

RICHARD D. EMERY  
ANDREW G. CELLI, JR.  
MATTHEW D. BRINCKERHOFF  
JONATHAN S. ABADY  
EARL S. WARD  
ILANN M. MAAZEL  
HAL R. LIEBERMAN  
DANIEL J. KORNSTEIN  
O. ANDREW F. WILSON  
ELIZABETH S. SAYLOR  
DEBRA L. GREENBERGER  
ZOE SALZMAN  
SAM SHAPIRO  
ALISON FRICK  
DAVID LEBOWITZ  
HAYLEY HOROWITZ  
THEODOR O. OXHOLM

## EMERY CELLI BRINCKERHOFF & ABADY LLP

ATTORNEYS AT LAW  
600 FIFTH AVENUE AT ROCKEFELLER CENTER  
10<sup>TH</sup> FLOOR  
NEW YORK, NEW YORK 10020

TELEPHONE  
(212) 763-5000  
FACSIMILE  
(212) 763-5001  
WEB ADDRESS  
www.ecbalaw.com

CHARLES J. OGLETREE, JR.  
DIANE L. HOUK

October 16, 2015

### *Via Federal Express and Email*

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

### *Re: Justice for Tamir Rice*

Dear Prosecutor 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 write to express the Rice family's disappointment and grave concern regarding your office's handling of the criminal investigation of the police officers who killed Tamir.

The delay in presenting this case to a grand jury, the decision to retain pro-police "experts" and release their reports to the media on a Saturday night over a holiday weekend (after sharing them with media in advance but refusing to give them to the Rice family), and the obvious shortcomings of the reports themselves, have all contributed to make the Rice family feel that your office is not committed to securing an indictment in this case. It now appears that the grand jury presentation will be nothing short of a charade aimed at whitewashing this police killing of a 12-year-old child.

### *The Delay in Presenting the Case to the Grand Jury*

Police officer Timothy Loehmann fatally shot Tamir Rice on November 22, 2014. But, to date, your office has not yet presented the case to a grand jury. While we understand the general need to proceed with caution and thoroughness, no reasonable prosecutorial effort should be taking this long, especially under the circumstances of this case.

In sharp contrast to the delay here, recently, in South Carolina and Baltimore, prosecutors moved expeditiously to indict and prosecute officers responsible for fatal police

shootings. In North Charleston, South Carolina, a grand jury indicted police officer Michael Slager on a murder charge on June 8, 2015—just over two months after Slager fatally shot Walter Scott on April 4, 2015. In Baltimore, on August 19, 2015, a grand jury indicted police officer Wesley Cagle for attempted first-and second-degree murder, as well as first- and second-degree assault and use of a handgun in a crime of violence, for his December 28, 2014 non-fatal shooting of Michael Johnson.

- These cases demonstrate that when prosecutors do their job diligently and present an accurate, truthful account of a police shooting to a grand jury, grand juries can and do indict.
- Loehmann shot Tamir before Walter Scott or Michael Johnson were shot, but almost a year later your office still has not presented the case to a grand jury.

When Tamir’s family questioned this long delay, your office repeatedly told them that you were attempting to ensure a thorough investigation. But your release this past Saturday night of two plainly biased “expert” reports leads us to the inescapable conclusion that the true agenda here is to facilitate a presentation to the grand jury that is inappropriately skewed in favor of the police.

### ***The Retention of Pro-Police “Experts” to Improperly Influence the Grand Jury***

Experts are generally not permitted to opine on the ultimate issue (here, whether the use of force was unreasonable) before a grand jury. The unorthodox, if not unprecedented, use of expert reports at this stage of the criminal proceeding is all the more troubling because these reports are clearly designed to exculpate the officers. Typically, biased reports of this type are offered by criminal defense lawyers at trial. Here, it appears your office has abandoned its obligation to diligently pursue criminal charges against the killer of a 12-year-old boy because the shooter was a police officer. We view this as an abuse of the grand jury process. Regrettably, under these circumstances, we fear the grand jury is being utilized to cover up an improper effort to protect police officers who should be subject to the criminal law.

