

January 16, 2013

Via U.S. Mail

Timothy J. McGinty
Cuyahoga County Prosecutor
1200 Ontario St.
Cleveland, OH 44113

Victor R. Perez
Chief Assistant City Prosecutor
601 Lakeside Ave., Room 106
Cleveland, OH 44114

Michael McGrath
Chief of Police
1300 Ontario St.
Cleveland, OH 44113

Thomas F. Jones
Office of Professional Standards
Chairman, Civilian Police Review Board
205 West St. Clair Ave.
Cleveland, OH 44113

Re: *Ortiz v. Kazimer, et al.*, Case No. 1:11-cv-01521 (N.D. Ohio)

Gentlemen:

Our firm represents Juan Ortiz and his parents, Ramón Ortiz and Alma Peréz. We write on their behalf regarding an incident on August 16, 2010 in which Cleveland patrol officer Brian Kazimer attacked Juan, a young Hispanic boy with Down syndrome, while Kazimer's partner, patrol officer Dan Crisan, did nothing to intervene. Witnesses have testified that the officers used excessive force and uttered racial slurs during the encounter. We write to request that each of your offices take appropriate action to punish and deter the conduct described below.

In August 2010, the Ortiz family was living in the West Terrace Apartments on Lorain Avenue. Juan was 16, but appeared much younger.¹ He was under five-feet tall and weighed a little over 100 pounds.² Juan cannot speak or understand English.³ His Down syndrome is visibly evident from his appearance.⁴

¹ Decl. of Y. Acevedo (Nov. 20, 2012) at ¶ 3 (enclosed as Ex. 1) ("Juan is a little boy with Down syndrome. Juan looks younger than his age. I would estimate that he appears to be about 13."); *see also* Decl. of L. Hernandez (Nov. 14, 2012) at ¶ 3 (enclosed as Ex. 2) and Decl. of N. Kennedy (Nov. 27, 2012) at ¶ 4 (enclosed as Ex. 3).

² Decl. of E. Manzano (Nov. 28, 2012) at ¶ 3 (enclosed as Ex. 4) (Juan...is under five-feet tall and weighs a little over 100 pounds. In August of 2010, he appeared to be approximately 12-13 years of age.").

On August 16, 2010, Timothy Krall was robbed of his wallet. He described the perpetrator as a white male, 5'8", wearing a hat and a long shirt (no color noted), and headed toward the Rapid station.⁵

Shortly thereafter, Nina Kennedy, manager of the West Terrace Apartments, called police to report that two men had turned in a wallet to her. She described these Good Samaritans as white and heading eastbound on Lorain Avenue, one in a blue t-shirt with blondish hair and a mustache and the other as an "older gentleman" with a ball cap, clean shaven, possibly wearing a red shirt.⁶ She estimated the man in the possibly red shirt to be in his 50s.⁷ At no time did Ms. Kennedy suggest that the men who turned in the wallet were involved in the robbery.⁸

Meanwhile, Juan was playing in the yard at the West Terrace Apartments. He was listening to music on his headphones. He was neither headed toward the Rapid station nor eastbound on Lorain Avenue. He did not match the description of the robbery suspect or the Good Samaritans who turned in Mr. Krall's wallet. Indeed, Juan is a different race and decades younger than the men who turned in the wallet. Other than the fact that Juan was male and wearing a red shirt, he matched no part of any description given by the victim or the apartment manager.

Nina Kennedy testified that "[a]nyone would have known from looking at Juan that he is not a white adult male. Anyone would have known from looking at Juan that he was not in his 40s or 50s."⁹ Juan's adult nephew, Eliezer Manzano, testified similarly: "Anyone could tell from looking at Juan that he was a child, not an adult. Anyone could see in his face that he has Down syndrome. Even from a distance, it would be obvious to any person who cared to look that Juan has Down syndrome."¹⁰

Notwithstanding the fact that Juan did not match any description the police received, which Crisan has admitted,¹¹ Kazimer spotted Juan playing in the yard and began chasing him. At the time Kazimer gave chase, Crisan radioed that his partner was in pursuit of a "black male," so

³ Manzano Decl. at ¶ 3; Kennedy Decl. at ¶ 3; Decl. of J. Posey (Nov. 14, 2012) at ¶ 8 (enclosed as Ex. 5).

⁴ See photographs of Juan Ortiz (enclosed as Ex. 6).

⁵ See 08-16-10 16-57-08 Tel 15 Ext-3233 (3233) (enclosed as Ex. 7). Richard Smiley, Jr. and Jordan Temple were arrested after the incident with Juan. They are currently serving time for the robbery. Both Mr. Smiley and Mr. Temple are white males. See Ohio Dept. of Rehab. and Corr. Offender Search Detail for Richard Smiley, Jr. and Jordan Temple (enclosed as Ex. 8). [ORTIZ 000001 and 000002].

