

FW: Request for Investigation by BPD // By: Victim | As to: Lance Goree // Re: 2/4/22 Battery Incident at YMCA (Berkeley) // BPD Report No. 22-5533

Michael Slater <m Slater@theslaterlawfirmapc.com>

Tue, Mar 14, 2023 at 5:41 PM

To: "Wilson, Jennifer" <JWilson@berkeleyca.gov>

Cc: "CMaldonado@cityofberkeley.info" <CMaldonado@cityofberkeley.info>, "KFutch@cityofberkeley.info"

<KFutch@cityofberkeley.info>, "police@cityofberkeley.info" <police@cityofberkeley.info>,

"attorney@cityofberkeley.info"

<attorney@cityofberkeley.info>, "dpa@cityofberkeley.info" <dpa@cityofberkeley.info>, Victim

<victim@gmail.com>, "erin.kingsbury@acgov.org" <erin.kingsbury@acgov.org>

Sgt. Wilson,

I am concerned with how my request—that the Berkeley Police Department (“BPD”) criminally investigate Lance Goree in connection with a physical altercation Goree had with my client, Victim, on 2/4/22—has been handled. For transparency, and in an effort to facilitate resolution, I am copying the Police Accountability Board, the City Attorney’s Office and the District Attorney’s Office to this email. I have also copied other members of the BPD, who I have copied on my previous correspondence to you but, for reasons unknown to me, you have excluded from your email correspondence to me.

To recap our communications to date (most of which are in this email thread):

1. On 1/25/23, I emailed you to introduce myself as Victim’s attorney and to request that BPD investigate a 2/24/22 incident involving Victim and then-YMCA employee, Lance Goree, at the Downtown Berkeley YMCA Residence (2001 Allston Way, Berkeley, CA 94704)—during which time Goree tackled Victim to the ground and strangled Victim for no less than 14 minutes (the “subject incident”). To inform what I anticipated would be BPD’s investigation into the conduct of Goree during the subject incident, I provided you with a copy of Victim’s civil complaint; as well as links to cell phone video footage, video surveillance footage and cell phone audio of the subject incident. I also explained why we believe Goree’s force against Victim was deadly (use of carotid / vascular neck restraint chokehold) and supported criminal charges against Goree – or, at a minimum, a meaningful investigation into the criminality of Goree’s use of force. Additionally, I explained why we believed Goree’s force exceeded the limits of self-defense force. I described Victim’s myriad, life-changing injuries, including: chronic PTSD, depression, anxiety, chronic migraine headaches, post-concussion syndrome, severe chest pain, back pain, neck pain, blurry vision, difficulty breathing and a suspected traumatic brain injury.
2. On 1/25/23, I also called your office and left you a voicemail conveying the information identified in Paragraph 1 (above) and to reiterate my request that BPD investigate the criminality of Goree’s use of force during subject incident.
3. Having received no response from you or anyone at BPD, on 2/6/22, I called your office and left you a voicemail to follow up on my 1/25/22 email and my 1/25/22 voicemail and to reiterate my request that BPD investigate the criminality of Goree’s use of force during subject incident.
4. On 2/6/23, Victim called BPD and was able to speak with you on the phone. Victim conveyed to me that you represented the following to him:

