

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL
ATTORNEY GENERAL

MEMORANDUM

Warrant Denial Memorandum
[Rev. 02/11/2020]

September 15, 2021

Agmt 56

APPROVED: Brian Resnick 10-6-21
Solicitor General Date
on behalf of 26 Assistant Attorneys General
☐ Check here when Division Chief has final approval
authority for the request.

TO: Danielle Hagaman-Clark
Division Chief
Criminal Trials and Appeals

FROM: Melissa Palepu
Assistant Attorney General
Criminal Trials and Appeals

APPROVED: Danielle Hagaman-Clark 10/6/2021
Division Chief Date

RE: Request for Authority to Deny Criminal Charges
Due Date for Response: September 29, 2021
People v. David Schmoldt
AG# 2021-0318656-B

Attached: See attached exhibits.

Press release: Yes.

Dates

This matter was submitted for review via a Special Prosecuting Attorney request, made by Presque Isle County Prosecuting Attorney Kenneth Radzibon and the evidence was provided on or about May 17, 2021. It is this writer's belief that Deputy David Schmoldt has returned to his normal duties as a Presque Isle County Sheriff's Deputy and a School Resource Officer placed within the Onaway School District. Therefore, there are no dates or circumstances that would be further impacted by the review of this memorandum.

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Recommendation

Based upon a thorough review of all available evidence, and given the facts and circumstances as they existed, Deputy David Schmoldt utilized reasonable force against minor [REDACTED] on February 19, 2021. Therefore, no criminal charges should be issued against Deputy David Schmoldt. [REDACTED]

Items Reviewed

In reaching the above recommendation the following items were reviewed: video from the booking area of the Presque Isle County Jail during the time [REDACTED] was present; D/Sgt. Nathan Groya's investigator's report and supplemental reports; Trooper Joseph Duff's incident report and supplemental reports; Deputy David Schmoldt's incident report; Presque Isle County Proposition for School Resource Officers Millage – Certificate of Determination; witness [REDACTED] timeline of events; witness [REDACTED] timeline of events; David Schmoldt's medical records from McLaren Northern Michigan ER; [REDACTED] medical records from Munson Healthcare – Otsego Memorial Hospital; [REDACTED] medical records from Munson Healthcare – OMH Medical Group – Indian River; [REDACTED] medical records from Munson Healthcare – Munson Medical Group; photographs of David Schmoldt's injuries; photographs of [REDACTED] injuries; photographs of [REDACTED] injuries; photographs of the classroom where the incident occurred depicting the items thrown by [REDACTED] video of an interview with [REDACTED] forensic interview of [REDACTED] independent research on Schools Educators Police Liaison Association (hereafter "SEPLA")²; a review of Deputy David Schmoldt's 2015, 2016, 2017, 2018, and 2019 SEPLA Training Certificates; and the Presque Isle County Sheriff's Office Road Patrol Policy & Procedure G.O. #004 – Use of Force.

Background Information

This matter arose from an incident that occurred on February 19, 2021, at the Onaway Public Schools. The parties involved were Deputy David Schmoldt (hereafter

¹ [REDACTED]

² This research included learning about the organization, resources available through the organization, and conferences/trainings held by the organization.

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“Deputy Schmoldt”), the Sheriff’s Deputy who was assigned to the public school as the School Resource Officer, and [REDACTED] (hereafter “[REDACTED]” an eighteen-year-old special education student at the school. [REDACTED]

[REDACTED] The classroom contained students of all different grades, which meant there were much younger students in the classroom.

Facts

Brief Overview of Scene

On February 19, 2021, [REDACTED] was in class with other classmates, his teacher [REDACTED] paraprofessional [REDACTED] and social worker [REDACTED] had been acting out and was upset [REDACTED]

[REDACTED] .⁴ Due to feeling upset, [REDACTED] became disruptive in class. [REDACTED] allowed [REDACTED] to call his grandmother, “Nana”, which was part of his I.E.P. Normally [REDACTED] would calm down after being allowed to call his Nana, however, on this occasion [REDACTED] became more agitated. [REDACTED] began yelling profanities and throwing items such as tables, chairs, and school supplies throughout the classroom.⁵ As a result of [REDACTED] aggressive behavior [REDACTED] had the classroom cleared and she and [REDACTED] remained in the room with [REDACTED] While they were alone in the classroom [REDACTED] continued to shout profanities at [REDACTED] [REDACTED] continued to throw items including tables and chairs, and threatened [REDACTED] with a pair of scissors⁶. As a result of [REDACTED] behavior [REDACTED] was hit in the leg by an object and suffered a bruise (see Exhibit 1). [REDACTED] was also hit by a table, but the impact left no marks.

Since [REDACTED] was escalating and [REDACTED] and [REDACTED] were unable to calm him, [REDACTED] texted [REDACTED] and requested Deputy Schmoldt be advised and brought to the classroom. When Deputy Schmoldt arrived he was able to calm [REDACTED] and was [REDACTED]

³ [REDACTED]

⁴ [REDACTED]

⁵ See Exhibit 4 for reference.