There is no question that the “experts” you selected were biased:

- Lamar Sims: Your office hired Lamar Sims in July 2015—two months *after* he gave a television interview on Denver public access television, which was subsequently posted on YouTube, in which he expressed pro-police opinions about the shooting of a young child playing with a toy gun, a clear reference to the shooting of Tamir Rice.<sup>1</sup> Sims also participated in an event centered on the police’s use of force in March 2015 hosted by your office, where he expressed pro-police sentiments.<sup>2</sup> Your decision to hire Sims, of all the thousands of prosecutors in the country you could have chosen, *after* he made these comments, indicates that you were looking for an expert who was decidedly

---

<sup>1</sup> <http://www.wkyc.com/story/news/investigations/2015/10/12/investigator-video-records-show-tamir-rice-experts-held-pro-police-stance/73833152/>

<sup>2</sup> [http://www.cleveland.com/court-justice/index.ssf/2015/03/three\\_takeaways\\_from\\_county\\_pr.html#comments](http://www.cleveland.com/court-justice/index.ssf/2015/03/three_takeaways_from_county_pr.html#comments)

sympathetic to the police and who would look to excuse Loehmann, not hold him accountable.

- Kimberly Crawford: You hired Kimberly Crawford even though she has been discredited as an expert in this field after the U.S. Department of Justice rejected her opinion in the high profile 1992 fatal Ruby Ridge shootings on the grounds that her legal analysis was flawed, distorted the applicable caselaw, and improperly quoted cases selectively in an effort to exonerate the police in their use of deadly force.<sup>3</sup> If your office was genuinely seeking a neutral expert, why would you select someone whose views on police force the federal government found to be unduly weighted in favor of the police?

In short, neither Crawford nor Sims could fairly be described as independent or neutral. They both have an unmistakable pro-law enforcement bias. Your delay in proceeding to the grand jury for nearly a year, while your office strained to find these two “experts” whom you have misleadingly labeled as neutral, is deeply disturbing and disappointing.

### ***The “Expert” Reports Distort Both the Law and the Facts***

Our concerns with Sims and Crawford are reflected in the substantial deficiencies and inaccuracies in their reports as to both the facts and the law.

As to the facts:

- Both reports are speculative. Remarkably, neither Loehmann nor Garmback have given sworn testimony about what happened and neither “expert” ever interviewed the officers. As a result, both so-called “experts” resort to pure speculation about what they think the officers *might* have seen, said, or thought, including the central assumption that Loehmann believed “Rice posed a threat of serious physical harm or death.”
- Both reports also improperly rely on hearsay—sometimes even multiple levels of hearsay—which is inherently unreliable and legally unsound. For example, Sims goes so far as to say that the statement Loehmann allegedly made to the FBI agent that he gave commands to Tamir before shooting is of “particular import”—even though that statement is plainly hearsay and demonstrably false, as the video makes it clear that there was no time for Loehmann to issue any commands.
- The reports contradict each other. For example, while Crawford repeatedly claims that the video shows Tamir “reaches toward his right side waist and lifts his jacket,” Sims admits that “the video is grainy and it is unclear - from the video - whether Rice reaches for his gun.”
- The reports fail to explore the credibility issues surrounding police claims that the officers warned Tamir three times immediately before shooting, when the 1.7-second time frame makes it apparent that did not happen. The “experts” made no attempt to

<sup>3</sup>

<http://law2.umkc.edu/faculty/projects/ftrials/weaver/dojrubyIVF.htm>

trace back those demonstrably false claims to the officers themselves—the natural source—which would undercut the officers’ credibility.

- Both Sims and Crawford spend much time arguing that Loehmann could not have known that Tamir was a minor or that the gun was a toy. But given the undisputed fact (as shown on the video) that Loehmann shot Tamir within 1.7 seconds of arriving at the scene, no reasonable officer would have had time to make any assessment at all about Tamir’s age or toy (which he was not even holding when Loehmann shot him). No reasonable officer would even have had time to assess whether Tamir matched the description provided by the 911 caller, particularly as Tamir was not on the swings (as the caller had said) but in the gazebo. But according to these so-called “experts,” it is reasonable for police officers to drive into a park (which Sims at least is willing to acknowledge is “a location where there may be children and young people”), and immediately open fire on any African American boy they encounter there.
- The reports ignore the influence of race on the officers’ actions. Would these “experts” really have reached the same conclusion if Loehmann and Garmback had responded to a call in a park in an affluent suburban neighborhood and the 12-year-old they shot within 1.7 seconds of arriving was the Caucasian child of a public figure, celebrity, or professional? We think not.