- a. **BPD's Investigation.** You represented that BPD had already investigated the subject incident and, therefore, BPD was not going to conduct additional investigation.
 - b. **District Attorney's Office's Investigation.** You also represented that the District Attorney's Office ("DA's Office") had already determined Goree's conduct was not criminal.
5. On 2/7/23, I emailed you to, among other things, respond to the points you made to Victim during your 2/6/23 phone conversation (Paragraph 4a and 4b), as follows:
 - a. **BPD's Investigation.** I requested clarification with respect to your 2/6/23 representation to Victim that BPD had already investigated the subject incident. I asked you whether BPD investigated the conduct of Victim, Goree, and asked you to please identify the evidence BPD considered.
 - b. **District Attorney's Office's Investigation.** I also asked you how it could possible be, as you represented, that the DA's Office had already determined Goree's conduct was not criminal, when the DA's Office had only investigated Victim in connection with the 2/4/22 incident (and not pursued charges) **and not Goree's use of force.**
 - i. The DA's Office evaluated BPD recommendation that Victim be charged criminally in connection with the subject incident, and declined to pursue charges. The DA's Office has not investigated the criminality of Gore's use of force during the subject incident. When I asked the DA's Office to investigate the potential criminality of Goree's use of force during the subject incident, on 1/3/23, Erin Kingsbury of the DA's Office (copied here for visibility) responded as follows: "The District Attorney's Office does not conduct investigations as you have requested. **Any statements or evidence concerning this incident should be provided directly to the Berkeley Police Department for follow-up investigation, if appropriate.** Upon completion of their investigation, they may present all information to the District Attorney's Office for review and charging consideration. Thank you." (Emphasis added.)
6. On 2/7/23 at 12:22 p.m., you emailed me representing that you reviewed "the surveillance and other associated video of the incident" and, based thereon, that you "agree[d] there was sufficient probable cause to arrest [Victim] for assaulting Mr. Goree." Furthermore, that "[i]n [your] assessment, [Victim] was the primary aggressor of this incident and escalated a verbal dispute into a physical altercation." Your response raises significant concerns, primarily for three reasons:
 - a. First, you had not even reviewed the cell phone video footage, video surveillance footage or cell phone audio of the subject incident. This is made plain by your other statements in your 2/7/22 (12:22 p.m.) email to me: "Your client told Officer Maldonado that he had video of the incident, yet declined to show him the video in entirety. Your client showed Officer Maldonado the portion of the video *after* he assaulted Mr. Goree, despite the officer's requests to see the entire video. Officer Maldonado gave your client a link to upload the full video, which he has not. **I have emailed you the same link so that you can do so.**" (Emphasis added.) (Thereafter, on 2/7/23 at 12:24 p.m., you emailed me an Axon "Evidence Share Request" (No. 2022-00005533), soon after which time I uploaded the cell phone video footage, video surveillance footage and cell phone audio of the subject incident.)

b. Second, even if you had reasonably determined, based on reviewing all the relevant evidence (which

did not occur), that Victim “was the primary aggressor” and “escalated a verbal dispute into a physical altercation[,]” it does not follow therefrom, logically or legally, that Goree did not commit felony assault / battery, misdemeanor assault / battery, aggravated assault / battery (PC 245), or any other criminal act(s). Indeed, in your 2/7/22 12:22 p.m. email, you gave no mention and offered no analysis whatsoever with respect to Goree’s use of force against Victim – which, as explained below, amounted to deadly force. At a minimum, the DA’s Office should have the opportunity to determine if Goree’s fourteen-minute chokehold against Victim was criminal. That the BPD seems bent on standing in the way of that determination is confounding to me.

c. Third, even if you had reasonably determined, based on reviewing all the relevant evidence (which did not occur), that Victim “was the primary aggressor” and “escalated a verbal dispute into a physical altercation[,]” your analysis / reasoning did not even mention the force Goree used against Victim whatsoever – not even in passing. I would have respectfully disagreed with you if you had identified and analyzed Goree’s use of force against Victim and determined it amounted to self-defense (see below), but you did not even attempt to do so. Based on the information available to me and your correspondence, you have appeared to have excused Goree’s force altogether simply based on your conclusion, without watching all relevant evidence, that Victim “was the primary aggressor of this incident and escalated a verbal dispute into a physical altercation.” If I follow that logic, there was no limit to the amount of force Goree could have legally used against Victim in self-defense, because Victim “was the primary aggressor of this incident and escalated a verbal dispute into a physical altercation.” A self-defense defense is more nuanced than that.

7. On 2/10/23, I emailed you to respond to your points made in your 2/7/23 email to me. Specifically:

a. **Deadly Force.** While I do not disagree with your observation that Victim was the **first** to make physical contact with Goree, Goree does not have a self-defense right to use whatever force he wanted to against Victim in response. For Goree to have taken Victim to the ground and/or restrained his movement would have been one thing. That Goree took Victim to the ground and used carotid and airway chokeholds—**deadly force that even the BPD would not have been permitted to employ against Victim**, and for nearly fifteen minutes—is something else entirely and exceeds permissible self-defense.

One of the ways a person can commit aggravated assault is by using “force likely to produce great bodily injury.” (Pc, § 245, subd. (a)(4).) Great bodily injury is that “which is significant or substantial, not insignificant, trivial or moderate.” People v. Armstrong (1992) 8 Cal.App.4th 1060, 1066. The use of hands or fists alone may constitute force likely to produce great bodily injury. People v. Aguilar (1997) 16 Cal.4th 1023, 1028. California law is replete with examples of cases in which people were criminally charged / convicted for employing a carotid chokehold without sufficient justification, including criminal charges for aggravated assault in violation of Penal Code section 245, subdivision (a)(4). See, e.g., People v. Gomes, 2023 WL 1193032, at *17 (Cal. Ct. 2023), review filed (Jan. 31, 2023); and People v. Becerra, 2020 WL 6110985, at *2 (Cal. Ct. App. Oct. 16, 2020).

