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CUYAHOGA COUNTY PROSECUTOR

# **CUYAHOGA COUNTY PROSECUTOR'S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE**

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## Table of Contents

1. Introduction.....	1
2. Factual Summary.....	2
3. Investigation .....	5
a. Officers on the Scene (Chronological Order) .....	5
1. Patrol Officer Timothy Loehmann .....	5
2. Patrol Officer Frank Garmback.....	6
3. Patrol Officer William Cunningham .....	7
4. Detective Daniel Lentz .....	8
5. The FBI Special Agent .....	9
6. Patrol Officer Ken Zverina .....	10
7. Patrol Officer Ricardo Roman.....	11
8. Patrol Officer Louis Kitko.....	11
9. Patrol Officer Chuck Judd.....	12
10. Patrol Officer Thomas Griffin .....	12
11. Sergeant Janell Rutherford .....	13
b. Dispatchers .....	13
1. Beth Mandl.....	13
2. Constance Hollinger .....	13
c. Witnesses on the scene .....	14
1. Witness #1 .....	14
2. Witness #2 .....	14
3. Witness #3 .....	15
4. Witness #4 .....	15
5. Witness #5 .....	16
6. Witness #6 .....	16
7. Witness #7 .....	16
d. Miscellaneous witnesses.....	17
1. Detective Jeffrey Follmer .....	17
e. Scene Description of the Cudell Recreation Center .....	17
f. Timeline of video .....	18
CAMERA 1 .....	19

CAMERA 2 .....	22
CAMERA 3 .....	23
CAMERA 4 .....	23
CAMERA 5 .....	25
CAMERA 6 .....	25
CAMERA 7 .....	25
CAMERA 8 .....	27
CAMERA 9 .....	28
CAMERA 10 .....	29
g. Ohio State Highway Patrol Accident Reconstruction .....	29
h. BCI Report.....	30
i. Coroner’s Report .....	31
j. Trace Evidence .....	31
k. Experts .....	31
i. Use of Force Experts.....	31
ii. Other Experts .....	32
4. Standard of Review in Police Use of Deadly Force Cases. ....	33
a. Role of the Prosecuting Attorney and Grand Jury.....	33
b. Legal standard governing the use of deadly force by law enforcement officers. ....	35
i. Police officers may not be criminally charged in deadly force incidents unless their conduct violates the Fourth Amendment. ....	35
ii. The prosecutor’s role in the grand jury. ....	36
iii. Under the Fourth Amendment, the tactics used by the officers prior to the use of deadly force cannot be the basis for finding the use of deadly force itself unreasonable. ....	37
5. Analysis .....	41
a. Officers Loehmann and Garmback were dispatched to handle a Code-1 call involving a man with a gun threatening people at Cudell Recreation Center. ....	41
b. Officer Garmback’s decision to use the West 99th Street approach to quickly confront what he had been informed was an armed suspect near the Recreation Center was reasonable. ....	41
i. A suspect pointing a gun at people at a recreation center poses a severe threat to the safety of officers and the public.....	42
ii. The incident conforms to the Cleveland Police Department Active Shooter policy.....	46
iii. Officer Garmback approached the incident using a route commonly taken by First District Officers.....	49

c.	Credible evidence firmly corroborates Officers Loehmann and Garmback's statements that they saw the suspect with a gun.....	50
i.	Forensic video analysis confirms the officers' statements.....	51
ii.	The position of the gun after the shooting and the officers' defensive reaction confirms that they saw the suspect pulling out a gun. ....	56
iii.	Officers Loehmann and Garmback's subsequent statements are consistent with the evidence in this case.....	60
iv.	Independent evidence shows that throughout the day on November 22, 2014, Tamir was pulling the gun in and out of his waistband.....	61
v.	Tamir's replica firearm was functionally identical to a real firearm.....	66
6.	Conclusion.....	69

The following report is a synopsis of the facts and circumstances surrounding the officer involved shooting death of Tamir Rice on November 22, 2014. This report is intended to provide the public with (1) an explanation of the legal standards used to review police use of deadly force (UDF) incidents, and (2) an overview of the facts and the process utilized in determining whether criminal liability is present. The information contained in this report is gleaned from the exhaustive investigation done by the Cuyahoga County Sheriff's Department (CCSD), the Cleveland Police Department Investigative Report (CPD), with input by the Ohio State Highway Patrol (OSP), the Ohio Bureau of Criminal Investigation (BCI), as well as expert reports and opinions.

The purpose of the investigation was to determine whether probable cause existed to show that Cleveland Police Officers Timothy Loehmann and Frank Garmback committed criminal offenses for their respective roles in causing the death of Tamir Rice on November 22, 2014.

## **1. Introduction**

On November 22, 2014, at 3:30 p.m., Tamir Rice, age 12, was shot and killed at Cudell Recreation Center in Cleveland, Ohio by on-duty Cleveland Division of Police (CDP) Officer Timothy Loehmann. When Tamir Rice was shot, he had in his possession an air-soft replica firearm that appeared to be a 1911 Colt pistol.

At the time of this incident the CCPO was finalizing a protocol to be used county-wide in officer use-of-force cases wherein an outside agency would conduct the investigation. It was not until January 4, 2015 that CCSD was designated as the investigative agency. On January 15, 2015, the City of Cleveland Law Department provided the investigative file to the CCPO, which designated a walled-off prosecutor to review and redact any *Garrity*<sup>1</sup> information, and who then provided the redacted CPD file to the CCSD. The CCSD received the CPD investigative file on February 4, 2015.

The CCSD started the investigation from scratch by gathering all relevant (non-*Garrity*) evidence from the CDP file. The CCSD then interviewed 29 witnesses and also engaged OSP, as well as BCI, to utilize their advance knowledge in specific areas of crime scene analysis. The OSP submitted a report of an accident re-construction analysis and BCI submitted reports on video break down and 360 scan analysis of the shooting scene.

Further, CCPO engaged three use-of-force experts, as well as a forensic video consultant. These experts provided CCPO with written reports stating their findings and opinions. Attorneys representing the Rice family in a federal civil lawsuit also provided the prosecutor's office with three expert reports. These included two police procedure experts and a biomechanics and accident reconstruction expert.

