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CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police

From: James R. Touchstone, Esq.

**OFFICER'S USE OF LESS-LETHAL FORCE THAT SERIOUSLY INJURED
BYSTANDER FILMING NEAR A PROTESTING CROWD NOT UNREASONABLE
GIVEN THAT PROTESTERS OBJECTIVELY POSED AN IMMEDIATE THREAT TO
THE SAFETY OF OFFICERS, CITIZENS, AND PROPERTY**

The Ninth Circuit Court of Appeals held in *Cheairs v. City of Seattle*,¹ that the use of force by an officer – who threw a blast ball diversionary device that injured a bystander who was filming protestors – was not excessive. In reaching its conclusion, the Court concluded that the protestors at the front of the crowd, near whom the bystander stood, objectively posed an immediate threat to the safety of officers, citizens, and property.

Background

A Minneapolis police officer arrested George Floyd on May 25, 2020, during which arrest, Mr. Floyd died. A few days later, demonstrations protesting Mr. Floyd's death began in Seattle. On June 7, 2020

after more than a week of demonstrations, protestors went down Interstate 5; threw rocks, bottles, and other projectiles at police officers; lit patrol cars on fire; and threw Molotov cocktails. The Seattle Police Department (“SPD”) equipped the officers responding to the protests with less-lethal munitions, including blast balls.² One type of blast ball used on the night of June 7-8, 2020 and relevant here was oleoresin capicum (OC). OC blast balls create a flash of light, emit a loud noise, and also disperse OC powder, commonly known as pepper spray. Officer Carl Anderson was SPD's Chemical Agent Response Team Leader on the night of June 7-8, 2020. His assignment required special training and made him responsible for deploying blast

¹ *Cheairs v. City of Seattle*, 2025 U.S. App. LEXIS 19330 (9th Cir. Aug. 1, 2025).

² “Blast balls” are about three inches in diameter, are activated by pulling a pin, and operate like grenades. Once activated, there is a 1.5-second delay that initiates the fuse assembly separation, followed by another 0.5-second delay before detonation.

balls and other munitions as necessary to protect police officers and citizens, and to prevent significant property damage.

SPD planned to use various barricades on June 7, 2020 to protect Capitol Hill's East Precinct police station and to maintain distance from that night's anticipated crowd, but protestors breached police fencing that the police had installed to close off the streets surrounding the East Precinct. Rather than moving back as directed over the public address system, the crowd began slowly inching toward the police line at 11th Avenue and Pine Street.

Interactions between SPD and protesters continued to escalate. Protesters continued to disassemble the fencing the police had installed to close off the streets surrounding the East Precinct. The Operations Center log indicated that at 9:20 p.m., a group of protesters on the police side of the barricades was "making announcements to burn down the precincts." From 9:23 p.m. to 11:38 p.m., SPD warned the protesters multiple times to refrain from removing fencing and advancing toward the officers. However, the Operations Center log noted protesters shining lasers into SPD officers' eyes at 9:24 p.m., 10:26 p.m., and 12:07 a.m.; breaking fencing and using it as weapons at 10:10 p.m.; throwing bottles at 11:36 p.m.; and throwing a bottle with a chemical irritant at 11:52 p.m.

Shortly after midnight, the situation significantly escalated with some protesters holding plywood shields with "nails in them concealed by paint," and, at about the same time, protesters throwing bottles, rocks, and fireworks at the police line. Deciding the

protest had devolved into a riot, the incident commander ordered the line officers to advance from midblock on Pine toward 11th, and authorized the officers on the line to use less-lethal munitions to break up the crowd. At approximately 12:04 a.m., the incident commander authorized the officers to begin deploying OC blast balls. Using a public address system, SPD broadcast several orders for the crowd to immediately disperse. The dispersal orders warned those in the crowd that they would be subject to arrest if they did not comply. The announcements also gave notice that the police would use chemical agents or less-lethal munitions, and informed protesters of two egress routes they could use to leave the area safely.

