible abrasions to Mr. Cox's forehead and hairline, near where his helmet padding would likely have been, are present in the photographs he provided. However, these small abrasions are not consistent with his description of being struck in the face five times by a person wearing gloves with plastic reinforced knuckles. The evidence is consistent with Officer Clark's statement, that Officer Clark hit Mr. Cox in the helmet, not the face. Viewed from the perspective of Officer Clark, he perceived Mr. Cox's actions as not only resistant to his efforts to place Mr. Cox under arrest, but also assaultive in that Mr. Cox pushed his hands up into Officer Clark's face and knocked his helmet off. Corroborating this belief, Officer Clark referred criminal charges against Mr. Cox that included Assaulting a Public Safety Officer. Given the environment, and Mr. Cox's behavior, Officer Clark's belief that unlawful force was being used against him was objectively reasonable.

Regarding Officer Clark's belief that he needed to hit Mr. Cox in the helmet in response to Mr. Cox's behavior, Officer Clark was in a declared riot and his task was to arrest people who had refused to comply with police orders to disperse the area. He had run into the crowd and tried to arrest Mr. Cox. Mr. Cox resisted him, put hands into his face, and knocked off his helmet. Officer Clark's head was exposed without protection. Officer Clark was vulnerable without head protection and needed to get Mr. Cox under control as quickly as possible. It was not a situation where Officer Clark would have or should have used any weapons against Mr. Cox, and he did not do so. Instead, Officer Clark hit Mr. Cox three to four times in the helmet in an effort to stop his resistance, and once Mr. Cox stopped resisting and indicated he would comply with the arrest, Officer Clark stopped hitting him. Under these circumstances, Officer Clark's belief that he needed to use that degree of force was objectively reasonable.

Mr. Cox has indicated that Officer Clark's subsequent unsuccessful attempt to remove Mr. Cox's helmet by pulling on it is a third use of force that warrants review. However, video evidence shows that Officer Clark pulled on Mr. Cox's helmet one time. Once it was clear the helmet was not coming off, Officer Clark left it alone. It is not clear from the review of medical records what injuries, if any, resulted directly from this use of force. Further, there is insufficient evidence to show that Officer Clark's action in pulling on the helmet was done with any criminal intent. This action appears to have been incidental to the arrest. It therefore does not warrant further review.

For these reasons, Officer Clark's use of force during the arrest of Tyler Cox was justified under Oregon law. As a result, criminal charges are not warranted in this case.