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<sup>1</sup> *Garrity* statements are given by a public employee during an internal investigation under threat of the employee's termination from office, are compelled statements, and are subject to the constitutional protections of the Fifth and Fourteenth Amendments. *State v. Jackson*, 125 Ohio St. 3d 218, 218, 2010-Ohio-621, 927 N.E.2d 574, 576, (Ohio 2010), citing *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562

## 2. Factual Summary

On Saturday November 22, 2014 at approximately 10:30 a.m., Tamir Rice (12 years old) along with his sister (14 years old), his good friend Witness #2 (16 years old), and Witness #2 cousin walked over to the Cudell Recreation Center. Witness #2 lived across the street from Tamir on West 99th Street. Over the year that the Rice family lived at that location, Witness #2 became good friends with Tamir.

Tamir was a regular at the Recreation Center and he usually spent five days a week at there, which is located a mere two blocks from his house. At that time, Witness #2 had owned a replica firearm, an airsoft pistol that fired plastic BBs, that his Witness #2's father had previously purchased at a local Wal-Mart. Tamir and Witness #2 agreed that day that Witness #2 would give the replica firearm to Tamir and Tamir would give Witness #2 a cell phone that only the Wi-Fi worked on, so that Witness #2 could access the internet.

According to Witness #2, that replica firearm came with an orange tip to signify it was a toy and not a real gun. Sometime before the shooting, the replica firearm malfunctioned and Witness #2 took it apart, fired it, but was unable to put the orange tip back on the gun. Witness #2 also stated that before November 22, 2014, Tamir had borrowed the replica firearm from Witness #2 on several occasions and even kept the gun overnight. On that very day, Witness #2 warned Tamir to be careful with the gun because the orange tip was missing and because the replica firearm looked like a real gun.

During the morning of November 22, 2014, Tamir made the exchange with Witness #2 and put the replica firearm in his backpack. They then went into the Recreation Center. At around noon, Tamir and his sister went home back home and then returned to the Recreation Center after 1:00 p.m. Witness #2 indicated that he was supposed to get the gun back that day, but never did.

Video surveillance that afternoon shows Tamir generally playing around with the gun outside the Recreation Center at various times during the day. The surveillance video also indicates that friends of Tamir at various times also played with the gun outside the Recreation Center. Tamir can be seen pulling the replica firearm from his right side waist, putting the gun back into his right side waist, shooting at car tires, and pointing it at Witness #2, shooting at his sister, pointing out towards nobody, showing his friends and generally playing with the replica firearm.

At around 3:11 p.m., the 911 caller entered the park area and sat down at the far bench under the gazebo outside the Recreation Center. The 911 Caller was waiting for a bus to arrive. At 3:24 p.m., the 911 Caller made the following 911 call to Cleveland Police Dispatcher Constance Hollinger:

**911 Caller:** Hi, how are you?

**Dispatcher:** Good.

**911 Caller:** I'm sitting here in the park by West Boulevard by the West Boulevard Rapid Transit Station. There's a guy with a pistol. It's probably fake, but he's like pointing it at everybody.

**Dispatcher:** So you're at the rapid station?

**911 Caller:** (coughing)

**Dispatcher:** Are you at the Rapid Station?

**911 Caller:** No, I'm sitting across the street at the park.

**Dispatcher:** What's the name of the park? Cudell?

**911 Caller:** Cudell; yes. Guy keeps pulling it in and out of his pants. It's probably fake, but you know what? It's scaring the shit out of me.

**Dispatcher:** What does he look like?

**911 Caller:** He has a camouflage hat on.

**Dispatcher:** Is he black or white?

**911 Caller:** He has a gray, gray coat with black sleeves; gray pants on.

**Dispatcher:** Is he black or white?

**911 Caller:** I'm sorry.

**Dispatcher:** Is he black or white?

**911 Caller:** He's black.

**Dispatcher:** You said he had a camel jacket and gray pants?

**911 Caller:** No he has a camouflage hat on. You know what that is?

**Dispatcher:** Yes.

**911 Caller:** Desert Storm and his jacket is gray, and it's got black sleeves in it. He's sitting on a swing right now, but he keeps pulling it in and out of his pants, and pointing it at people. He's probably a juvenile; you know?

**Dispatcher:** You know the guy?

**911 Caller:** No, I do not.

**Dispatcher:** Do you want to leave your name and number?

**911 Caller:** Huh?

**Dispatcher:** Do you want to leave your name and number?

**911 Caller:** Sure, I'm getting ready to leave, but I wanted...

**Dispatcher:** Sir, what is your name?

**911 Caller:** [Caller gives his name].

**Dispatcher:** What's the phone number?

**911 Caller:** [Caller gives his phone number]; I'm getting ready to leave, but you know what? He's right here by the, you know; youth center or whatever, and he keeps pulling it in and out of his pants. I don't know if it's real or not.

**Dispatcher:** Ok; we'll send a car out there; thank you.

**911 Caller:** Thank you.

In the City of Cleveland, the dispatch center has a two-step process before the information is dispatched. A "call taker" receives the initial call, vets the information and then relays it electronically to the actual dispatcher. On this date the call taker did not inform the dispatcher of all of the information. Specifically, the call taker did not inform the dispatcher that the "guy" with the gun "was probably a juvenile" and that the gun "is probably fake."

The dispatcher, after some difficulty getting a car to respond because other units were busy, had "Adam 2-5" (Garmbach and Loehmann) respond to a Code 1 (the highest priority call) to Cudell Recreation Center. Officers Garmbach and Loehmann were only minutes away and agreed to take the call after clearing a burglary alarm. The verbatim dispatch is as follows:

**Dispatcher:** Hey, we have a Code-1 at Cudell. Everybody is tied up on priorities. Supposed to be a guy sitting on the swings pointing a gun at people.  
\* \* \*

**Adam 2-5:** We'll take it. The alarm check is okay.

**Dispatcher:** Alright thanks; Charlie 20 just disregard them. Alright, it's at Cudell Rec Center; 19, 10 West Boulevard; 1, 9, 1, 0 West Boulevard. [911 caller] calling. He said in the park by the Youth Center, there's a black male sitting on the swing. He's wearing a camouflage hat, a gray jacket with black sleeves. He keeps pulling a gun out of his pants and pointing it at people. Code 1-8, 4, 1, 8: 84, 18.

With that information, Officers Garmback and Loehmann drove to the Recreation Center taking West 99th Street, which is a dead end street. They approached by driving past the dead and over the grass, coming up to the swing set area where Tamir was reported sitting. Tamir was actually sitting on the last bench under the gazebo which is located directly west from the swing set.

