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November 16, 2015

Via Electronic Mail and Federal Express

Timothy McGinty
Cuyahoga County Prosecutor's Office
The Justice Center, Courts Tower
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113

Re: Continued Subversion of the Grand Jury Process

Dear Mr. McGinty:

As you know, this firm, together with The Chandra Law Firm LLC and FirmEquity, represent Samaria Rice, her daughter, T.R., and the Estate of Tamir Rice. We are compelled to write to you for the third time in less than a month because of your continued subversion of the grand jury process through the serial release to the public and proposed presentation to the grand jury of pro-police "expert" reports that purport to exonerate Officers Loehmann and Garmback. Late last week, you released yet another report by a former Florida police officer named Ken Katsaris.

Like your first two supposed "experts" Kimberly Crawford and Lamar Sims (who were thoroughly discredited by Ms. Rice's representatives, independent legal experts, and the media), Katsaris is not credible. Multiple courts have rejected him as an expert witness. Just like Sims and Crawford, Katsaris relies on the same improper speculations that infected the last two reports. Like Sims and Crawford, Katsaris rubber stamps the officers' blatantly improper tactics. But in an even more remarkable maneuver, Katsarsis takes the egregious step of actually blaming the victim in ways that are plainly refuted by the video evidence. It is difficult to imagine anything more offensive than Katsaris' conclusion, which equates the "tragedy" of "the possibility of loss of career" for Loehmann and Garmback with the "tragic loss of life" of Tamir Rice. To release such a report, just ten days before the anniversary of Tamir's death, shocks the conscience. It is clear you need to step down and let an independent special prosecutor take over this case.

Katsaris' Attempts to Blame the Victim Are Refuted by the Video

Katsaris repeatedly blames the victim Tamir Rice in his crusade to exonerate the police offers who killed this 12 year-old child. All of these attempts are refuted by the video evidence.

For example:

- Katsaris states that there was "movement of Rice towards Loehmann" (p.7) —but the video is clear that *it was the officers who drove up to Tamir* and, within just 1.7 seconds, jumped out and shot him. Katsaris' suggestion that the officers were stationary and Tamir threatened them by moving towards them is utterly false.

- Katsaris claims Tamir was "*possibly* not reacting to Loehmann's commands" (p. 7)—but the video is clear that there was no time for the officers to issue any commands, much less for Tamir to react or respond to such commands had any been given. It bears noting that speculative testimony of this sort is prohibited as an evidentiary matter in any legal proceeding, whether in a grand jury or at trial. Why your office believes an expert opinion based on something the reporter thinks "possibly" happened could be relevant or anything other than a misleading distraction to the grand jury is a mystery to us and to independent observers.

- Katsaris asserts that Tamir had "notice of the police presence" (p. 10)—but the video shows they drove up and immediately shot him within 1.7 seconds, so in fact he had no notice at all. Again, the suggestion by Katsaris that he knows what was in the child's mind before he was shot is, under the circumstances, preposterous.

- Initially, Katsaris acknowledges the video "is not . . . clear" as to whether Tamir is "reaching for his waist" when the officers drive up (p.7). But, in his determination to blame Tamir for his own death, Katsaris later treats it as a certainty that Tamir was reaching for his waist, claiming for example that the video "shows Rice's movement toward the waist," "the actions of Tamir Rice lifting his jacket and reaching for his waist," "especially the hand movements, and the movements towards the waist." (p. 9). This and other strained manipulations of the facts demonstrate an "expert" who, far from being neutral and objective, is determined to support the officers.

- Katsaris says "Rice was warned by the owner of the replica gun that the 'orange tip' identifying the gun as a replica firearm had been removed and that the gun really 'looks real'" (p. 10-11)—but the video shows Tamir wasn't holding the toy gun when the officers drove up, so they had no time to see the gun, much less that it didn't have an orange tip, before they shot Tamir. So, Katsaris' musing about how real the gun looked is totally irrelevant, except to suggest it was Tamir's fault.

Just Like the Other Reports, Katsaris' Report Relies on Pure Speculation

Neither Loehmann nor Garmback have given any sworn testimony or statements about the shooting of Tamir Rice. Yet Katsaris, just like the last two "experts" you retained, repeatedly speculates about what the officers might have seen or believed.

For example, Katsaris claims that Tamir's "presence in the gazebo was not expected, causing Officer Garmback to apply the brakes suddenly" and concludes therefore that the "vehicle stop position was not by choice, but by necessity." (p. 8). Again, this is nothing but speculation, because:

- The officers have never testified that it was "not expected" to see Tamir in the gazebo. Katsaris' claim is pure supposition.

- In fact, the swings (where the 911 caller had reported seeing Tamir) are located in an area where one would reach before arriving at the gazebo; the officers drove by the swings first, then continued on to the gazebo. The logical inference about their actions is that they continued past the swings to continue to look for Tamir and they then found him just a few feet further along, at the gazebo—hardly surprising or unexpected.

- The Highway Patrol report actually concludes that Garmback began braking and decelerating *40 to 75 feet away* from where the car ultimately came to a stop in front of Tamir (p. 43), which suggests they had plenty of other options to stop elsewhere or drive the car somewhere else.

Katsaris Rubber Stamps the Officers' Tactics

Crawford and Sims were widely criticized for not questioning the officers' tactics that led to them parking their car right in front of Tamir and jumping out and shooting him within 1.7 seconds. Katsaris' report is deficient in the same way.

- Katsaris assumes, without any basis, that the officers had no choice but to stop their car right next to Tamir (p. 8). But, as set forth immediately above, the evidence actually suggests that is not true: they had plenty of time and space to stop earlier, to direct their car elsewhere, or to keep driving after they saw Tamir until they were at a safe distance.

