



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Law

Criminal Division
Office of Special Prosecution

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August 17, 2015

Sgt. Kid Chan
Sergeant, Alaska Bureau of Investigation,
Alaska State Troopers
5700 East Tudor Road
Anchorage, Alaska 99507

Re: Alaska Department of Public Safety Investigation (Incident AK15006783)

Sgt. Chan:

On February 6, 2015, the Alaska Bureau of Investigation (ABI) referred incident number AK15006783 – the investigation of 33-year-old Larry Kobuk – to the Office of Special Prosecutions (OSP) for a determination of whether criminal charges surrounding Mr. Kobuk's death were appropriate. Mr. Kobuk died during an incident in which several correctional officers were trying to forcibly remove clothing from him at the Anchorage Jail. The clothing was evidence in a pending vehicle theft investigation.

Based on our review of the investigation the State of Alaska will not be filing criminal charges in this matter. Based on the circumstances of the incident, the State is unable to *disprove*, beyond a reasonable doubt, that the officers were not entitled to use the level of force employed. Please note this is a review for criminal prosecution, not a review of administrative or civil issues. The State has determined that the criminal prosecution of the four involved correctional officers is unwarranted. This conclusion is discussed in more detail below.

Summary of Pertinent Facts and Analysis

On January 27, 2015, the Anchorage Police Department received a report that a 1997 GMC Sierra pickup truck had been stolen in the area of Northway Drive. Based on this report, APD dispatch issued an alert for all officers to be on the look-out for the vehicle. Later that same day, APD officers received a report that the pickup was traveling northbound on Lake Otis Parkway. According to dispatch, the vehicle owner was following the pickup truck and providing regular updates regarding its location. The vehicle owner reported that the driver of the stolen vehicle was failing to stop at several lights, was driving erratically, and was swerving on the road. Near the area of 16th and Primrose Street, the driver lost control of the stolen truck and crashed into a snow bank. The driver, later identified as Mr. Kobuk, fled the area on foot. The vehicle owner stayed with the vehicle until police arrived.

APD officers located Mr. Kobuk running up Bragaw Street. Officers were eventually able to take him into custody, and during an officer-safety pat search, Mr. Kobuk told officers that he had a hypodermic needle in his pocket. He indicated that he had used "heroin" approximately 4 hours prior to his arrest.¹ Officers did not remove the needle (instead intending to request DOC to remove the needle during booking). Mr. Kobuk refused to identify himself to the police. Mr. Kobuk remained hostile towards law enforcement through-out the contact.

Officers conducted a "show-up" with the owner of the stolen vehicle. The victim positively identified Mr. Kobuk as the person she observed driving the stolen truck. The victim also noted that Mr. Kobuk was wearing a black sweatshirt and a red sweatshirt that belonged to her, which were inside the truck when it was stolen. The victim verified that the sweatshirts were missing from the vehicle.

Mr. Kobuk was arrested on charges of first-degree vehicle theft, fourth-degree theft, driving with a suspended license, and reckless driving. Officers transported Mr. Kobuk to the Anchorage Jail where Mr. Kobuk identified himself to DOC personnel.

Mr. Kobuk remained threatening to the APD officers during the initial booking process. Surveillance video from the incident shows Mr. Kobuk threatening to kill the APD officers. As time passed, Mr. Kobuk calmed down and was moved to DOC intake. Mr. Kobuk was first "medically cleared" by DOC medical staff. (According to DOC medical staff, all inmates go through a pre-booking medical screening, in which a DOC nurse determines if the inmate has an acute medical condition that would suggest that the detainee should be transported to the hospital before being admitted into the jail. DOC medical personnel described this process as a "preliminary assessment," and not a complete medical screening. A key component of this assessment is a determination of the detainee's breath alcohol level. If an individual's breath alcohol level is dangerously high, the jail facility will not accept the detainee. Instead, DOC medical staff will direct law enforcement to transport the detainee to the hospital for medical clearance.)