Officer Garmback, who was driving, then approached the gazebo. Since it had recently snowed, the ground was wet and covered with wet leaves and snow. Due to the conditions, the police car slid about 40 feet and stopped right in front of the gazebo. Simultaneously with the car sliding, Tamir took a couple of steps northwest toward the open field, and then approached the sliding police car.

As the car came to a sliding stop, Officer Loehmann immediately exited the patrol car from the passenger door, and as he did, Tamir reached into his right side waist band. At that moment, Officer Loehmann discharged his firearm within two seconds of exiting the car. Officer Loehmann fired two shots, one of which hit Tamir in the abdomen and caused him to fall in the area between the patrol car and the gazebo.

Tamir's sister, who was outside near the main entrance on the other side of the Recreation Center, ran through the Recreation Center through the North Door toward where Tamir was lying. Officer William Cunningham, a CDP officer working off-duty to provide security at the Recreation Center, also ran out to the gazebo and, along with Officer Garmback, restrained Tamir's sister, who was in a state of panic. Officers Cunningham and Garmback handcuffed her and placed her in the back of the patrol car.

Detective Daniel Lentz and an FBI Special Agent who were in that area investigating a bank robbery heard the call of shots fired and proceeded to the Recreation Center and arrived within three minutes. Dispatch records indicate that the shots fired call was made at 3:31:57pm and is as follows:

**ADAM 2-5:** Radio, um, shots fired! Male down. Um, black male, maybe 20 [years old]. Black revolver-black handgun. Send EMS this way. And a road boss.

**Dispatcher:** Are you at Cudell?

**ADAM 2-5:** Yes, ma'am. At Cudell. [Unintelligible] got a gunshot wound to the abdomen.

**ADAM 2-1:** (another patrol car) Are they okay down there?

**ADAM 2-5:** We're fine. Rookie hurt his ankle.

The Special Agent was also a national registered paramedic trained to treat gunshot wounds and had served as a combat medic with the Marine Corps. The Special Agent immediately began to treat Tamir and immediately realized that Tamir's bullet wound was very severe and required surgery. The Special Agent had Officer Garmback assist in him in providing first-aid to Tamir until the Fire Department arrived approximately eight minutes later. An ambulance arrived shortly after the Fire Department, which then immediately rushed Tamir to MetroHealth Hospital.



Despite undergoing surgery to repair the damage caused by Officer Loehmann's gunshot, Tamir Rice died at MetroHealth Hospital several hours after the incident.

### **3. Investigation**

The witnesses and information contained in this report are found in the exhaustive CCSD investigative file and are deemed relevant to the legal inquiry of criminal liability of Officers Garmback and Loehmann. A complete rendition of all witnesses and facts developed throughout the investigation are contained in the CCSD file that has been made available on the CCPO website.

#### **a. Officers on the Scene (Chronological Order)**

##### **1. Patrol Officer Timothy Loehmann**

Officer Loehmann was hired by the City of Cleveland on December 4, 2013. Officer Loehmann went through the Cleveland Police Academy. Loehmann started working patrol as a trainee officer in September, 2014. He was in his "training" phase and under the supervision of his Field Training Officer (FTO) Garmback at the time of the incident.

Officer Loehmann exercised his Fifth Amendment rights to remain silent, but did submit a written statement to the CCSD. It reads:

I, Timothy Loehmann, state the following:

I was in the company of my partner, Frank Garmback, working Car 1 Adam 25. It was Saturday, November 22, 2014. Officer Garmback was my training officer I was on probation. I had previously worked at the Fourth District (4<sup>th</sup>). I worked many cases, including homicides, aggravated robberies with a gun, and assaults with weapons. In the Fourth District, I was involved in many active shooter cases. I started around 2:30 p.m. on November 22, 2014. We received a call to proceed to St. Ignatius Church on Lorain and West Boulevard. While speaking to the Priest at St. Ignatius and finishing the call, we received a broadcast of a "male waiving a gun and pointing it at people" at the Cudell Recreation Center. The description was of a Black Male, camouflage hat, grey jacket, and black sleeves at or near the swing set. We responded to a Code 1.

Officer Garmback was driving and I was working the radio. The other police cars were tied up and answering the calls. Our car was the closest car. Car A-26 was coming from 150<sup>th</sup> and Lorain, about 3 to 4 miles away. Officer Garmback told me to contact radio and advised that we would "proceed." We went from St. Ignatius to the Cudell Recreation Center. We approached from 99<sup>th</sup> Street. 99<sup>th</sup> Street ends at the park and near the swing set. This entry to the park avoids the pylons and puts us closer to the location where the suspect is known to be.

When we arrived the suspect was not at the swing set. As we were even with the swing set, we observed a male matching the description given by the radio seated under the Gazebo. The male was wearing a camouflage hat and grey jacket with black sleeves. I saw the suspect, Officer Garmback drove toward the Gazebo. The driving conditions were cold and wet with a layer of snow (like a dusting). I estimated we were traveling about 10 MPH based on the weather conditions. I saw

the suspect pick up an object and stick it down into his waistband and he stood up and walked toward the Recreation Center. Frank said "watch him he's going to run." We feared he was going to run into the Recreation Center. As the car was approaching, the suspect turned towards our car. Officer Garmback attempts to stop the car as the male turns towards the car. The car's anti-lock brakes rumbled as the car slid to a stop. As car is slid, I started to open the door and yelled continuously "show me your hands" as loud as I could. Officer Garmback was also yelling "show me your hands."

I kept my eyes on the suspect the entire time. I was fixed on his waistband and hand area. I was trained to keep my eyes on his hands because "hands may kill." The male appeared to be over 18 years old and about 185 pounds.

The suspect lifted his shirt reached down into his waistband. We continued to yell "show me your hands." I was focused on the suspect. Even when he was reaching into his waistband, I didn't fire. I still was yelling the command "show me your hands."

I tried to get to the back of the car. We are taught to get behind the cruiser for cover. We are taught shoot and move. You do not want to be a sitting target. The suspect had a gun, had been threatening others with the weapon and had not obeyed our command to show us his hands. He was facing us. This was an active shooter situation.

I had very little time as I exited the vehicle. We are trained to get out of the cruiser because "the cruiser is a coffin." I observed the suspect pulling the gun out of his waistband with his elbow coming up. Officer Garmback and I were still yelling "show me your hands." With his hands pulling the gun out and his elbow coming up, I knew it was a gun and it was coming out. I saw the weapon in his hands coming out of his waistband and the threat to my partner and myself was real and active.