⁶ See 08-16-10 17-27-26 Tel 07 Ext-3225 (3225) (enclosed as Ex. 9); see also Kennedy Decl. at ¶ 4-5.

⁷ *Id.*

⁸ Dep. of B. Kazimer (Sept. 20, 2012) at 15:4-6 (enclosed as Ex. 10).

⁹ Kennedy Decl. at ¶ 11.

¹⁰ Manzano Decl. at ¶ 3.

¹¹ Dep. of D. Crisan, Sept. 20, 2012, at 20:17 (enclosed as Ex. 11).

there can be no argument that the officers believed Juan might be one of the **white** men for whom they were searching. In initiating a *Terry* stop of Juan, Kazimer and Crisan chose to ignore the vast majority of the description Ms. Kennedy provided by detaining a visibly disabled Hispanic child, whom they perceived to be black.

Juan cannot tell us why he ran that day. His father testified that Kazimer shouted at Juan, scaring him, so Juan ran to his parents.¹² This shows that Kazimer and Crisan initiated the *Terry* stop *before* Juan ran to his parents. So Juan's alleged "flight" cannot be part of any reasonable suspicion justifying the *Terry* stop when the supposed flight occurred *after* Kazimer and Crisan initiated the stop. Nor could the officers testify as to why Juan ran: Kazimer admits that he doesn't know whether Juan was aware that Kazimer was a police officer or whether Juan can identify a patrol car.¹³ Crisan admits that he cannot say whether Juan saw the officers before he ran: "I don't know when he saw us."¹⁴

Regardless of why Juan ran, the officers had no reason to pursue him in the first place. The fact that Juan was wearing a red shirt was not reasonable suspicion to detain him when (1) Juan did not match the vast majority of the description and (2) no one reported that the man wearing the red shirt had engaged in any criminal activity (because turning in a wallet is not a crime). The Sixth Circuit has held that officers do not have reasonable suspicion to stop someone whose "physical appearance differ[s] significantly from that of the suspect."¹⁵ The court has also noted that reasonable suspicion is undermined when officers identify a *Terry* detainee as a different race than a suspect for whom they are searching.¹⁶

Before Kazimer attacked Juan as described below, Kazimer knew that Juan had Down syndrome. As Kazimer chased Juan along the path to the parking lot where Juan's parents were standing in the parking lot, Eliezer Manzano attempted to intervene to help the officer.¹⁷ After Juan ran past Manzano, Manzano stepped into the path in front of the Kazimer and told him who he (Manzano) was to Juan, that Juan had Down syndrome, and that Juan did not understand what the officer was saying.¹⁸ Kazimer told Manzano to "Shut up and get out of my way."¹⁹ Manzano complied, and stepped out of Kazimer's way, but followed him to the parking

¹² R. Ortiz Resp. to Interrog. No. 8 (enclosed as Ex. 12).

¹³ Kazimer Dep. at 67:12-19.

¹⁴ Crisan Dep. at 23:6-25.

¹⁵ *U.S. v. Jackson*, 188 Fed. Appx. 403, 410 (6th Cir. July 20, 2006).

¹⁶ *U.S. v. Galaviz*, 645 F.3d 347, 353 (6th Cir. 2011) (when searching for a black suspect, officers' reasonable suspicion for *Terry* stop was undermined when they identified defendant as Hispanic).

¹⁷ Manzano Decl. at ¶¶ 5-7.

¹⁸ *Id.* at ¶ 6.

¹⁹ *Id.*

lot.²⁰ Manzano's testimony is confirmed by Lissette Hernandez, who witnessed Manzano's interaction with Kazimer on the path.²¹

While Manzano was telling Kazimer about Juan's Down syndrome and offering to help, Juan reached his parents in the parking lot. Juan was hugging his elderly mother when Kazimer reached them.²² Kazimer grabbed Juan by the back of his shirt, pulled him from his mother, and slammed Juan into a nearby vehicle.²³ Other witnesses confirm the excessive force that Kazimer used to slam Juan into the vehicle.²⁴

Kazimer admits that Juan had "stopped at the car"²⁵ and "surrendered" before Kazimer pinned Juan to the car.²⁶ Under clear Sixth Circuit case law, officers cannot use force against a suspect who has surrendered.²⁷ Kazimer's use of force was clearly and egregiously excessive—and indeed criminal—given his own admission that Juan had surrendered before Kazimer laid a hand on Juan.