As to the law, both Sims and Crawford argue that Garmback and Loehmann’s decision to drive their car right up to Tamir, and Loehmann’s decision to then immediately exit the car while shooting his gun, should not be considered in assessing the reasonableness of the use of force. That is not the law. A police officer’s decision to create a dangerous situation is highly relevant in determining whether or not his use of force was excessive. “Where a police officer unreasonably places himself in harm’s way, his use of deadly force may be deemed excessive.” *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008). Police officers are not constitutionally allowed to create a dangerous situation for themselves when one did not exist and then use lethal force to gun their way out of the danger they created.

### ***The Video Shows What Really Happened***

The Sims-Crawford suppositions are especially troubling given the objective video footage of the shooting. There is no dispute that the video shows:

- Tamir was by himself in the gazebo when Loehmann and Garmback drove up. Clearly, he was not threatening or endangering anyone at that time. The officers created the danger the “experts” now use as justification for this homicide.
- Tamir was not even holding the toy gun when Loehmann and Garmback arrived.
- Garmback hurriedly pulled the car right up next to Tamir, so that the passenger side of the car was only a few feet away from Tamir.
- Loehmann immediately jumped out of the car and, within 1.7 seconds, fired two shots at Tamir.

- There was no time for Loehmann or Garmback to have issued any intelligible commands to Tamir, much less for Tamir to respond to any commands, before Loehmann fired.
- Loehmann shot Tamir before Garmback had even fully stopped the car and gotten out.
- After Tamir collapsed to the ground, fatally wounded, neither Loehmann nor Garmback gave him *any* medical assistance. For at least four minutes, they just stood around.
- When Tamir’s 14-year-old sister ran towards her wounded brother crying, Loehmann and Garmback tackled her to the ground, handcuffed her, and put her in their police car—right next to where her brother lay fatally injured.

A reasonable grand jury reviewing this video and other available evidence would conclude that Loehmann and Garmback should face criminal charges. We know that, in part, because at least one independent fact-finder already reached that conclusion. After seeing this video, Judge Ronald B. Adrine of the Cleveland Municipal Court found probable cause to charge Officers Timothy Loehmann and Frank Garmback, writing: “The video in question is notorious and hard to watch. After viewing it several times, this court is still thunderstruck by how quickly this event turned deadly.”

### ***Loehmann Was Plainly Unfit to be a Police Officer***

- Before the City of Cleveland hired him, Loehmann worked as a police cadet for the City of Independence, Ohio. Independence police decided to terminate Loehmann’s employment after an incident on the gun range where Loehmann essentially had a mental breakdown. In the episode, during a firing range examination, Loehmann began crying, was distracted, and was not following instructions. As a result, the supervising officer was forced to confiscate Loehmann’s gun.
- Loehmann’s personnel file documented that he “could not follow simple directions, could not communicate clear thoughts nor recollections, and his handgun performance was dismal.”
- When the supervising officer attempted to discuss the situation with Loehmann, Loehmann told his supervisor “what I want is for you to just shut up.”
- A similar incident had occurred when Loehmann was in the police academy.
- Importantly, Loehmann’s personnel file also documents that he lied to his supervisors on at least two occasions.
- Loehmann’s employment file noted: “It just appears that he is not mature enough in his accepting of responsibility or his understanding in the severity of his loss of control on the range.”

- In September 2013, Defendant Loehmann failed the Cuyahoga County Sheriff Department's written entrance exam earning only 46 points out of 100, on an exam with a passage requirement of a minimum of 70 points.
- Before Loehmann was hired by Cleveland, he applied to work in five different police departments, including Akron, Euclid, and Parma Heights, all of which refused to hire him.