I fired (2) two shots. Based on "tap-tap", training, I shot towards the gun in his hand. After two shots, I went to the rear of the cruiser. I planted my foot and twisted my ankle. After suspect was down, I didn't know if the threat was over. Frank Garmback continued to yell "show me your hands."

## 2. Patrol Officer Frank Garmback

Officer Garmback is a First District Patrol Officer and had been with the Department (at the time of the incident) for seven and a half years.

Officer Garmback exercised his Fifth Amendment rights to remain silent, but did submit a written statement to the CCSD. It reads:

I, Frank Garmback state as follows in regards to the Tamir Rice shooting incident at Cudell Recreation Center on November 22, 2014.

1. I was working 1 Adam 25 on the afternoon of November 22, 2014 with Ptl. Loehmann. I started at 1430 (2:30 p.m.) Ptl. Loehmann was a new officer, on probation at the time. I was training him.

2. Very early in our shift, we responded to an alarm call at St. Ignatius Church at 10205 Lorain Road. While finishing up that call, we overheard a Code 1 broadcast reporting a male "waiving a gun and pointing it at people" at Cudell Recreation Center. It was radioed that there was a black male at Cudell waiving and pointing a

gun. The male was threatening and scaring people with a handgun. He was on or near the swing set. We responded to Code 1.

3. I made the decision to approach the park from West 99<sup>th</sup>. West 99<sup>th</sup> dead ends at the park, very near the swing set. From there, I know we would have a good view of the swing set, and good access, if necessary, as that is where the male was reported to be. Unlike the parking lot, there is no barrier to automobiles.

4. I observed that the male that was not at the swing set. When I did not see him there I entered the park and drove by the swing set toward the gazebo. As we moved in to the park, I saw the male in the gazebo. He matched the description given over the radio: black male, camouflage hat, and a gray sweatshirt/jacket with black sleeves. He saw us and started walking toward the Recreation Center Building.

5. I believed at first the male was going to run. I think I told my partner "watch him he's going to run." However, he stopped and turned towards our cruiser.

6. I was travelling at 10 to 12 MPH once in the park.

7. Part of my intentions was to keep him away from entering the Recreation Center Building.

8. The cruiser did slide as I applied the brakes. I am not sure how far. The car did not stop where I intended.

9. I first saw the gun that the male had a gun about the time Ptl. Loehmann exited the cruiser. The male was pulling it from the right front area of his waistband. I thought the gun was real.

10. I believe the cruiser windows were up at the time of these events, but I am not sure.

11. Both Ptl. Loehmann and I directed the male to show his hands.

12. I thought the male was an adult. Over 18 years old.

13. I saw the gun loose on the ground, a few feet from the male after he was shot. I moved it further away from him.

### 3. Patrol Officer William Cunningham

On the day of the incident, Officer Cunningham had been employed as a Cleveland Police Officer for over fourteen years. On November, 22, 2014, Officer Cunningham, in full uniform, was working part-time security inside the Cudell Recreation Center at the sign-in desk during the time of the shooting.

The security cameras are locked in a separate room and were not available for Officer Cunningham to view when sitting at the sign-in desk. Officer Cunningham was unaware that Tamir was pointing the replica firearm at various individuals at the Recreation Center that afternoon.

At some point (seconds after the shots were fired) a youth ran up to Officer Cunningham and told him that the police had just shot someone. Officer Cunningham went out to investigate and heard Tamir's sister scream and run toward the crime scene. At that point, Officer Cunningham ran after her as Officer Garback tried to stop her.

Officer Cunningham indicated that Tamir's sister was kicking and screaming, and would not calm down. Thus, Officer Cunningham assisted Officer Garback in placing handcuffs on her. Officer Cunningham further stated that Tamir's sister was not tackled, but since the ground was slippery as she ran toward the scene Officer Garback put out his arms and her feet slipped out from under her and she fell. It was Officer Cunningham's idea to place her in the back of the car since she would not calm down.

Officer Cunningham indicated that Officer Loehmann appeared upset and distressed. Within 90 seconds of the shooting, Officer Cunningham asked Officer Loehmann what happened. Officer Cunningham indicated that Officer Loehmann stated to him that, "he didn't give me a chance... he reached for the gun and he gave me no choice. There was nothing I could do."

Officer Cunningham further indicated that when he first observed the weapon on the ground, he believed it was real, and that he helped secure the scene until back-up arrived. Officer Cunningham also observed the arrival of the FBI Agent who started to administer first aid to Tamir with the help of Officer Garback.

#### 4. Detective Daniel Lentz

Detective Lentz, a Marine Corps veteran, is an 18-year veteran of the CDP (assigned first district major crimes division) was in the company of an Federal Bureau of Investigation (FBI) Special Agent on the date in question investigating an unrelated bank robbery. They were in the area of West 117th Street when they heard the broadcast of shots fired. Det. Lentz stated: "We didn't know what we were approaching. I just know there was a call for shots fired. I didn't know if it was an active shooter. I didn't know if the officers had been shot or if the officers shot someone else, or just shots fired in general."

Det. Lentz and the FBI Agent proceeded to the Cudell Recreation Center where the FBI Agent immediately began administering first aid to Tamir who was lying on the ground. Det. Lentz observed the scene with his attention drawn to the gun lying within 20 feet of Tamir. Initially, Det. Lentz thought the gun was real, but after noticing the magazine was separate from the gun, Det. Lentz saw a green ball, and at that point, realized that the magazine and ammunition were not real. Referring to his experience and knowledge of firearms (including teaching classes as a Concealed Weapons (CCW) Instructor) he stated that he thought the weapon looked 1000% real.

At that point a male (later identified as Tamir's older brother) arrived on the scene, tried to enter past the crime scene tape, and was detained and put in another squad car. When Det. Lentz attempted to calm this individual down, he spit in Det. Lentz's face. Det. Lentz additionally had several interactions with the female in the original squad car (Tamir's sister) but was able to calm her down, and lowered the rear driver side window for her.

Det. Lentz, after talking to Tamir's sister, had trouble believing that that Tamir was 12 years old. Det. Lentz was under the impression that Tamir was between 17 or 18 years old.