⁶ The scissors were a pair of child’s safety scissors.

able to get [REDACTED] to sit down and talk for a moment. However, [REDACTED] again became agitated, stood up, threw a pencil box at Deputy Schmoldt (hitting him), and continued to shout profanities. [REDACTED] also began to advance on Deputy Schmoldt. Deputy Schmoldt then attempted to physically gain control over [REDACTED] and continued to tell him to calm down. When he was unable to control [REDACTED] they both fell to the ground. Deputy Schmoldt attempted to gain control by laying on top of [REDACTED] but [REDACTED] continued to fight. Deputy Schmoldt attempted to handcuff [REDACTED] but was only able to get one handcuff on [REDACTED] wrist, as [REDACTED] continued to pull and fight. [REDACTED] was also using his fingernails to physically assault Deputy Schmoldt at this time. Additionally, during the struggle [REDACTED] attempted to grab Deputy Schmoldt's taser and handgun, while at the same time threatening to shoot and kill Deputy Schmoldt. When Deputy Schmoldt used his hands to hold onto his weapons, [REDACTED] tried to pry Deputy Schmoldt's hands off the handgun.

After a few moments of struggle, Deputy Schmoldt was able to fully handcuff [REDACTED] and was finally able to gain control over him. Deputy Schmoldt helped [REDACTED] up and sat him in a chair while [REDACTED] apologized for what happened. As a result of the incident Deputy Schmoldt suffered several scratch/gouge marks and was bleeding (see Exhibit 2). [REDACTED] also suffered some minor scratches and marks as well (see Exhibit 3) but did not appear to be bleeding.⁷ [REDACTED] mother was then contacted by [REDACTED] and [REDACTED] was placed under arrested and transported to the Presque Isle County Jail for processing.

Video Evidence

The only video evidence related this incident came from the Presque Isle County Jail booking area. This video did not contain any audio. The video showed [REDACTED] being escorted into the jail, while handcuffed. While in the booking area [REDACTED] handcuffs were removed and he was seated in a chair in what appeared to be a waiting/office area. There was nothing out of the ordinary with the scene depicted in the video and there did not appear to be any hostility between any individuals. The video did not provide any additional information.

A request was made for any body-worn cameras, in-car video, or classroom surveillance video. There were no classroom surveillance cameras and there was no

⁷ [REDACTED] did have blood on him after the struggle, but it was determined that the blood came from Deputy Schmoldt and was not associated to any injuries sustained by [REDACTED]

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in-car video. Also, Deputy Schmoldt's body-worn camera was malfunctioning and thus there was no video of the incident.⁸

Statements

Statements regarding this incident were obtained from Deputy Schmoldt, [REDACTED] [REDACTED] and [REDACTED]. All statements from individuals at the scene were consistent and all described [REDACTED] as the aggressor⁹ and Deputy Schmoldt as having attempted to calm [REDACTED] and control the situation by talking before the situation deteriorated. The witnesses also described [REDACTED] as combative with Deputy Schmoldt and physically attacking him, as well as trying to take Deputy Schmoldt's weapons from him. Once Deputy Schmoldt was able to get physical control over [REDACTED] and [REDACTED] calmed, Deputy Schmoldt ceased using force and had [REDACTED] sit in a chair.

Deputy Schmoldt provided statements to the ER doctor at McLaren, to D/Sgt. Groya, as well as authored an incident report immediately after the incident.¹⁰ Deputy Schmoldt had been the School Resource Officer for about seven years at the time of the incident and had interacted with [REDACTED] on numerous occasions previously. While obtaining medical treatment Deputy Schmoldt stated he attempted to de-escalate a student in the special education class. He indicated the student was eighteen years old and about 140lbs but was significantly cognitively impaired. He indicated he initially calmed the student down but then the student threw a box of pencils at him, and a "tussle" ensued. During the struggle the student grabbed his taser and gun and was trying to bite him. The statement provided to the ER was consistent with his recitation of the events in his incident report. In the incident report Deputy Schmoldt stated that he was called to the classroom for a disturbance. When he arrived, he observed students in the hallway with [REDACTED] the social worker assigned to the classroom. When he entered the classroom, he observed [REDACTED] squaring off with [REDACTED] and [REDACTED] was yelling at them. He diverted [REDACTED] attention from [REDACTED] and was able to get him to sit down and calm a little. Then [REDACTED] suddenly jumped from the seat and said, "fuck you cop" and grabbed a pencil box off the table and threw it at Deputy Schmoldt, hitting him in the

⁸ Deputy Schmoldt was going to be reprimanded internally for failing to ensure his body-worn camera was functioning.