Juan's parents and other family members told Kazimer about Juan's disability from the moment Kazimer slammed Juan into the vehicle. Juan's father, Ramón Ortiz, told Kazimer "that he was making a mistake. That this was just a little boy with Down [s]yndrome."²⁸ Kazimer actually retorted, "I don't care"²⁹ and said they were "lucky" he "didn't shoot [Juan]."³⁰ Manzano again

²⁰ *Id.* at ¶ 9.

²¹ Hernandez Decl. at ¶ 5.

²² Manzano Decl. at ¶ 8.

²³ *Id.* See also Dep. of R. Ortiz (Aug. 20, 2012) at 27:9-13 (testifying that Kazimer "attacked my little son, and he slammed him real hard against the car.") (enclosed as Ex. 13); Dep. of A. Pérez (Aug. 20, 2012) at 39:25-40:3 (enclosed as Ex. 14) (testifying that Kazimer "came toward us, this very short distance, and Juan is giving me his radio, and he grabs him from the back of the sweater, and he slams him against the car and handcuffs him.").

²⁴ Decl. of M. Pérez (Dec. 5, 2012) at ¶ 5 ("The officer tackled Juan and slammed him hard into our mother's car.") (enclosed as Ex. 15); Acevedo Decl. at ¶ 4 (confirming that she saw Kazimer "tackle Juan into the car.").

²⁵ Kazimer Dep. at 31:16-20.

²⁶ *Id.* at 33:2-3 ("He was leaning on the car in a way that made me believe he was surrendering.").

²⁷ *Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir. 2006) ("We have repeatedly held that the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law.").

²⁸ R. Ortiz Dep. at 28:22-29:1.

²⁹ R. Ortiz Resp. to Interrog. No. 13. See also Acevedo Decl. at ¶ 5; Manzano Decl. at ¶ 16 ("In response to all of us trying to tell the officer about Juan and his condition, the officer said, 'shut up,' 'get away,' and 'I don't care.'"); M. Pérez Decl. at ¶ 6 ("Just after the officer tackled Juan, I yelled, 'what are you doing? He is Down syndrome.' I tried to explain to the officer that he was making a mistake. The officer responded, 'Shut up or I will take you to jail.' I said, 'he doesn't understand you because of his condition.' The officer responded, 'I don't care! Shut up!'").

told Kazimer about Juan's condition and that Juan did not understand what the officer was saying.³¹ Malvin Pérez, Juan's half brother, also told Kazimer about Juan's Down syndrome.³²

When Juan's mother—who is even smaller than Juan, suffers from debilitating asthma, and appears to be in her mid-70s—tried to comfort Juan as Kazimer pinned Juan to the car, Kazimer intentionally shoved her to the ground.³³ Numerous individuals witnessed this assault.³⁴

Kazimer then kept Juan pinned against the car for 15 minutes or more according to the testimony of various witnesses.³⁵ Kazimer held Juan notwithstanding the fact that apartment manager Nina Kennedy told Kazimer and Crisan that they had the wrong person.³⁶ Ms. Kennedy testified as follows:

I yelled to the officers that I had the wallet and they had the wrong person. I said, "You got the wrong person! That's not right!" The officer had to have heard me given how close we were. One of the officers—not the one pinning Juan to the vehicle—looked directly up at me while I was yelling, but he said nothing and did nothing to stop the other officer from hurting Juan.³⁷

But Kazimer ignored Ms. Kennedy. And he ignored the desperate pleas of Juan's parents and other family members and continued to detain Juan, pinning him against the hot vehicle in the August heat. Kazimer admits that he did not take into consideration what was said to him as he was detaining Juan.³⁸ Kazimer offers no justification for this failure.

³⁰ R. Ortiz Resp. to Interrog. No. 13. *See also* Manzano Decl. at ¶ 18 (testifying that Crisan made the comment about the family being "lucky" to officers didn't shoot Juan).

³¹ Manzano Decl. at ¶ 11.

³² *Id.* at ¶¶13-14.

³³ A. Pérez Resp. to Interrog. No. 12 (enclosed as Ex. 16).

³⁴ Kennedy Decl. at ¶ 8 ("I observed one of the officers push Juan's mother and she fell to the ground."); Posey Decl. at ¶ 5 ("I observed Juan's mother attempt to intervene to protect him, but the police held her back and pushed her to the ground."); Acevedo Decl. at ¶ 5 ("I also saw the officer push Alma Pérez when she tried to help her son."); Manzano Decl. at ¶ 12 ("At the same time, Juan's mother tried to help him, speaking to the officer in Spanish. But the officer pushed her away and she stumbled back. At that point, she had a panic attack. She was breaking down mentally, she was shaking, and her asthma started to flare up. She was in no condition to go through the trauma of seeing her Down syndrome child being brutalized by a police officer."); M. Pérez Decl. at ¶ 7 ("I observed the officer push my mother.").