## 5. The FBI Special Agent

The FBI Special Agent (SA) has been with the FBI since 2012 assigned to the Cleveland Field Office since the beginning of his career. Currently, he is assigned to the Violent Crime Task Force with a focus in Bank Robberies and serves as the Division Bank Robbery Coordinator. Prior to joining the FBI, the FBI Agent was a Rochester Police Officer from January 2010 to September 2012. He has four and a half (4 ½) years of service in the United States Marine Corps as an Infantryman as well as Reconnaissance. The FBI Agent is also currently serving in the United States Air Force National Guard (New York) Para-Rescue. Through his duties in the Air Force he is involved in civilian combat search and rescue and is a National Registered Paramedic. The FBI Agent additionally was deployed to Afghanistan while serving in the Air Force.

On Saturday, November 22, 2014, the FBI Agent was with Cleveland Police Detective Daniel Lentz following up on an unrelated bank robbery investigation. The FBI Agent said:

“At approximately 3:30pm we heard a broadcast over the CDP emergency dispatch for a shooting. We initially thought that a subject was shot and he was fleeing, that quickly changed when they qualified it and said the individual was shot and they were requesting fire and EMS respond. We made it there in three (3) minutes after the shooting happened ... as I approached the officers I asked for any first aid equipment, medical gear, anybody that has any of that to bring it over here. They didn't have any of that so I said ok give me a pair of rubber gloves and I walked over to Tamir Rice and began to assess him and do the medical treatment I could.”

The FBI Agent at first did not see Tamir move as he lay on his back, on the concrete, with his coat open and his shirt partially pulled up, exposing his abdomen. As he was assessing Tamir, the FBI Agent told Tamir that he was a paramedic and he was there to help. Tamir responded with a nod of his head and he reached for the FBI Agent's hand. The FBI Agent afterward related his impression of the injury:

“[T]he reality of an injury like that is that he needed bright lights and cold surgical steel, he needs a surgeon to repair that ... he needs to go to surgery, that's the end all result, that's the only thing that is going to repair the damage. The only thing we were doing on scene was just to keep him alive long enough to get to the hospital. He needed blood products and he needed surgery.”

The FBI Agent also indicated that Tamir told him his name and made a reference to a gun, but does not recall exactly what he said. Officer Garmback also assisted the FBI Agent in administering first aid, and that at one point, the FBI Agent felt threatened by a disturbance that occurred as Tamir's older brother came on to the scene.

The FBI Agent also stated that he heard Tamir's sister in the backseat of the squad car scream that Tamir was only 12 years old. The FBI Agent stated that this surprised him, because Tamir's size gave the Agent the impression of an older male.

After making sure that Tamir was on his way to the hospital with EMS, the FBI Agent turned his attention to the injured Officer Loehmann. He stated that Officer Loehmann was

distraught and declined assistance from the FBI Agent. The FBI Agent specifically described his interaction within 10 minutes of the shooting with Officer Loehmann this way:

“he seemed like a guy that was put in a very difficult situation and had to make a very quick decision based upon what he believed was an imminent fear of death or serious physical injury to himself and reacted to it. Either way I don’t believe it was a situation he wanted to be in.”

Officer Loehmann told the FBI Agent in what the Agent believed to be a “spontaneous utterance... he had a gun and he reached for it after he told him to show his hands.” The FBI Agent told him he was only there to see if he needed medical attention.

The FBI Agent further stated Officer Loehmann seemed to be in a lot of pain, but that Loehmann said he would wait for the EMS to arrive to get medical assistance. The FBI Agent further described Loehmann’s demeanor: “I think it was a very difficult situation for him to deal with and you knew probably now as the adrenaline is wearing off, I think the realization is kicking in that he just had to shoot somebody.”

The FBI Agent also mentioned that he did not see the weapon but heard the officers talk about it. After seeing Officer Loehmann, Det. Lentz and the FBI Agent asked Sergeant Janell Rutherford if they could assist in any way and were told to make sure they were entered into the crime scene log. They then left the scene.

#### 6. Patrol Officer Ken Zverina

At the time of the incident, Officer Zverina had been a CDP officer for 3 ½ years and assigned to the First District his entire career. On 11/22/14 Officer Zverina was partnered with Officer Roman driving 1-Adam-26.

At about 3:30 p.m. as Patrol Officer Zverina with Officer Roman were clearing a domestic dispute when they heard a broadcast of a “man with a gun” at Cudell Recreation Center. While in route to Cudell they heard “shots fired send EMS” and six minutes later they arrived on scene and observed an unknown male (the FBI Agent) near the suspect. The FBI Agent asked Officer Zverina for medical equipment and Zverina responded they did not have any.

Officer Zverina observed Tamir lying on the pavilion floor with his head facing south and his legs facing north. Officer Zverina did not hear Tamir talking but did observe him breathing. Officer Zverina further stated that he observed a full frame, black semi-automatic handgun just north of where Tamir was lying on the grass and described Tamir as 18-20 years old, 6 feet tall, and about 200 pounds.

Officer Zverina did not have any conversations with Officers Loehmann or Garmback but did hear Officer Loehmann stating that his ankle was in pain. At that point, Officer Zverina was tasked with setting up a perimeter to protect the scene when he encountered a large black male who breached the crime scene tape and took up a fighting stance. With the help of other officers, Officer Zverina was able to peacefully place that individual into the back of a squad car parked nearby. Immediately after, a black female approached from the same direction stating that she was Tamir’s mother. Officer Zverina obtained permission from Sergeant Rutherford to have the mother ride in the EMS wagon with her son.

Officer Zverina's stated that the gun appeared to be real and that he did not learn that it was a replica until sometime after. He was also unaware that Tamir was only 12 years old.

#### 7. Patrol Officer Ricardo Roman

At the time of the incident, Officer Roman had been employed as a CDP officer for three years and was partnered with Officer Zverina on the day in question. After clearing a domestic dispute he heard the dispatch of a "man with a gun" at the Cudell Recreation Center as they were in route they heard Officer Garmback's dispatch of "shots fired" and at that point Officer Roman did not know who was shot.

Officer Roman was driving the car, and at 3:34 p.m., they arrived at the Cudell Recreation Center from West Boulevard, parking on the south side of the lot facing east. Officer Roman's initial observation was that there was a black automatic gun and magazine clip near where the suspect was lying, which he believed to be real. Officer Roman also described the suspect as a black male, early twenties and easily over 200 pounds. Officer Roman stated that when he observed the suspect he was experiencing shallow breathing.

As they arrived, Officer Roman observed Officer Garmback assisting the FBI Agent in administering first aid to Tamir. Officer Roman also observed the incident with Tamir's brother, as well as Tamir's mother arriving on the scene.