⁹ [REDACTED]

¹⁰ [REDACTED]

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chest and chin. Deputy Schmoldt told [REDACTED] he could not throw things and then [REDACTED] swung his fist and tried to punch Deputy Schmoldt in the head. Deputy Schmoldt grabbed his right arm and told him to stop fighting. [REDACTED] continued to swing his arms and said he was going to kill Deputy Schmoldt. Deputy Schmoldt then took [REDACTED] to the floor to keep himself from getting hit, and to keep [REDACTED] from hurting himself. [REDACTED] then said he was going to bite Deputy Schmoldt, and tried to do so. Deputy Schmoldt continued to tell [REDACTED] to calm down, but [REDACTED] kept scratching and digging at Deputy Schmoldt. Deputy Schmoldt was able to get one handcuff on [REDACTED] left wrist, but [REDACTED] kept struggling. [REDACTED] kept screaming that he was going to kill Deputy Schmoldt and put his right hand on Deputy Schmoldt's taser, trying to remove it from the holster. While trying to get the taser he also kept yanking his left hand out of Deputy Schmoldt's grasp. When Deputy Schmoldt pulled [REDACTED] hand off the taser, [REDACTED] immediately swung his arm across Deputy Schmoldt's body and attempted to get his handgun, while screaming that he was going to shoot Deputy Schmoldt. Deputy Schmoldt had to put his hand on top of the gun to keep it in the holster and away from [REDACTED]. [REDACTED] was gouging Deputy Schmoldt's hand trying to get Deputy Schmoldt's hand off the gun. Deputy Schmoldt remained on top of [REDACTED] until [REDACTED] finally calmed down. Once [REDACTED] calmed down, [REDACTED] apologized for fighting and began to comply with Deputy Schmoldt's verbal commands to get handcuffed. Then Deputy Schmoldt helped [REDACTED] up. Mr. Trotter provided Deputy Schmoldt with a washcloth so that Deputy Schmoldt could clean the blood off his injuries.

[REDACTED] was forensically interviewed on March 3, 2021, at the Children's Advocacy Center of Northeast Michigan in Alpena. The interview was conducted by [REDACTED]. [REDACTED] was able to demonstrate the difference between the truth and a lie, was able to correct mistakes, agreed to indicate when he didn't understand something and agreed to not guess. When asked about why he was there, he stated "Officer Schmoldt, he's a bad cop."

[REDACTED]. He told everyone to leave the classroom because he was "having a break" and he started throwing things and getting mad. [REDACTED] said he was "throwing shit and Schmoldt came in and took him to jail and his Nana and Papa picked him up." [REDACTED] indicated he threw a pencil box at Deputy Schmoldt and then Deputy Schmoldt got mad and took him to the ground. [REDACTED] also admitted he scratched Deputy Schmoldt's face and scratched him with his fingernails while they were on the ground. [REDACTED] stated that Deputy Schmoldt put him in handcuffs, and he was taken to jail. During his interview [REDACTED] did not ever indicate that Deputy Schmoldt said anything mean to him or was physically aggressive to him other than holding his hands and taking him to the ground. He did indicate he was scratched but initially indicated he did not know how he was scratched.

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██████████ was the special education teacher in ██████████ classroom. She provided a few statements, including a verbal statement to Deputy Schmoldt, two separate verbal statements to D/Sgt. Groya, and provided a written timeline of events. ██████████ indicated that ██████████ had been escalating throughout the day. She did allow him to call his Nana but when he hung up, he was still very agitated, and he flipped over a couple of desks. Due to ██████████ escalating behavior the classroom was cleared and just ██████████ remained with ██████████. Once the classroom was cleared ██████████ made several statements indicating he was going to hurt ██████████ and he rushed to the cupboard and grabbed a pair of scissors and cut up his behavior chart. He then said, “he was going to take care of [her]” and ran towards her with the scissors but then threw the scissors at her. ██████████ then began approaching her and ██████████ in a threatening manner, all while flipping tables and throwing chairs at them.¹¹ ██████████ stated that during this incident she was struck with a pencil box and a table and as a result she had a bruise on her leg. ██████████ also had texted ██████████ during this time to let her know that ██████████ was making threats, he had called his Nana and that the room was evacuated. Since ██████████ was not calming down and was escalating, she had Deputy Schmoldt come down to the classroom. (See Exhibit 4 for photographs of the classroom after ██████████ outburst.) Deputy Schmoldt came to the room at about 1:50 pm and began trying to talk to ██████████. ██████████ told Deputy Schmoldt that he was having a bad day because he couldn’t have a play date with his friend. ██████████ was calm for a minute but then called her “a fucking asshole” and told Deputy Schmoldt “fuck you, you fucking cop” and grabbed a pencil box and threw it at Deputy Schmoldt while approaching him. The box hit Deputy Schmoldt in the chest and face and then ██████████ swung at Deputy Schmoldt. Deputy Schmoldt attempted to restrain ██████████ but was unsuccessful and then they both fell to the floor. Deputy Schmoldt kept telling ██████████ that he had to calm down, but ██████████ would not and kept fighting. ██████████ indicated she then turned away because it was too stressful for her to watch. ██████████ eventually calmed down and Deputy Schmoldt helped him up and had him sit in a chair. Deputy Schmoldt had blood dripping from both arms and his forehead, so ██████████ retrieved a towel for him. ██████████ did not observe any injuries on ██████████. ██████████ then apologized to everyone and ██████████ called ██████████ mom. Per ██████████ request, ██████████ handed the phone to Deputy Schmoldt.