During the preliminary medical screening, a DOC nurse asked Mr. Kobuk if he suffered from any pre-existing medical conditions – a standard intake question – and Mr. Kobuk told the nurse that he had "cardiomyopathy²" and was taking various medications for the condition. The DOC nurse continued on with the screening process. According to DOC medical personnel this course of action was appropriate – cardiomyopathy is not a condition that would have required Mr. Kobuk to be transported to the hospital for medical clearance.

¹ As discussed in more detail below, no heroin was found in Mr. Kobuk's blood. Instead, Mr. Kobuk's blood toxicology came back positive for ethanol, amphetamine, methamphetamine, phenobarbital, nordiazepam, and chlordiazepoxide.

² "Cardiomyopathy" is a general term that refers to the abnormality of the heart muscle itself. Dilated cardiomyopathy is a disease of the heart muscle, wherein the ventricle stretches and thins (i.e., dilates) and is unable to pump blood as effectively as a healthy heart.

The DOC nurse then asked Mr. Kobuk to provide a breath sample to determine Mr. Kobuk's alcohol level. Mr. Kobuk refused. Witnesses describe Mr. Kobuk as being agitated and belligerent during the process, but ambulatory and communicating without difficulty. As Mr. Kobuk became more hostile, the DOC nurse released Mr. Kobuk to the nearby correctional officers for safety reasons.

Around this time, APD officers told DOC that they (APD) needed to collect both the black and red sweatshirts Mr. Kobuk was wearing as evidence. When DOC officers asked Mr. Kobuk to remove the sweatshirts, he refused. Mr. Kobuk began swearing at the DOC officers stating that the sweatshirts were his and that he was not going to take them off.

Correctional officers (CO) [REDACTED] and [REDACTED] moved Mr. Kobuk from the booking area to cell number 3. The COs forcibly placed Mr. Kobuk on the floor in the prone position (prone position is where the body is lying face down). CO [REDACTED] held Mr. Kobuk's right arm and CO [REDACTED] held Mr. Kobuk's left arm. Shortly thereafter, correctional officers [REDACTED] and [REDACTED] entered the cell to assist COs [REDACTED] and [REDACTED]. CO [REDACTED] attempted to restrain Mr. Kobuk's legs. CO [REDACTED] removed Mr. Kobuk's handcuffs. The video surveillance shows CO [REDACTED] with one knee on Mr. Kobuk's torso.

Alaska law permits correctional officers to "use non-deadly force upon another person when and to the extent reasonably necessary and appropriate to maintain order [within the facility]."³ AS 11.81.410(a). Department of Corrections policies also permit correctional officers to use force to "compel compliance" if such orders directly impact the security of the institution. See Department of Corrections Policy and Procedure 1207.01.⁴ Further, Alaska law authorizes the use of force when used to assist a peace officer in the performance of the officer's duties.⁵ The correctional officers' command to have Mr. Kobuk remove his clothing was a lawful command since the correctional officers were justified in collecting the evidence at the request of the Anchorage Police Department.

Additionally, it is noted that DOC requires all inmates to be "dressed out" prior to being released into general population. This means the inmate must remove any street clothes and change into clothing provided by DOC. As explained by DOC training personnel, both for the safety of the employees within the facility and for the safety of the other inmates, DOC requires each inmate to be thoroughly searched before being placed into the general population and this changing of clothing is part of that process.

³ Similar to self-defense, the state is required to disprove, beyond a reasonable doubt, that the justification does not apply in this case. For the reasons stated herein, the state is unable to meet this burden.

⁴ For security reasons, this section of the Department of Corrections Policy and Procedure Manual is not available for public review.

⁵ See generally, AS 11.81.420(b)(2), which states, "[t]he justification afforded by this section also applies when the person reasonably believes the conduct to be required or authorized to assist a peace officer in the performance of the officer's duties, notwithstanding that the officer exceeded the officer's authority."

The use of several officers to remove the clothes Mr. Kobuk was wearing was an attempt to create a safe environment in accomplishing this task. The officers are trained to restrain inmates with sufficient force to compel compliance, but not to cause injury. The use of four correctional officers to strip an uncooperative inmate would allow for sufficient control of a disruptive inmate, and reduce the risk of injury to all involved – the officers and the inmate.