³⁵ R. Ortiz Dep. at 50:22-24 (15 minutes or more); A. Pérez Dep. at 46:1-2 (15-20 minutes); Kennedy Decl. at ¶ 10 (10-15 minutes).

³⁶ Kennedy Decl. at ¶ 7.

³⁷ *Id.*

³⁸ Kazimer Dep. at 36:16-23.

Further exacerbating the excessiveness of the force employed, while pinning Juan against the vehicle, Kazimer pushed Juan's arms up over his head above his shoulders before handcuffing him.³⁹ Kazimer admits that Juan was not struggling at all when Kazimer began to handcuff Juan.⁴⁰ Again, this use of force was gratuitous, unnecessary, and unjustified under the controlling case law.⁴¹

Kazimer then continued to detain Juan after handcuffing him despite what Kennedy and Juan's family told Kazimer. Witnesses estimate the total detention was 15-45 minutes.⁴² This is completely unreasonable given that Juan did not match the description of anyone who'd been reported to police as committing any crime, and especially given the information available to the officers from the apartment manager and from Juan's family. Despite it all, the violent detention continued.

Juan has been diagnosed with post-traumatic stress disorder as a result of the attack.⁴³ He also experienced chest pain, abrasions to his wrists, and a supra-pubic abscess requiring surgery (as a result of being pinned to a hot car in the August heat). He continues to experience anxiety and since the attack has been terrified of police officers. Before the attack, he had no such reaction to law enforcement.⁴⁴

In addition to the gratuitous attack on Juan, the officers used vulgar, profane, and racist language during this encounter:

- Jean Posey, the aunt of apartment manager Nina Kennedy, testified that "[i]n response [to Juan's parents' pleas to let him go,] the police were screaming and using vulgar, obscene, and racist language toward Juan's parents. The language those officers used would make a sailor blush. **One of the officers told Juan's mother to 'get the h---- back to where she belong.' He called her a 'Mexican wetback.'**"⁴⁵

³⁹ Manzano Decl. at ¶ 10; M. Perez Decl. at ¶ 11.

⁴⁰ Kazimer Dep. at 33:2-3; 48:3-7.

⁴¹ *Baker*, 471 F.3d at 607.

⁴² *See, e.g.*, Acevedo Decl. at ¶ 6 (30-45 minutes); Posey Decl. at ¶ 9 (15-20 minutes); Manzano Decl. at ¶ 21-22 (20-25 minutes).

⁴³ Expert Report of Peter J. Geier (Oct. 5, 2011) (attached as Ex. 17) [ORTIZ 000501-06]

⁴⁴ *See, e.g.*, Kennedy Decl. at ¶ 12 ("After the incident on August 16, 2010, Juan was scared to death to see police officers. Every time he would see a police car, he would run into the apartments. I observed Juan reacting in terror to seeing a police car on numerous occasions...Prior to the incident, I had never observed Juan to be frightened of law enforcement. Based on my observation of Juan, he was scared of police officers only after the incident on August 16, 2010 where he was pinned against the car and handcuffed.").

⁴⁵ Posey Decl. at ¶ 7 (emphasis added).

- Apartment Manager Nina Kennedy testified similarly: “But the police were not listening and were using very profane language toward Juan’s family. The police were using the “f” word a lot. I heard one of the officers tell Juan’s parents **to go back to their own country** if they can’t speak the language here. The officers were telling Juan’s parents and other relatives to ‘shut the fuck up’ and ‘get the fuck away from here.’ The language they used was extremely inappropriate.”⁴⁶
- Malvin Pérez testified that he told the officers “that Juan could not understand them as he understood only Spanish. At that point, one of the officers said, **‘if he doesn’t speak our language, why is he here, he should go back to where he came from.’**”⁴⁷
- Eliezer Manzano testified: “The second officer also said, ‘You don’t know English, shut up, **you shouldn’t live in the United States if you don’t know English.**’ I found this comment to be extremely racist. Ramón, Malvin, and I all speak English very well. Only my grandmother [Juan’s mother] was speaking Spanish. After the officer made the racist comment about not speaking English, I told the officer I was speaking English and asked him if he didn’t understand me. He ignored me and kept running his mouth, saying ‘shut up’ and telling us that we ‘should be speaking English in this country’ as he walked away.”⁴⁸

Juan and his family are from Puerto Rico, a United States territory. This is their country.