██████████ was the paraprofessional in ██████████ classroom and had been for three years.¹² ██████████ also made several statements regarding the incident. He made a statement to D/Sgt. Groya on two different occasions and made a timeline of

¹¹ ██████████ also stated that this was not the first time ██████████ had physically assaulted her and that on January 26, 2021, he punched her in the chest.

¹² ██████████ stated that about a year and a half ago ██████████ tried to grab a pair of scissors to stab his teacher. ██████████ was backed into a corner so that he couldn’t hurt anyone.

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events. [REDACTED] stated that [REDACTED] was escalated that day and had turned over tables and threw chairs and other items. [REDACTED] indicated that he was struck by a table on the leg and a pencil box in the arm, although they did not leave any marks. [REDACTED] statement was the same as the statement provided by [REDACTED] with just a few additions. [REDACTED] also indicated that [REDACTED] was upset that day and became more upset after speaking with his Nana. After he hung up with his Nana, he called [REDACTED] a "bastard" and hit the classroom phone. [REDACTED] then had [REDACTED] evacuate the classroom. [REDACTED] continued to make threats to [REDACTED] and threw his chair across the room. He took his schedule and went to the cupboard to get scissors to cut it up. Then he threatened [REDACTED] with the scissors and threw them at her. He continued to throw chairs and other items and flipped tables at them when they attempted to calm him. Deputy Schmoldt was then called to the classroom. Deputy Schmoldt came in and tried to calm [REDACTED] down, which worked for a minute. Then [REDACTED] called [REDACTED] "a fucking asshole" and said "fuck you" to Deputy Schmoldt, grabbed a pencil box and threw it at Deputy Schmoldt, hitting him in the face. Deputy Schmoldt tried to reason with [REDACTED] but [REDACTED] refused to listen, and they fell to the ground. [REDACTED] observed [REDACTED] reach for Deputy Schmoldt's taser and heard Deputy Schmoldt tell [REDACTED] to calm down or he would have to tase him. [REDACTED] then said he was going to kill Deputy Schmoldt and tried to grab his gun. Deputy Schmoldt was able to get one handcuff on [REDACTED] but [REDACTED] continued to resist. Eventually Deputy Schmoldt was able to get both handcuffs on [REDACTED] and [REDACTED] calmed down and Deputy Schmoldt helped him up. Deputy Schmoldt was bleeding from his arms, forehead, and cheek but there were no visible injuries on [REDACTED]. [REDACTED] apologized for what happened.

[REDACTED] is [REDACTED] mother, and while she was not present during the incident, she did provide a few statements that corroborate what the other witnesses have stated. [REDACTED] spoke with forensic interviewer [REDACTED] Trooper Duff, and with D/Sgt. Groya. [REDACTED] stated to [REDACTED] that she was upset about the incident because she believed the school should have handled the situation differently. [REDACTED]

It should be noted that those facts [REDACTED] reiterated were the same facts stated by all the other witnesses. During this recitation [REDACTED] also stated that she did not doubt [REDACTED] said that he was going to kill or shoot Deputy Schmoldt, as that was [REDACTED] "go to" when he was upset. [REDACTED] also stated that there was a similar incident with [REDACTED] behaving this way in September of 2019 and that [REDACTED] fought back with Deputy Schmoldt because if someone grabs at him, he will fight back. When [REDACTED]

[REDACTED] She also stated that when [REDACTED] was confronted, instead of a "flight" response, he had a "fight" response and would react

to a situation the way a 2-year-old would, but with the strength of his age. When asked whether [REDACTED] should have just been left alone until he calmed down, [REDACTED] responded no, and stated that [REDACTED] cannot be left to destroy things and that she and her husband have also had to physically remove him from their home so he wouldn't destroy things. [REDACTED] [REDACTED] also did not deny [REDACTED] behavior during the incident, but she did state that Deputy Schmoldt should not have utilized as much force as he did during the situation.

Medical Evidence

Both Deputy Schmoldt and [REDACTED] sought medical treatment after the incident. Neither was conveyed via ambulance. Deputy Schmoldt sought treatment at McLaren Northern Michigan in Petoskey on February 19, 2021. In the medical records it is reported Deputy Schmoldt stated that he suffered scratches to the right side of his face and to both of his arms. Deputy Schmoldt cleaned his wounds with soap and water prior to coming to the emergency room. The doctor observed multiple superficial gouge marks on Deputy Schmoldt's right forearm and left upper arm, as well as abrasions and scratches to the right side of his face. The doctor noted these marks appeared to be from fingernails. Deputy Schmoldt's injuries may be viewed in Exhibit 2.