Officer Roman stated he did not have any conversations with Officers Loehmann (but based on Officer Roman's observations he appeared to be very upset) and Garmback about what happened, except that he did briefly talk to Loehmann about his ankle injury, and his main task on the scene was to guard the perimeter.

#### 8. Patrol Officer Louis Kitko

Officer Kitko has been employed a CDP officer for 18 years and was assigned to a one man car, on another assignment, on the day in question when he heard the broadcast of "shots fired" with a request for EMS. Officer Kitko arrived on the scene at 3:36 p.m.

Upon arrival, Officer Kitko observed the suspect (Tamir) lying on the ground with his head facing south with a firearm laying close to his body. Officer Kitko stated that the gun appeared real and that the male looked to be 19 or 20 years old. Officer Kitko called the Cleveland Police Officer's Union since he had been on three use of deadly force scenes before.

Officer Kitko did talk to Officer Loehmann about what happened on scene and stated that Officer Loehmann was very emotional and upset about the incident, and that they may have prayed together in the back of the ambulance. Officer Kitko at the time of the interview could only recount the generics of Officer Loehmann's statement to him about what happened. Officer Kitko stated that Officer Loehmann told him at the scene that they were "yelling commands at the male, they stopped the car and the male went for the firearm and tried to pull it out," and that was when Officer Loehmann shot him.

Officer Kitko recounted that he observed a black male (Tamir's brother) breach the crime scene tape yelling and balling up his fist. Officer Kitko further observed that other officers placed him in a squad car. Officer Kitko also heard Tamir's sister in a squad car yelling and he observed Sergeant Rutherford calm down Tamir's mother, subsequently

getting her to ride with EMS to the hospital. Officer Kitko also advised the Cudell Recreation Center Staff that they would need a copy of the surveillance video.

Officer Kitko was only on scene for 30 minutes.

#### 9. Patrol Officer Chuck Judd

Officer Judd, a 15-year veteran of CDP who has spent his entire career in the First District, stated that on the day in question he was on patrol with rookie Officer Brian Taylor, who was in the first stage of the Field Training (FT) program. Officers Judd and Taylor heard the broadcast of an officer involved shooting. Officer Judd traveled with lights and sirens on to the Cudell Recreation Center going down West 99th Street, which dead ends, and up over the curb into the park. The route taken by Officer Judd was the exact route taken by Patrolman Garmback. When asked why he took that route, Officer Judd stated that it is common practice among by First District patrol officers to take that route because the officer would have a good view of everything that is going on in the park, and because it gives the officers a tactical advantage as opposed to coming in through the parking lot.

Officers Judd and Taylor arrived at 3:37 p.m. Officer Judd's initial observation of the male (Tamir) laying on the ground was that he was a 18 or 19 year old black male, weighing 200 pounds, and that he did not look like a 12 year old. Officer Judd analyzed the scene immediately, instructing Officer Taylor to assist him in placing yellow tape around the scene. According to Officer Judd, within minutes after his arrival, a large crowd started to gather nearby.

Officer Judd also encountered Tamir's brother breaching the yellow tape and was able to talk to him and put him in the back seat of Officer Judd's squad car. Sometime after that, Officer Judd assisted Sergeant Rutherford in getting Tamir's mother in the EMS vehicle.

Sergeant Rutherford instructed Officer Judd to follow EMS to the hospital. Officer Judd had Officer Taylor ride in the back of the EMS vehicle with Tamir as Officer Judd (after removing Tamir's brother from his squad car to another squad car) followed EMS to the hospital. Officer Judd was on the scene for approximately 15 minutes.

#### 10. Patrol Officer Thomas Griffin

Officer Griffin has been a CDP officer for 21 ½ years with the majority of his time as a patrol officer and some experience as a vice detective.

On November 22, 2014, while on patrol in the First District, Officer Griffin heard the broadcast of shots fired at Cudell Recreation Center and then responded to the scene. At the scene, Officer Loehmann told him that he thought he injured his ankle when he dove to the back of his car taking cover.

Surveillance video shows the weapon just north of Tamir's feet and Officer Griffin putting a bag over the weapon. Officer Griffin then assisted in setting up the perimeter and maintained the crime scene log until the scene was cleared.

Officer Griffin stated that within a week he was able to talk to Officer Garmback about what happened. Officer Garmback stated to Officer Griffin "that they pulled up saw a suspect matching the description and thought he might run, as they pulled up the suspect



started to walk toward them as he attempted to stop but could not and slid up to the gazebo. As he walked up [the suspect] pulled up his shirt and drew a gun from his waistband.” Officer Garmback also stated to Officer Griffin that both he and Officer Loehmann were yelling commands as they slid to “put up your hands.”

Officer Griffin also talked to Officer Loehmann within a week of the incident. Officer Loehmann told him that “the suspect pulled up his sweatshirt and then pulled a gun out of his waistband and that he saw the gun in the suspect’s hand and it really looked big, as well as that he had no choice.” Officer Griffin stated that Officer Loehmann still seemed like he was in a daze over the incident.

#### 11. Sergeant Janell Rutherford

Sergeant Rutherford was not interviewed as part of the CCSD investigation because of the parameters imposed under what is known as “Garrity” law. Facts developed throughout this investigation indicate that Sergeant Rutherford was the only “road boss” on shift that afternoon and she arrived on scene at 3:43 p.m. Sergeant Rutherford was the senior officer on scene and would have taken charge of the scene at that time.

#### **b. Dispatchers**

##### 1. Beth Mandl

Beth Mandl was the person who dispatched the call to Officers Garmback and Loehmann on November 22, 2014. Ms. Mandl has been a dispatcher for Cleveland since December, 2010. According to standard operating procedure, Ms. Mandl would have dispatched the information given to her electronically after being vetted by the call taker.

On the day in question, Ms. Mandl stated that when the call appeared in her queue of calls to be assigned, there were no cars free that she could assign to respond. She called for a “road boss”. Ms. Mandl then dispatched the call to two car: A26, A25 (Garmback and Loehmann) that were able to clear from their current assignment.

After dispatching the initial call, Ms. Mandl managed the request by Officer Garmback for EMS after checking to make sure the officers were not injured, as well as follow up requests by Officer Garmback to “step it up” regarding the EMS. On both occasions, Ms. Mandl informed Officer Garmback that EMS had been advised.

Initially, Ms. Mandl did not realize it was a police shooting and once she realized an officer discharged his weapon, she notified her supervisor to notify the Chief of Police, District Commander, Use of Deadly Force Investigation Team (UDFIT), Union Representative, all commanders, and the Safety Director.