As the officers slowly advanced, they were again assaulted by the crowd with projectiles. After SPD began deploying less-lethal munitions, the video record and witness statements show that the crowd alternated between retreating in response to tear gas and blast balls, and moving forward to reengage with the police line. At 12:05 a.m., the record shows that the police had created space between the protesters and the police line, but by 12:11 a.m., the Operations Center log indicates the crowd was surrounding the officers on three sides.

Meanwhile, Taylor Cheairs had been having dinner on Capitol Hill. He was aware of the ongoing protests and out of curiosity he decided to walk toward the "interaction between the protesters and the police" after dinner to "see and film what was happening at the front." The record contained no evidence that Cheairs was there to participate in the protest. The video record

revealed that Cheairs walked up to a position on a sidewalk at the intersection of 11th and Pine that was abreast of all but a few of the protesters at the front of the crowd. As he approached, some protesters were dispersing in the opposite direction. Cheairs positioned himself to get a better vantage point but stayed on the sidewalk. The video record suggests that, at the time Cheairs arrived, about 15 yards separated the protesters from the police line. The audio portion of Cheairs's first iPhone recording captured one of SPD's dispersal orders.³

Officer Anderson's body-cam video recorded that he threw several blast balls in the ten minutes between 12:04 a.m. and 12:14 a.m. One of the blast balls Officer Anderson threw overhand landed on the pavement near the curb where Cheairs was standing, bounced and exploded, and struck Cheairs in the groin as he was filming the protest. Cheairs was seriously injured.

Cheairs sued the City of Seattle, SPD, and several unnamed police officers pursuant to 42 U.S.C. section 1983. He claimed that the officer who threw the blast ball that injured him (later identified by Defendants in discovery as Officer Anderson) used excessive force and retaliated against him

³ Cheairs's iPhone recorded the dispersal order that was issued at 12:08 a.m. The order consisted of the following: "I command all those assembled at 11th and Pine to immediately disperse, which means leave this area. If you do not do so, you may be arrested or subject to other police action. Other police action could include the use of chemical agents or less lethal munitions, which may inflict significant pain or result in serious injury. If you remain in the area just described, regardless of your purpose, you will be in violation of city and state law. The following routes of dispersal are available: Westbound on Pine. Southbound on Twelve." Cheairs later testified at his deposition that he did not know if he heard this dispersal order and that there were many different "extremely loud" sounds happening.

for filming the protest. The District Court granted summary judgment in favor of Defendants. Cheairs appealed.

Discussion

The Ninth Circuit Court of Appeals addressed Cheairs's contention that SPD used excessive force against him in violation of his Fourth Amendment rights. The Court initially explained that the Fourth Amendment guarantees the right to be free from unreasonable seizures. *Torres v. Madrid*, 592 U.S. 306, 311 (2021). Considering whether Cheairs was seized within the meaning of the Fourth Amendment, the Ninth Circuit "A seizure requires the use of force *with intent to restrain*," and the inquiry into the intentionality of the use of force considers "whether the challenged conduct *objectively* manifests an intent to restrain." *Id.* at 317 (emphases in original). The Court held that a reasonable jury could conclude that Cheairs was seized when struck by the blast ball, as the use of force may have manifested an objective intent to restrain. However, whether Cheairs's Fourth Amendment claim survived the motion for summary judgment depended on whether the record supports his contention that a jury could find that Officer Anderson's use of force was unreasonable. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

The Ninth Circuit explained that this question required the Court to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion" to determine whether the government's use of

force was excessive. *Scott v. Harris*, 550 U.S. 372, 383 (2007) (quotation omitted). The government’s interest in the use of force depends on: “(1) the severity of the crime; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.” *Sabbe v. Wash. Cnty. Bd. of Comm’rs*, 84 F.4th 807, 82 (9th Cir. 2023); *Graham*, 490 U.S. at 396-97. The “immediate threat” factor is the most important. *Sabbe*, 84 F.4th at 822. When balancing these interests, courts consider the “totality of the circumstances,” *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014), including the “particular situation” and the “particular type of force” used. *Scott*, 550 U.S. at 382. “The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396. Courts allow for an officer’s need “to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Id.* at 397.