[REDACTED] also suffered multiple superficial scratches and abrasions as a result of the incident. [REDACTED] had a small abrasion on the left side of his head and several bruises and scratches on his head, neck, arms and back. He also had some redness on his left wrist as a result of his pulling while handcuffed. [REDACTED] initially went to OMH Medical Group in Indian River on February 19, 2021. It was noted he had a contusion to his wrist and forearm and an abrasion on his face. [REDACTED]

[REDACTED] The records also indicated that [REDACTED] had dried blood and smears in areas where there were no injuries and that he had dried blood under his fingernails. These smears of blood likely came from Deputy Schmoldt's injuries, as they were in very close proximity during the incident and the dried blood is evidence of [REDACTED] attack on Deputy Schmoldt. While at OMH Medical Group, [REDACTED] did not complain of any pain, other than to his wrist. An x-ray was completed on his wrist and there was no evidence of any fracture. [REDACTED] later went to Otsego Memorial Hospital on complaints of pain to his head. He was then transported to Munson Medical Center in Traverse City where he remained overnight so that a CT scan and MRI could be performed. Both examinations showed no injuries, [REDACTED] denied any neck pain and was discharged. [REDACTED] injuries may be viewed in Exhibit 3.

[REDACTED] teacher, was also injured during [REDACTED] outburst. [REDACTED] [REDACTED] suffered from a bruise to her leg as a result of an object that [REDACTED] threw at her. It is unclear whether it was a chair, table or pencil box that left the mark. [REDACTED] injury may be viewed in Exhibit 1.

Presque Isle County Sheriff's Policy – Use of Force

The Presque Isle County Sheriff's Office implemented a Use of Force policy in 2019. The policy states in Section V that sheriff's deputies may utilize non-lethal force to prevent injury or to stop assaultive behavior "[i]f a person is acting on an assaultive or threatening manner and [a]lternatives to the use of force have failed or are unavailable to an officer." Additionally, "[i]f a person is physically resisting a lawful arrest and alternatives to the use of force have failed or are unavailable to an officer, an officer may use non-lethal force to prevent injury and to stop the assaultive behavior."

Deputy David Schmoldt Training

Deputy Schmoldt had been the school resource officer for seven years at the time of the incident on February 19, 2021. Apart from his on-the-job experience, Deputy Schmoldt also attended the SEPLA conferences in 2015, 2016, 2017, 2018, and 2019. These conferences consist of three days of trainings for school resource officers and others who are also working with law enforcement and the school systems.

Legal Analysis

Consistency of Witnesses

All the witnesses to the incident involving Deputy Schmoldt and [REDACTED] provided consistent statements regarding what occurred in the classroom. They all indicated, including [REDACTED] himself, that [REDACTED] was agitated that day and began being both physically and verbally assaultive to [REDACTED]. The classroom, which housed numerous kids of various ages, including younger children, had to be evacuated due to [REDACTED] aggression. [REDACTED] threatened to harm [REDACTED] and began throwing items such as chairs and school supplies at [REDACTED] and was flipping tables over. [REDACTED] and [REDACTED] were both hit by multiple objects. Deputy Schmoldt had to be called into the classroom as all other attempts to calm [REDACTED] failed. When Deputy Schmoldt arrived, he attempted to calm [REDACTED] by speaking with him, however, those efforts failed, and [REDACTED] became physically aggressive towards Deputy Schmoldt. [REDACTED] threw items at Deputy Schmoldt, made verbal threats to Deputy Schmoldt, and physically resisted him. [REDACTED] also attempted to take control of Deputy Schmoldt's taser and handgun during the struggle and continuously refused to comply with Deputy Schmoldt's orders/requests to calm down and stop fighting. Eventually Deputy Schmoldt was able to fully handcuff [REDACTED] and get him to calm down. Deputy Schmoldt had several deep scratches that were bleeding as a result of his encounter with [REDACTED] and [REDACTED] had several superficial scratches and marks.

Apart from the witnesses to the altercation, [REDACTED], the mother of [REDACTED] also provided a statement that indicated that the depiction of [REDACTED] behavior during

this incident would have been consistent with how [REDACTED] reacts when he becomes upset. [REDACTED] stated that she believed [REDACTED] did act out and was throwing items, as that would have been consistent with his behavior. She also indicated that she believed [REDACTED] did make verbal threats to Deputy Schmoldt, as that would be his “go to” reaction when he gets upset. [REDACTED] also described [REDACTED] as having a “fighting” response and that he would react to situations “with the strength of his age.”