- Katsaris concludes that Loehmann's actions were reasonable because of "the potential threat from possible gunfire at the officers." (p. 8). But if there really was a threat of gunfire, it obviously would have been safer to drive away than to do what Loehmann did: get out of the car, without any cover, at close proximity to Tamir, and immediately begin shooting. Here again, Katsaris' claims about what happened here are totally inconsistent with any reasonable interpretation of proper policing.

- Katsaris simply ignores the fact that there was no immediate threat requiring Loehmann to shoot—Tamir was not even holding the toy gun, much less pointing it at anyone or otherwise threatening anyone, and no one had reported Tamir had, moments earlier, discharged a gun. He was alone by himself in the gazebo.

Katsaris is a Discredited Expert

In addition to the many flaws in Katsaris' report, as laid out above, Katsaris himself is not a credible expert witness. Multiple courts throughout the country have disqualified him and prohibited from testifying. *See, e.g.*, *Rosado v. Deters*, 5 F.3d 119, 124 (5th Cir. 1993) (disqualifying Katsaris from opining on whether a police officer had backed up his car or not because he had no "scientific, technical, or other specialized knowledge in the area of accident reconstruction"); *Bruner-McMahon v. Sedgwick Cnty. Bd. of Comm'rs*, No. 10-CV-1064-KHV, 2012 WL 33837, at *5 (D. Kan. Jan. 6, 2012) (refusing to allow Katsaris to testify because he offered legal conclusions that "would usurp the jury's role" and because he sought to testify on matters "outside his field of expertise"); *Owens v. City of Fort Lauderdale*, 174 F. Supp. 2d 1298, 1311 & n. 3 (S.D. Fl. 2001) (criticizing Katsaris' opinion as "rife" with improper "conclusory statements" and "legal conclusions"); *Taylor v. Watters*, 655 F. Supp. 801, 805 (E.D. Mich. 1987) (finding Katsaris had exaggerated his qualifications and experience, concluding that "Katsaris is held not to be an expert witness as a matter of law.").

It is particularly significant that at least two courts have prevented Katsaris from giving legal conclusions that attempt to usurp the role of the jury. *See Bruner-McMahon*, 2012 WL 33837, at *5; *Owens*, 174 F. Supp. 2d at 1311 & n. 3. It is similarly improper for you to have Katsaris (and your other purported experts) testify to the grand jury about the ultimate legal issue in this case: whether the officers' use of force was objectively unreasonable.

In fact, your apparent insistence on using these discredited reports creates an extraordinarily awkward and untenable situation. How can you present such flawed testimony and not vigorously cross examine these individuals as to the many defects underlying their findings? If you were to present any of these three purported "experts" without such cross examination, you would be misleading the grand jury and abandoning your obligation to provide a fair and impartial presentation. Accordingly, if you persist in this ill-advised direction, please confirm that your office will engage in proper cross examination of the experts you have chosen to present.

Conclusion

In stark contrast to your office's nearly year-long attempt to exonerate the officers who killed Tamir Rice, earlier this month, the officers who shot and killed 6-year-old Jeremy Mardis were arrested and charged with second-degree murder just 72 hours later.[1] Just like in this case, there was video footage of Jeremy's shooting, which the prosecutor relied on in reaching his decision to charge the officers. Unlike your office in this case, the prosecutor in the Mardis case did not spend nearly a year trying to find "experts" who would exonerate the officers in the face of a damning video. It is impossible to ignore the different treatment your office has given to Tamir Rice or the fact that, while Jeremy was white, Tamir was African American.

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[1] http://www.theatlantic.com/national/archive/2015/11/the-death-of-jeremy-mardis-and-trustworthy-police/415437/; http://www.nydailynews.com/news/national/king-justice-isn-swift-black-police-shooting-victims-article-1.2429899.

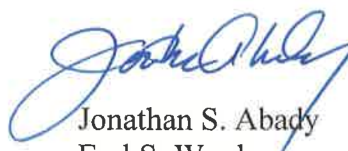
Although you insist your improvident disclosure to the media of these "expert reports" is done in the name of transparency, the true impact of your conduct is to demonstrate a naked and unconscionable bias in favor of police officers who are responsible for the death of a 12-year-old boy. Apart from the way this activity imperils the operation of the grand jury process, it also raises independent concerns about compliance with the law on grand jury secrecy and the rules of professional conduct. *See* Ohio Crim. R. 6(E) (stating that "Deliberations of the grand jury . . . shall not be disclosed" and providing that a "prosecuting attorney . . . may disclose matters occurring before the grand jury . . . *only when directed by the court*"); Ohio Rule of Professional Conduct 3.6(a) (lawyers are prohibited from making "an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding. . .").

On behalf of Tamir's mother and sister, for all the reasons set forth in this letter and our two prior letters of October 16 and November 9, we are profoundly disappointed by your office's approach to this case. If you had decided not to present the case to the grand jury because you did not think there was sufficient evidence of a crime, we would have been disappointed by your decision but we would have respected your candor. Instead, you have taken a duplicitous approach of pretending to present the case to the grand jury, while simultaneously commissioning these exonerating "expert" reports that we would have expected from the officers' defense attorneys, not from an impartial prosecutor. You appear determined to use these invalid opinions to try to convince the grand jury not to indict, and then hide behind the grand jury's decision. This approach is unprofessional, highly misleading, and, for this family grieving the loss of their son and brother, incredibly demoralizing.

As of the date of this writing, you have not responded to our October 16 and November 9 letters. That lack of response is further evidence of your office's unprofessional approach to this case and complete lack of respect for the victim's family. We request that you respond in writing to all of our letters by November 20 with a point-by-point, substantive reply.

In addition, we renew our call that you step aside and let an independent special prosecutor take over this case. Your handling of this case no longer has any credibility.

Sincerely,



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