##### 2. Constance Hollinger

Constance Hollinger has been a dispatcher for over 19 years, which includes being a “call taker” and a “dispatcher.” According to Ms. Hollinger, it is the responsibility of the call taker to get pertinent information, including the reason for the call, and send the vetted information electronically to the dispatcher to handle the case.

Ms. Hollinger did remember this particular call, but on the advice of union attorneys, did not tell Sheriff's investigators why the information of the gun being "probably fake" and Tamir being "probably a juvenile" was not sent to the dispatcher.

### **c. Witnesses on the scene**

#### **1. Witness #1**

Witness #1 stated that on the afternoon of November 22, 2014, he was sitting at the gazebo waiting for a bus when he observed an "older looking" black male who was walking from the Cudell Recreation Center. The male (Tamir) walked on the sidewalk in front of him but closer to the parking lot.

Witness #1 stated that the male then started to act "gangster" by pulling a gun in and out of his waistband and observed that specific motion at least 6 or 7 times. Witness #1 further stated that in 2012 he had been a victim of a previous assault and because of the actions by the male (Tamir) he became frightened and he refused to make eye contact with him.

Witness #1 recalled that at one point the male pulled the gun out in front of a passerby and pointed the gun directly at the person's face as she walked by him on the sidewalk. (Surveillance video captures this interaction between Tamir and Witness #6).

Witness #1 further stated that when the male walked back toward the recreation center and away from him, he took out his cellular telephone to place a call to a 911 dispatcher. Either during, or just after the 911 call, Witness #1 stated that the male walked back towards him, walked past him on the sidewalk and sat on the swing located in the park. He stated that because he had his "hoodie" up over his head, he was trying to conceal the fact that he was on the telephone from the male. He stated that at one point he was afraid that he may be shot in the back if he had gotten up and walked toward the back of the transit station.

Witness #1 stated that he kept peeking at the male on the swings, and when he saw the male had his back to him, he got up from the bench and calmly walked toward the transit station. He stated that he got on the bus and headed downtown. Witness # 1 stated that he did not know what had happened after he placed the 911 call until either later during the evening's late local news or the next day.

#### **2. Witness #2**

Witness #2 lived across the street from the Rice family and during the year that the Rice's lived there Witness #2 and Tamir became good friends.

Sometime before November 22, 2014, Witness #2's father had bought Witness #2 an air soft replica 1911 colt pistol and sometime later it malfunctioned. Witness #2 took it apart, fixed it, but could not get the orange tip back on the gun. Previous to November 22, 2014, Witness #2 had given the gun to Tamir to play with and Tamir on several occasions kept the replica firearm at his house overnight.

On the day in question it was agreed between Witness #2 and Tamir that they would trade the replica firearm for a cell phone so that Witness #2 could receive Wi-Fi. Witness #2, along with his cousin, Tamir, and Tamir's sister went to the Cudell Recreation Center. Witness #2 stated that Tamir would be at the Cudell Recreation Center for at least five days a week playing around both there and at the park nearby. That morning, Witness #2 specifically warned Tamir that someone could mistake the replica firearm for a real gun.

According to Witness #2, that morning Tamir was shooting the pellets at Witness #2, Witness #2's cousin, and was pointing the gun at his sister. Witness #2 also stated that he was supposed to get the gun back from Tamir that day, but the two never met up.

Witness #2 stated that he texted Tamir, later in the day, and did not get an answer. Witness #2 was at McDonald's on West 105th Street when he heard that Tamir had been shot.

### 3. Witness #3

Witness #3 knew Tamir from hanging out at the Cudell Recreation Center with Tamir. Witness #3 stated that Tamir and Witness #2 would always be together and that they were "play brothers."

On November 22, 2014, Witness #3 encountered Tamir at the Cudell Recreation Center with the replica firearm playing near the temporary trailers that were set up behind the Marion Seltzer Elementary School. The School is located directly northeast of the Cudell Recreation Center between the swing set, gazebo, and the Recreation Center. Witness #3 stated that Tamir showed him the gun and let him hold the gun and fire it at the trailers before taking it back.

After that, Witness #3 stated that he did not want to be around Tamir since 3-4 months earlier he had a BB gun in his pocket while in a store and the police approached him and told him put his hands up. After putting his hands up, the police then took the gun, and Witness #3 stated that he got in trouble because of that incident. Witness #3 also indicated that Tamir kept his gun inside his waist band with the barrel pointing downward and that Tamir had to lift up his jacket to pull it out when he was with him.

Witness #3 decided to meet up with Tamir inside the Cudell Recreation Center after Tamir took the gun back from him, but he ended up in front of the Cudell Recreation Center by the Arts Building when he heard the gunshots. Witness #3 claims he heard three gunshots and then heard Tamir's sister screaming. Witness #3 went to the gazebo area where he saw Tamir lying on his back with his knees bent toward the Cudell Recreation Center entrance. Witness #3 watched EMS take Tamir to the hospital and Witness #3 stated he went home after that.

### 4. Witness #4

Witness #4 is friends with Witness #3. Over the last year, Witness #4 knew Tamir from hanging out at the Cudell Recreation Center. On November 22, 2014, Witness #4 in the company of Witness #3 saw Tamir shooting the replica firearm at the tires of the parked car. Witness #4 also shot the gun at the parked car's tires but left Tamir to go into

the Cudell Recreation Center because he knew that Witness #3 had gotten in trouble for having a fake gun.

Witness #4 stated that before Tamir got shot he would pull the gun in and out of his pants “like robbers do” and he was in front of the Cudell Recreation Center with Witness #3 when they heard the shots. They ran towards the gazebo and witnessed the plain clothes officer (FBI) attend to Tamir. They stayed until Tamir was taken to the hospital.

#### 5. Witness #5

Witness #5 lives northwest of the Cudell Recreation Center and her son went to elementary school with Tamir. On that day, her son was in the Recreation Center playing basketball. Witness #5 stated she saw two little boys playing outside the Cudell Recreation Center from a window inside her home.

About 30 minutes after observing those boys outside the Cudell Recreation Center, Witness #5 was getting into a friend’s car to go to the store when she heard three gunshots and some yelling. Specifically, Witness #5 described two gunshots being “bang, bang” then hearing someone yelling “freeze ... show me your hands” and then there was a third and final bang.