Based upon all the witnesses’ statements, the evidence provided that [REDACTED] was the aggressor, and that Deputy Schmoldt did attempt to diffuse the situation by speaking with [REDACTED]. Deputy Schmoldt only resorted to physical force when all other methods and attempts to calm and prevent [REDACTED] from hurting others, or himself, had failed.

Proper Use of Force Per Policy

Deputy Schmoldt’s use of force was reviewed for excessiveness by two separate law enforcement officers, D/Sgt. Nate Groya with the Michigan State Police and Sheriff Joe Brewbaker with the Presque Isle County Sheriff’s Office. D/Sgt. Groya, who investigated the incident and reviewed all the available evidence, stated that he believed Deputy Schmoldt utilized reasonable force. Sheriff Brewbaker, who implemented and enforces the Office’s Use of Force Policy, stated that Deputy Schmoldt’s actions were not in violation of any policy and that Deputy Schmoldt did not use excessive force in his interaction with [REDACTED] on February 19, 2021. In fact, Sheriff Brewbaker did not remove Deputy Schmoldt and still has him assigned as the school resource officer. The policy at the Presque Isle County Sheriff’s Office states that an officer may utilize non-lethal force to prevent injury and to stop assaultive behavior if an individual is acting in an assaultive or threatening manner and alternatives to use of force have failed or are unavailable. Deputy Schmoldt attempted to calm [REDACTED] down by talking to him and again tried to calm him when he became agitated again by putting his hands on [REDACTED] hands and telling him to calm down. However, [REDACTED] behavior continued to escalate until Deputy Schmoldt utilized force. Even when Deputy Schmoldt used force [REDACTED] continued to escalate, even attempted to gain access to Deputy Schmoldt’s weapons. Once [REDACTED] calmed down the use of force ceased. Deputy Schmoldt only utilized as much force as he needed to gain control over the situation and as a result of Deputy Schmoldt’s restraint, [REDACTED] only received minor scratches and bruises.

Assaulting, Resisting, or Obstructing a Police Office

Pursuant to M.C.L. 750.81d, “an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.” M.C.L. 750.81d(1). Under this statute the term “obstruct” means “the use or threatened use

of physical interference or force or a knowing failure to comply with a lawful command.” M.C.L. 750.81d(7)(a).

The crime of resisting and obstructing a police officer is a general intent crime. *People v. Gleisner*, 115 Mich. App. 196, 200 (1982). In *People v. Little*, the Michigan Supreme Court stated that the language in M.C.L. 750.81d includes all ordinary police functions of keeping the peace, even those “that do not directly involve placing a person under arrest” and therefore, an individual may be guilty of obstructing an officer even if they are not being arrested. *People v. Little*, 434 Mich. 752, 759 (1990). Additionally, in *People v. Corr*, the Michigan Court of Appeals further acknowledged that obstruction can be “a knowing failure to comply with a lawful command.” *People v. Corr*, 287 Mich. App. 499, 503 (2010); *see also People v. Toger*, 2018 Mich. App. LEXIS 293, *4 (Mich. Ct. of App., February 20, 2018).

Based upon the evidence, at the time Deputy Schmoldt was physically engaging with [REDACTED] he was actively resisting and obstructing Deputy Schmoldt. Deputy Schmoldt was performing his lawful duties and was attempting to ensure the safety of everyone inside and outside of the classroom by handling [REDACTED] aggressive outbursts. Deputy Schmoldt made numerous commands to [REDACTED] to stop fighting and calm down. [REDACTED] failed to comply with his lawful commands and continued to fight and even attempted to disarm Deputy Schmoldt.

[REDACTED]

Right to Self Defense

The Michigan Model Criminal Jury Instructions state in M Crim JI 7.22 (Use of Nondeadly Force in Self-Defense or Defense of Others) that “a person has the right to use force to defend [himself] under certain circumstances. If a person acts in lawful self-defense, his actions are justified, and he is not guilty of [a crime]. M. Crim. JI 7.22. In making this determination one “should consider all the evidence” and should consider the following three rules, judging the individual’s actions according to how the circumstances appeared to that individual at the time they acted. The first rule provides that the individual must “have honestly and reasonably believed that [he] had to use force to protect [himself] from the imminent unlawful use of force by

another.” *Id.* The individual need not be correct in their evaluation of the danger presented, so long as their belief was honest and reasonable. Second, a person may only use the degree of force that seems necessary at the time, and the individual must have used appropriate force under the circumstances as [he] saw them. In making this determination, one must consider whether the individual knew of another means of protecting himself, but one must also consider “how the excitement of the moment affected the choice [he] made.” *Id.* Third, “the right to defend [oneself] only lasts as long as it seems necessary for the purpose of protection.” *Id.* Fourth, the individual claiming self-defense must not have acted wrongfully or instigated the assault. *Id.* See also, *People v. Deason*, 148 Mich. App. 27 (1985) and *Brownell v. People*, 38 Mich. 732 (1878).