On November 9, 2010, Chairman Jones notified Mr. Ortiz that the Office of Professional Standards had completed its investigation of Mr. Ortiz’s complaint on Juan’s behalf and that the Police Review Board had determined his complaint to be ruled “SUSTAINED.”⁴⁹

That same day, Chairman Jones sent a charge letter to Chief McGrath recommending the officers be disciplined.⁵⁰

This egregious conduct and the recommendation to discipline Kazimer and Crisan for their behavior occurred more than two years ago. But to date, the Division of Police has failed to take corrective action. Furthermore, no criminal charges have been filed for this wildly excessive and wholly unjustified use of force against a mentally disabled child.

Mr. McGinty and Mr. Perez, we ask that your offices charge Officers Kazimer and Crisan for their criminal conduct in connection with this incident. The evidence we have collected and are providing to you supports filing criminal charges for the following crimes: Assault (R.C. 2903.13(A)); Menacing (2903.22(A)); Kidnapping (R.C. 2905.01(A)(3) and (B)(2)); Abduction

⁴⁶ Kennedy Decl. at ¶ 9 (emphasis added).

⁴⁷ M. Pérez Decl. at ¶ 10 (emphasis added).

⁴⁸ Manzano Decl. at ¶ 20 emphasis added).

⁴⁹ Letter from Thomas F. Jones to Ramón Ortiz (Nov. 9, 2010) (attached as Ex. 18) [ORTIZ000005].

⁵⁰ Charge Letter (Nov. 9, 2010) (attached as Ex. 19) [Ramón Ortiz 10-339 page 4-5 of 64].

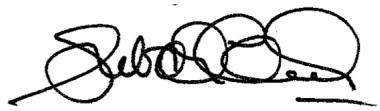
(R.C. 2905.02(A)(2)); Unlawful Restraint (R.C. 2905.03(A)); Disorderly Conduct (R.C. 2917.11(A)(1), (2), and (5)); Interference with Custody (R.C. 2919.23(A)(1)); Interfering with Civil Rights (R.C. 2921.45(A)).

Police use of excessive force is a serious matter in this community and must be addressed. Citizens cannot be made to feel that they are at the mercy of renegade cops who can attack the most vulnerable among us with no justification.

Chief McGrath, we ask that you impose appropriate discipline on these officers including, but not limited to, the discipline recommended more than two years ago by Chairman Jones. In imposing discipline, we ask that you take into account the information we have collected that was not available to or considered by the Office of Professional Standards and the Civil Police Review Board in 2010, namely, the attached declarations under penalty of perjury of numerous witnesses (including apartment manager Nina Kennedy and her aunt Jean Posey) that detail the physical abuse Juan endured and the vile racism the officers displayed while dressed in the uniform of the Cleveland Division of Police. You should not countenance this shameful conduct.

We ask that you thoroughly investigate and carefully consider the facts and take appropriate action.

Sincerely,



Subodh Chandra

cc: Anthony Jordan, Esq.

Enclosures

- Ex. 1 Decl. of Y. Acevedo (Nov. 20, 2012)
- Ex. 2 Decl. of L. Hernandez (Nov. 14, 2012)
- Ex. 3 Decl. of N. Kennedy (Nov. 27, 2012)
- Ex. 4 Decl. of E. Manzano (Nov. 28, 2012)
- Ex. 5 Decl. of J. Posey (Nov. 14, 2012)
- Ex. 6 Photographs of Juan Ortiz
- Ex. 7 Krall 911 call (08-16-10 16-57-08 Tel 15 Ext-3233 (3233))
- Ex. 8 Ohio Dept. of Rehab. and Corr. Offender Search Detail for Richard Smiley, Jr. and Jordan Temple
- Ex. 9 Kennedy 911 call (08-16-10 17-27-26 Tel 07 Ext-3225 (3225))
- Ex. 10 Dep. of B. Kazimer (Sept. 20, 2012)
- Ex. 11 Dep. of D. Crisan (Sept. 20, 2012)

- Ex. 12 R. Ortiz Resp. to Interrog.
- Ex. 13 Dep. of R. Ortiz (Aug. 20, 2012)
- Ex. 14 Dep. of A. Pérez (Aug. 20, 2012)
- Ex. 15 Decl. of M. Pérez (Dec. 5, 2012)
- Ex. 16 A. Pérez Resp. to Interrog.
- Ex. 17 Expert Report of Peter J. Geier (Oct. 5, 2011)
- Ex. 18 Letter from Thomas F. Jones to Ramón Ortiz (Nov. 9, 2010)
- Ex. 19 Charge Letter (Nov. 9, 2010)