The officers were able to remove Mr. Kobuk's jacket and black sweatshirt. When CO [REDACTED] attempted to remove Mr. Kobuk's red sweatshirt, Mr. Kobuk moved his body counterclockwise. Both CO [REDACTED] and [REDACTED] were standing while CO [REDACTED] continued to keep control of Mr. Kobuk's legs. CO [REDACTED] straddled Mr. Kobuk's body. Approximately five seconds later, Mr. Kobuk began stating that he could not breathe. Mr. Kobuk uttered this statement at least twice during the incident. The COs did not change Mr. Kobuk's position after he made these statements. Sgt. [REDACTED] entered the cell and provided the officers with scissors in an effort to remove the red sweatshirt. CO [REDACTED] positioned himself on top of Mr. Kobuk, who was still in the prone position. At this point, Mr. Kobuk was not actively resisting the officers, and CO [REDACTED] was able to cut the red sweatshirt off Mr. Kobuk. Mr. Kobuk remained prone on the cell floor.

The on-duty lieutenant monitored the entire incident via video surveillance and saw that Mr. Kobuk was uncooperative with the correctional officers. The lieutenant did not intervene in the incident, nor was he surprised that Mr. Kobuk was hostile during the incident, as Mr. Kobuk had been violent in the past, and at least on one prior incident, had challenged a correctional officer to fight.⁶ The on-duty sergeant's statement to the investigator was similar – Mr. Kobuk had an institutional history being very disruptive and hostile towards staff. Given Mr. Kobuk's violent nature, the correctional officers considered their safety precautions appropriate. Mr. Kobuk's criminal history is notable not because Mr. Kobuk is less deserving of the law's protection but because if criminal charges were filed against the correctional officers, a judge or jury would likely consider such information in assessing the reasonableness of the officers' actions.

The officers left the cell. When they left, Mr. Kobuk was not moving and lying motionless on the cell floor. The officers continued to monitor Mr. Kobuk through the cell window. According to the correctional officers, it is not unusual for inmates to remain motionless some period of time after a struggle with officers. The correctional officers assumed that Mr. Kobuk had exhausted himself during the struggle and was merely resting. After approximately one minute, CO [REDACTED] re-entered the cell to check on Mr. Kobuk. Mr. Kobuk was still motionless. CO [REDACTED] moved Mr. Kobuk onto his right side and requested medical assistance.

The entire incident – from the time officers first entered the cell with Mr. Kobuk until they left – lasted a little more than nine minutes.

⁶ Mr. Kobuk had a significant criminal history, spanning 20 years (1999-2014). Mr. Kobuk's criminal history included five convictions for "assaultive conduct" and two convictions for resisting arrest. Mr. Kobuk also had two prior felony convictions (both for burglary). Additionally, Mr. Kobuk had a significant DOC institutional history of being combative and violent.

Medical personnel attempted to revive Mr. Kobuk with an ammonia capsule. It was ineffective. Additional medical personnel were summoned, as was EMS. DOC medical staff performed CPR until paramedics arrived on scene.

EMS determined that Mr. Kobuk was in cardiac arrest. EMS took over Mr. Kobuk's medical care and transported him to a local hospital. Mr. Kobuk was pronounced dead at the emergency room shortly after his arrival. ABI was notified of the death shortly thereafter. When ABI investigators arrived on scene, each of the involved correctional officers were interviewed as well as supervisory personnel.