The U.S. Supreme Court has analyzed and ruled on the issue of police use of force in *Graham v. Connor*, 490 US 386 (1989). In *Graham v. Connor*, the Court held that claims alleging police officers have used excessive force must be analyzed under the Fourth Amendment “reasonableness standard” and not under a “substantive due process” approach. *Id.* at 395. Additionally, “[t]he ‘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.” *Id.* at 396. In determining whether an officer’s actions were reasonable, there must be “allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving...” *Id.* at 396-97.

Michigan courts have also spoken on the issue of police utilizing force. In *Delude v. Raasakka*, the Michigan Supreme Court found that police can use “force reasonable under the circumstances to effect [sic] an arrest” and “may take what action is reasonable to protect themselves in the course of an arrest or an attempted arrest.” *Delude v. Raasakka*, 391 Mich. 296, 303 (1974). Further, in *People v. Doss*, the Court discussed what constituted reasonable force and in the Court’s reasoning they looked to *American Jurisprudence 2d*, where it is stated:

What amounts to reasonable force on the part of an officer making an arrest usually depends on the facts in the particular case, and hence the question is for the jury. The reasonableness of the force used must be judged in the light of the circumstances as they appeared to the officer at the time he acted, and the measure is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances. The officer has discretion, within reasonable limits, to determine the amount of force which the circumstances require, and his is not guilty of wrong unless he arbitrarily abuses the power confided in him. 5 Am Jur 2d, Arrest, § 81, p 768. *Doss*, 406 Mich. 90, 102 (1979).

The court in *Doss* further stated, “police officers making a lawful arrest may use that force which is reasonable under the circumstances... and ... is not required to retreat before a display of force by his adversary.” *Doss*, 406 Mich. at 102.

Here, Deputy Schmoldt was lawfully carrying out his duties as a sheriff deputy and was attempting to de-escalate a situation in a special needs classroom in order to ensure the safety of all the students and staff, as well as the safety of the aggressor. [REDACTED] was given numerous opportunities to comply with the deputies’ lawful commands to calm down and stop fighting but instead ignored all commands. [REDACTED] continued to aggressively fight Deputy Schmoldt by throwing a pencil box at him, attempting to strike Deputy Schmoldt in the head with his fist, attempting to bite him, digging at Deputy Schmoldt’s face, hands, and arms with his nails, and attempting to gain control of Deputy Schmoldt’s taser and handgun. At the conclusion of the altercation, Deputy Schmoldt suffered numerous scratch and gouge marks to his face, hands and arms that were bleeding.

Based upon a thorough review of the evidence, including photographs of the injuries sustained by Deputy Schmoldt, there was a reasonable and honest belief by Deputy Schmoldt that he needed to utilize force against [REDACTED] in order to prevent injury and to stop the attack. Under Michigan and Federal laws and court rulings, Deputy Schmoldt acted within his rights in utilizing force against Ethan.

Misconduct in Office

Misconduct in Office is defined as “corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.” *People v. Waterstone*, 296 Mich. App. 121,133 (2012) citing *People v. Coutu*, 459 Mich. 348, 354 (1999). The criminal charge of Misconduct in Office is found in either M.C.L. 750.478 or M.C.L. 750.505, depending on the type of misconduct. With misconduct charges, there are three potential theories of liability: (1) malfeasance (committing an act which itself is wrongful), (2) misfeasance (committing a lawful act in a wrongful manner), or (3) nonfeasance (failing to perform any act that the duties of the office require). *People v. Waterstone*, 296 Mich. App. 121 (2012) citing Perkins & Boyce, Criminal Law (3d ed) p. 540. To charge under the malfeasance or misfeasance theories, prosecution must utilize M.C.L. 750.505, which provides the statutory authority to criminally charge any indictable common law offense when there is no specific statute under which to charge. M.C.L. 750.505 provides that any Misconduct in Office charge under the malfeasance or misfeasance theories would be a felony punishable by up to 5 years in prison and/or a fine or a fine of not more than \$10,000. M.C.L. 750.505. The elements of common-law Misconduct in Office are “(1) the person must be a public officer, (2) the conduct must be in the exercise of the duties of the office or done under the color

of the office, (3) the acts were malfeasance or misfeasance, and (4) the acts must be corrupt behavior.” *People v. Carlin*, 239 Mich. App. 49, 64 (1999).

In order to sustain a charge of Misconduct in Office, there must be a finding that the actor was a “public officer”, as contemplated in the charge of Misconduct in Office and “there must be established a ‘breach of a positive statutory duty’ or ‘the performance of a discretionary act with an improper or corrupt motive.’” *Carlin*, 239 Mich. App. at 66 *citing* 63C Am Jur 2d, Public Officers and Employees, §373, p. 814. The Michigan Supreme Court found that police officers were public officials for the purposes of the common-law offense of misconduct in office. The Michigan Supreme Court reasoned that officer’s powers are created by the Legislature, officers exercise sovereign power while engaged in the discretionary discharge of their duties, and officers take an oath before entering their duties as officers. *Coutu*, 459 Mich. at 354-55 (1999) *citing* *People v. Freeland*, 308 Mich. 449 (1944). Further, the Michigan Court of Appeals in *People v. Milton* found police officers to be public officials and subject to charges under the common-law Misconduct in Office. *Milton*, 257 Mich. App. 467 (2003).