b. **Self-Defense.** The right to use force against another has long been limited by the condition that the force be no more than “that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury.” Vaughn v. Jonas (1948) 31 Cal.2d 586, 600; Boyer v. Waples (1962) 206 Cal.App.2d 725, 727. Goree’s use of force was not reasonably necessary to prevent impending injury. Goree could have employed different means of restraining Victim, including

arm restraints and other body-control methods, and not including the potentially-lethal neck restraints Goree employed. Goree was much larger than Victim. Victim is much smaller than Goree and had not weapons on him. Once on the grounds, Victim was non-violent; his movements were to try to create enough space between his neck and Goree's stronghold so that he could breathe and stay alive. Goree was also completely surrounded by other YMCA employees—none of whom were acting with much urgency as the physical nature of the altercation abated just as quickly as it started.

8. On 3/6/23—having received no response from you or anyone at BPD to my 2/10/23 email—I emailed you to request an update regarding BPD's criminal investigation into the criminality of Goree's use of force during the subject incident and BPD's review of the evidence I uploaded through the AXON link you provided to me.
9. On 3/10/23, you emailed me to confirm that you had received the evidenced I uploaded through the AXON link (to be sure, you did not confirm you reviewed it), and to apologize if you were not specific in your 2/7/23 email (pre-dating my upload of evidence), that you "reviewed the case file" and to report: "No, the Homicide Division will not be doing any investigation into this incident." (Emphasis added.)

Based on the foregoing, I am concerned that my request that BPD investigate the criminality of Goree's use of force against Victim during the subject incident is, at best, not being taken seriously—or, worse yet, being disregarded entirely. I remain at a loss how BPD has concluded Victim's conduct during the subject incident gave the officers (who did not even see the altercation but only saw Victim being choked by Goree fourteen minutes after it had started) probable cause to arrest Victim for PC 242 (a criminal charge never even pursued by the DA's Office). At the same time, BPD has concluded, without reviewing the most telling evidence of the subject incident (and not just its aftermath) that Goree is absolved of all criminality. I believe BPD's response to date amounts to a dereliction of its duty to Victim.

***Request for Investigation**

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This email represents my final attempt to request to the BPD that the BPD investigate the criminality of Goree's use of force during the subject incident before seeking judicial intervention through writ petition or otherwise to compel same ("Contemplated Litigation")—though I trust that the latter will not be necessary. This request will expire on 3/28/23, after which time I intend to seek judicial intervention without delay. Please be advised that if judicial intervention is sought through Contemplated Litigation, Victim intends to seek reimbursement of his attorney's fees. Please advise at your earliest opportunity.

***Evidence Preservation**

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This email will also serve as Victim's formal demand that the City of Berkeley and BPD preserve all evidence relating to the Contemplated Litigation. This evidence includes, but is not limited to:

1. Videos the subject incident (including body-worn camera videos);
2. Communications sent to or from the BPD / City (including internal communications) discussing or describing the subject incident;
3. Documents discussing or describing the subject incident;

4. Communications sent to or from the BPD / City (including internal communications) discussing or describing my office's requests that BPD investigate the subject incident;
5. Documents discussing or describing my office's requests for BPD's investigation into the subject incident; and
6. All evidence (including metadata) which indicates precisely when (time-stamped) the cell phone video footage, video surveillance footage and cell phone audio of the subject incident was accessed / viewed by BPD.

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It is imperative that the City of Berkeley and BPD take affirmative steps to preserve all evidence related to the Contemplated Litigation. Failure to preserve evidence, even before litigation is initiated, amounts to spoliation of evidence. See Leon v. IDX Sys. Corp., 464 F.3d 951, 959 (9th Cir. 2006) (quoting United States v. Kitsap Physicians Serv., 314 F.3d 995, 1001 (9th Cir. 2002) ["A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were potentially relevant to the litigation before they were destroyed.'"]; Williams

v. Russ, 167 Cal. App. 4th 1215, 1223 (2008) ["Spoliation of evidence means the destruction or significant alteration of evidence or the failure to preserve evidence for another's use in pending or future litigation."].

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***Notice of Forthcoming California Public Records Act Request**

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This email is also to provide BPD with notice that my office, on Victim's behalf, intends shortly to make a California Public Records Act request for the foregoing six categories of evidence plus evidence directly related to the subject incident (police report, etc.). To be sure, this email **does not constitute said Public Records Act request**, which will instead be made through the City of Berkeley's online NextRequest function.

Thank you for your attention to these matters,

Michael Slater

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Principal | Partner

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