The Court found that by midnight on June 8, 2020, the government had strong justification to use some degree of force to respond to serious threats to police, the public, and property. The Court explained that officers’ body cams recorded, and Cheairs’s own videos confirmed, that protesters near Cheairs were throwing projectiles, launching fireworks, and shining lasers at officers in the minutes before Officer Anderson threw the blast ball that struck Cheairs. The protest had gone on

since the afternoon and the degree of violence appeared to be escalating. SPD had given orders to disperse before Cheairs was injured, and the announcements included directions for safely exiting the area. Some of the protesters complied, but others ignored the orders in violation of Washington law. The Operations Center log included entries reporting that protesters had threatened to burn down the nearby precincts.

Based upon the video evidence, the Court stated that a reasonable officer in Officer Anderson’s shoes would have concluded, before Officer Anderson deployed the OC blast ball grenade that injured Cheairs, that probable cause existed to arrest at least some of the protesters for disregarding the dispersal orders, or for assaulting or attempting to assault police officers on the line, at the intersection of 11th and Pine. Thus, the government had an important interest in using force to protect officers and bystanders and to prevent serious property damage. The Court noted that Officer Anderson deployed the blast ball that struck Cheairs in accordance with SPD policy and in response to an increasingly hostile, threatening crowd. The Court emphasized that the blast ball that injured Cheairs struck the pavement before it detonated. Had it been thrown in a way calculated to explode at head height, it would have presented a far greater risk of injury and thus could have constituted an unreasonable use of force.⁴

Based on the record before it, the Ninth Circuit found that it was reasonable for the police to perceive that the protesters at the

⁴ See *Nelson v. City of Davis*, 685 F.3d 867, 878 (9th Cir. 2012).

front of the crowd, near whom Cheairs stood, objectively posed an immediate threat to the safety of officers, citizens, and property. Therefore, having considered the totality of the circumstances, the Court of Appeals concluded that the force Officer Anderson employed was not excessive.

Cheairs also argued that Officer Anderson retaliated against him for filming the protest, thereby violating his First Amendment rights. The Ninth Circuit explained that to establish a First Amendment retaliation claim, Cheairs was required to show that: (1) he was “engaged in a constitutionally protected activity;” (2) the SPD officer’s actions “would chill a person of ordinary firmness from continuing to engage in the protected activity;” and (3) “the protected activity was a substantial or motivating factor” in the SPD officer’s conduct. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020).

The Ninth Circuit concluded that Cheairs failed to present a triable issue with respect to the third element of his retaliation claim. Cheairs testified in his deposition that he had no reason to believe that Officer Anderson intended to hit him with a blast ball as he stood filming the protest. Moreover, in response to the summary judgment motion, he offered no evidence that Officer Anderson was aware that Cheairs was filming the protest, much less that Officer Anderson sought to retaliate against him for exercising his First Amendment rights. The Court also found that the record corroborated Officer Anderson’s statements that there was a line of SPD officers standing in front of him, blocking his view.

Accordingly, the Ninth Circuit Court of Appeals affirmed the judgment of the District Court.

HOW THIS AFFECTS YOUR AGENCY

Regarding whether the use of force here constituted a seizure under the Fourth Amendment, agencies may note that the Court of Appeals discussed its decision in *Sanderlin v. Dwyer*, 116 F.4th 905 (9th Cir. 2024), which instructs that design, intent, and use of munitions are factors to consider when determining whether deployment manifests an objective intent to restrain. *Id.* at 913. Here, the Court of Appeals concluded that whether the use of force in this case manifested an objective intent to restrain the injured bystander was not capable of resolution at the summary judgment stage. The Court acknowledged that a reasonable jury could decide that the use of force in this case manifested an objective intent to restrain the protestor. However, the Court determined that it was reasonable for the police to perceive that the protesters at the front of the crowd, near whom the bystander stood, objectively posed an immediate threat to the safety of officers, citizens, and property. Therefore, the Court concluded under the totality of the circumstances, that the force the officer employed was not excessive.

As always, if you wish to discuss this matter in greater detail, please feel free to contact Jim Touchstone at (714) 446-1400 or via email at jrt@jones-mayer.com

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