While Deputy Schmoldt is a public officer, as contemplated under the law, and his actions occurred during the exercise of his duties, his actions did not constitute malfeasance or misfeasance and his actions were not corrupt in nature. Evidence demonstrates that Deputy Schmoldt did not violate any Presque Isle County Sheriff’s policies or procedures, other law enforcement officers evaluated his use of force and found no wrongdoing, and the evidence demonstrates Deputy Schmoldt was being physically attacked when he utilized force. Therefore, criminal charges for Misconduct in Office could not be sustained.

Burden of Proof

In order to charge an individual with a crime, the prosecution must be able to prove each element of the charged crime beyond a reasonable doubt. This burden of proof has long been established in both Michigan and Federal law. For example, in Michigan Rules of Evidence 302, when discussing potential presumptions found in law, it states, “the prosecution [sic] bears the burden of proof beyond a reasonable doubt of all the elements of the offense.” MRE 302. Additionally, many Michigan Supreme Court cases and United States Supreme Court cases acknowledge the burden of proof required in criminal proceedings, including in *People v. Kayne*, 286 Mich. 571 (1938), where the Michigan Supreme Court stated, “[i]n any criminal case, the burden of proof is upon the State to prove the guilt of the defendant beyond a reasonable doubt...” *Id.* at 578.

The Michigan Criminal Jury Instructions includes an instruction on the subject, which must be read in every criminal trial. M Crim JI 1.9, *Presumption of Innocence, Burden of Proof, and Reasonable Doubt* reads, “[a] person accused of a crime is

presumed to be innocent...This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he] is guilty.” *Id.* Additionally, “the prosecutor must prove each element of the crime beyond a reasonable doubt.” *Id.* The instruction goes on to define reasonable doubt as, “a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case.” *Id.*

Given the present facts and available evidence, the State of Michigan would not be able to sustain its burden of proof if it were to criminally charge Deputy Schmoldt with a crime for his use of force against [REDACTED]. Given the opinions of other law enforcement officials, the witness statements, the photographic evidence, Deputy Schmoldt’s statement, the Presque Isle County Sheriff’s Office Use of Force Policy and the self-defense laws in the State of Michigan, the State could not prove Deputy Schmoldt acted unlawfully or in bad faith in his dealings with Ethan.

Media Relationship

This case may have had some media attention but would likely garner media attention.

Conclusion

Based upon a thorough review of the evidence, it is clear that [REDACTED] was aggressive and resisted and assaulted Deputy Schmoldt. [REDACTED] was provided with numerous lawful commands by Deputy Schmoldt and failed to comply with any of the lawful commands. All the witness statements, including [REDACTED] were consistent and they all described [REDACTED] as being aggressive and being physically assaultive. The witnesses also described [REDACTED] as attempting to gain control over Deputy Schmoldt’s taser and handgun and ignoring all of Deputy Schmoldt’s orders to calm down and stop fighting. [REDACTED] physically struggled with Deputy Schmoldt until Deputy Schmoldt was finally able to get both of [REDACTED] hands into handcuffs. Once [REDACTED] was handcuffed Deputy Schmoldt immediately stopped using physical force against [REDACTED] and was able to get him to calm down. Additionally, Deputy Schmoldt sustained several superficial injuries as a result of [REDACTED] actions.

After a thorough review of the evidence, case law, common law and statutory law, Deputy Schmoldt’s use of force was not excessive, nor in violation of the law. Therefore, Deputy Schmoldt committed no criminal offense in his interactions with [REDACTED].

EXHIBIT 1
Photograph of [REDACTED] Injury



EXHIBIT 2
Photographs of Deputy Schmoldt Injuries



EXHIBIT 3
Photographs of [REDACTED] Injuries

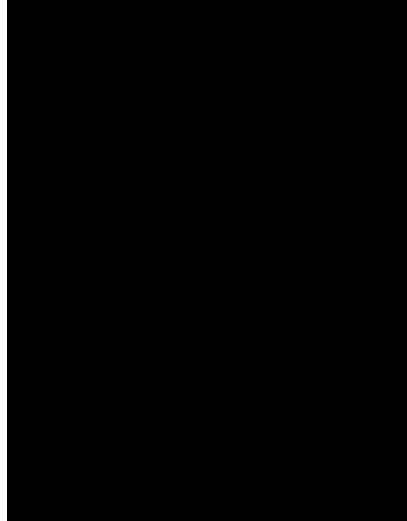


EXHIBIT 4
Photographs of Classroom