The State Medical Examiner (SME) conducted an autopsy and determined that Mr. Kobuk's manner of death was "undetermined" (as opposed to accident, homicide, or suicide). The SME confirmed that Mr. Kobuk had a pre-existing heart condition – he had an enlarged heart. The SME also observed evidence of a prior heart surgery. Toxicology confirmed that at the time of his death Mr. Kobuk was under the influence of alcohol and methamphetamines. The SME concluded that Mr. Kobuk died as a result of a "cardiac dysrhythmia due to dilated cardiomyopathy in association with methamphetamine toxicity⁷ and mechanical restraint." Notably, the SME found only a few minor injuries on Mr. Kobuk's body. Significantly, the neck and larynx were free of petechiae or other trauma. Likewise, there was neither trauma in the thoracic cavity nor was there evidence of petechiae or unusual congestion of the thoracic viscera. These medical findings suggest that it is unknown if positional asphyxia played a contributing factor in Mr. Kobuk's death.

These circumstances suggest the appropriate criminal statutes to be reviewed are manslaughter and criminally negligent homicide. A person commits the crime of manslaughter if the person "intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree." AS 11.41.120(a)(1). Conversely, a person commits the crime of criminally negligent homicide, if "with criminal negligence, the person causes the death of another person." AS 11.41.130(a).

As noted, correctional officers are entitled to use non-deadly force in an effort to maintain order within the facility. The force the correctional officers used while restraining Mr. Kobuk amounted to non-deadly force. Although the force used by the correctional officers resulted in Mr. Kobuk's death, the force did not rise to the level of "deadly force" as that term is defined by Alaska law. The term "deadly force" means any force that a person uses (1) with the *intent* of causing death or serious physical injury, or (2) under circumstances that the person knows creates a substantial risk of causing death or serious physical injury. AS 11.81.900(b)(16) (emphasis added). Here, notwithstanding Mr. Kobuk's pre-existing medical condition, there is no evidence that the correctional officers intended to cause Mr. Kobuk's death or that they engaged in circumstances that they should have known would have caused his death. This

⁷ The pharmacologic effect of methamphetamine exacerbates any pre-existing cardiovascular disease, such as cardiomyopathy.

distinction is similar to the operative difference between the actor's *mens rea*, or mental state, for manslaughter and criminally negligent homicide.

Given the circumstances surrounding Mr. Kobuk's death, the state has determined that it would be unable to prove – beyond a reasonable doubt – that the involved correctional officers caused Mr. Kobuk's death with the applicable *mens rea* and without legal justification. The correctional officers were entitled to use a certain level of force to compel Mr. Kobuk's compliance with their lawful commands. For this reason, the correctional officers did not "disregard a known risk" (i.e., acted "recklessly") or "failed to perceive a substantial and unjustifiable risk" (i.e., acted with "criminal negligence") when they continued to restrain Mr. Kobuk, even though he stated that he "couldn't breathe". The officers were trained to continue to secure an uncooperative individual, even if that individual is stating that he "can't breathe." This protocol is designed to ensure officer safety. Furthermore, the correctional officers knew from past experiences that Mr. Kobuk was aggressive and uncooperative. Since the collection of clothing from Mr. Kobuk's person was necessary – in part because it was evidence in the pending vehicle theft investigation and in part because Mr. Kobuk was being placed into general population – the correctional officers were entitled to use non-deadly force to compel Mr. Kobuk's compliance.

Equally important, the correctional officers were unaware of Mr. Kobuk's methamphetamine toxicity – a condition that would necessarily exacerbate his pre-existing cardiomyopathy. As the State Medical Examiner explained, the physical restraint used on Mr. Kobuk is not usually fatal. A person with a healthy heart, placed in Mr. Kobuk's situation, would not have likely died from the level of restraint employed by the correctional officers. It is unknown the extent to which the officers' application of restraint contributed to Mr. Kobuk's death. However, it is clear that Mr. Kobuk's pre-existing heart condition, combined with his methamphetamines toxicity, did contribute significantly to his death.

Conclusion

In summary, the State of Alaska will not file criminal charges against the corrections officers for their use of force against Mr. Kobuk on January 27, 2015. Please contact me if you have any questions. I can be reached at 907.269.6250 or robert.henderson@alaska.gov.

Sincerely,

CRAIG W. RICHARDS
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "R. E. Henderson", with a long horizontal flourish extending to the right.

Robert E. Henderson
Supervising Assistant Attorney General
Office of Special Prosecutions