It is clear that Timothy Loehmann should have never been hired by the Cleveland Division of Police. But rather than acknowledging Loehmann as a cadet who was found emotionally unfit for duty, who lied to his supervisors, who failed the police entrance exam and who was rejected by at least five other police departments, your supposed "experts" attempt to reinvent him as a model officer and speculate, without ever having spoken to him, that he acted reasonably in shooting a 12-year-old child where there is no credible evidence that the child posed any threat whatsoever, much less a threat justifying the precipitous use of deadly force. All of this evidence calls into question the credibility of any assumption or claim that Loehmann was reasonably in fear for his life. Under these circumstances, any reasonable observer would question your office's good faith intention to present this case in a proper manner to the grand jury.

***The Department of Justice Already Found Cleveland Police Have a Pattern of Excessive Force***

Finally, we note that neither of your so-called "experts" addressed nor acknowledged the undisputed fact that the shooting of Tamir Rice was carried out by officers from a division that has a well-documented and notorious history of using excessive force. In December 2014, the U.S. Department of Justice found there was reasonable cause to believe that the Cleveland police division engages in a pattern and practice of using unreasonable and unnecessary force. DOJ's findings are scathing and highly relevant.

- DOJ found widespread and longstanding problems in the police department with regard to the excessive use of force and shootings specifically.
- DOJ expressly found that Cleveland police officers fired guns at people who did not pose an immediate threat of death or serious bodily injury to officers or others, and that officers used guns in a careless and dangerous manner.
- DOJ found that the Cleveland police used unreasonable and excessive force on minor children, including one incident where an officer punched a handcuffed 13-year-old boy in the face several times after arresting him for shoplifting.
- DOJ found that the Cleveland police fostered an "us-versus-them" mentality, as evidenced by the war-zone sign hanging in the police vehicle bay that reads: "Forward Operating Base."
- DOJ found that Cleveland police officers too often escalated incidents instead of using accepted tactics to de-escalate tension.

***A Special Prosecutor Is Needed***

The delay in presenting this case to the grand jury, the choice of biased, pro-police “experts,” the multiple deficiencies in the so-called expert reports detailed above, and the irregularity of presenting experts to a grand jury on the ultimate issue are all a remarkable departure from standard grand jury practice. That your office purports to utilize these proposed opinions is especially troubling. Experts who ignore the culture of excessive force and misconduct that pervades this division; who fail to properly credit the video evidence; and who pretend that Loehmann is a model police officer when there is a documented record that he is incompetent, emotionally unstable, immature, and dishonest, are not objective. Your reliance on them is horribly misplaced and terribly disappointing, particularly because, of all the police shootings that have plagued this country in recent years, this case stands out as unique because it involved the homicide of a 12-year-old child.

Unfortunately, in light of the way your office has handled this investigation to date, particularly the release of these improper, biased reports, the Rice family no longer believes your office is discharging its duty in a way that justice and accountability will be achieved. After you give the grand jury the biased “expert” reports produced at your office’s direction (which advocate against indictment), it is apparent that you will not follow the prosecutorial custom of requesting the grand jury to bring a true bill of indictment. Even if you made such a request, the presentation would be self-contradictory and confusing and would be unlikely to result in an indictment.<sup>4</sup>

There is a long history in this country of prosecutors failing to fairly investigate and prosecute allegations of police misconduct. The close institutional alliance between police and prosecutors appears to thwart what should be objective and impartial inquiries. Recognition of this problem recently led the Attorney General of New York to move for independent investigations of all fatal police shootings in his state, and has lead others across the nation to insist on independent investigations in these matters.

We respectfully request that you recuse yourself from this case and that a special prosecutor be appointed to investigate and prosecute this matter, including presentation of the proper evidence to a grand jury. That is the only way that Tamir’s family, the community in Cleveland, and the nation as a whole will have any faith in this process.

---

<sup>4</sup> Should, by some miracle, the grand jury indict despite your efforts, we fail to see how your office could prosecute the case without conflict given that the defense will wave around the defense-oriented expert reports that your office procured.

Should you, as we expect, refuse to appoint a special prosecutor, at least end the pretense and publicly state your position about whether probable cause exists in this case, and whether you will seek an indictment—just as you would in any other murder case.

Sincerely,



Jonathan S. Abady

Earl S. Ward

Zoe Salzman

- c: Subodh Chandra (via email)
- William Mills (via email)
- Matthew Meyer, Assistant Prosecuting Attorney (via email)
- James Gutierrez, Assistant Prosecuting Attorney (via email)