Witness #5 further stated she witnessed a girl running towards where the police car was located screaming “that’s my brother” and subsequently fighting with one officer. Another officer came from behind the car and appeared to be hurt since he was leaning up against the vehicle. Eventually, Witness #5 got inside her friend’s car, rolled down the window, and observed the fire truck arriving while hearing more sirens getting closer to the area. Witness #5 also observed numerous kids running from inside the Cudell Recreation Center to the outside where the shooting took place.

The location of Witness #5 when she observed these events is approximately 320 feet from the gazebo with an eight foot high chain link fence overlooking a wide open field.

#### 6. Witness #6

Witness #6 knew Tamir from her interaction with him at the Cudell Recreation Center and she encountered Tamir on November 22, 2014. Witness #6 stated that Tamir was on the swings showing her the gun and telling her it was not real. Witness #6 also stated that she was sure the gun had an orange tip on it.

However, the video surveillance from Camera 1 demonstrates that Tamir and Witness #6 actually met on the sidewalk in front of the gazebo. (Witness #1 was sitting inside the gazebo at that time during the interaction). The video shows Tamir openly carrying the replica firearm then pointing it at Witness #6 as she walked away.

#### 7. Witness #7

Witness #7 lives near the Cudell Recreation Center and works out regularly at the gym. He knew Tamir from being around the Recreation Center.

Late in the morning of November 22, 2014. after working out at the gym, Witness #7 observed Tamir playing with a gun “inside and outside the Recreation Center.” Witness #7 stated, “just waving the gun, pulling it out like (he robbin people).” Witness #7 clearly told Tamir to “put the gun up, you can’t be playing with a gun like that this day and age,” which Tamir responded by laughing it off.

Later that day Witness #7 was at home getting into his car that was parked on the street and observed Tamir standing under the gazebo and saw two officers pull up. Before the car could stop, one of the officers got out, stumbled, and shot Tamir. According to Witness #7, the police officers were in a state of shock, and observed an unmarked police car pull up and a man get out of the car and start applying pressure to Tamir’s wounds.

Witness #7 stated that when the ambulance and paramedics came, he believed at that time that Tamir was dead. He later learned that Tamir died at the hospital.

#### **d. Miscellaneous witnesses**

##### **1. Detective Jeffrey Follmer**

Detective Jeffrey Follmer, at the time of the incident, has been a CDP officer for 23 years and was President of the Patrolman’s Union.

On the date in question, Detective Follmer, in his capacity as Union President, was able to talk to Officer Loehmann when he arrived at the Fairview Hospital. Detective Follmer stated that Officer Loehmann told him that:

- On the way to the park Officer Garmback was teaching Officer Loehmann how and why they were approaching (to contain the suspect).
- When they entered they saw the suspect on the bench pick up a gun and place it in his waistband.
- They thought he was going to run.
- The car did not stop where he wanted it to and the car kept sliding.
- As the car was sliding they were giving verbal commands “to show your hands.”
- He told Det. Follmer that he knew the gun was in his waistband and that he did not want the suspect’s hands to go to his waistband.
- At the moment they were stopping the suspect went for the gun, started to pull it out, and Officer Loehmann was in fear that he or his partner were going to be shot.

Detective Follmer stated that at the hospital Officer Loehmann’s emotional state was up and down and turned to disbelief when Detective Follmer told Officer Loehmann the age of Tamir. Officer Loehmann believed Tamir to be between the ages of 20 and 25.

Officer Garmback told Detective Follmer that as they were approaching he expected the suspect to run. When the suspect turned towards them, Officer Garmback stated he slammed on the brakes and slid up to the suspect. He also stated that he was in disbelief when he learned Tamir’s age.

#### **e. Scene Description of the Cudell Recreation Center**

The scene of the shooting is the City of Cleveland Cudell Park with an address of 1910 West Blvd. Cudell Park is situated on the southeast corner of West Blvd. and Detroit Road. Cudell Park is also bordered by West 98th Street to the east and to the south by Marion C. Seltzer Elementary School with an address of 1468 West 98th Street, residences, and West 99th Street/West 100th Street and the CVS located at 10022 Madison Avenue.

Cudell Park varies in size with an approximation of the northern end of 653' east to west and around the southern end the park extends from West Blvd. 538' east to Seltzer Elementary School. Along the area of West Blvd. the park is 716' from Detroit Road south to the property line while in the area of West 98th Street the park is 420' from Detroit Road to the property line at the parking lot of Seltzer Elementary School.

Cudell Recreation Center is within Cudell Park and is a building that is approximately 217' north to south and 121' east to west. The Recreation Center is approximately 166' east of West Blvd. and 80' south of Detroit Road. The entrance to the Recreation Center is about centered on the east side of the building. Cement walkways lead to and from the entrance to Detroit Road to the north, West 98th Street, basketball courts and a parking lot to the east, and south towards the parking lot.

The park parking lot is adjacent to West Blvd. and measures approximately 263' east to west and 128' north to south. The walkway also leads to a hexagon shaped gazebo approximately 200' south of the recreation center entrance.

Approximately 25' south of the gazebo is a park playground pad that also has a swing set that was approximately 50' from the gazebo. The walkway continues past the gazebo south to West 99th Street, southwest to West Blvd., and southeast to areas around Seltzer Elementary School.

The confrontation with the police officers occurred at the gazebo in Cudell Park. The gazebo was 35'3" east of the eastern curb of the parking lot. The sidewalk is 12'3" wide along the east curb with 23' of grass between sidewalk and gazebo.

The gazebo is built over a cement pad that is level with the surrounding ground. The roof was held up by six separate poles each at a point where each of the six roof edges come together. Each of the six roof edges were each approximately 15' long. There are no sides to the gazebo.

Located underneath the gazebo were three cement picnic tables that were each 7'1" long and 5'9" wide. Each of these picnic tables lengthwise were positioned north to south. Two of these picnic tables were end towards end, 1'9" apart, on the eastern side of the gazebo while the third table was on the western side approximately 3'5" from the other two picnic tables.

#### **f. Timeline of video**

The incident occurred at the Cudell Recreation Center, 1910 West Boulevard, Cleveland, Ohio on November 22, 2014 at approximately 3:30 p.m. The DVD reviewed by Detective David Jacobs was provided to the Cuyahoga County Sheriff's Office via the Cuyahoga County Prosecutors' Office (CCPO). The DVD contains approximately five hours of surveillance video. The recording time for all cameras is 11:00 a.m. to 4:00 p.m. The DVD also contains ten separate camera views. The cameras listed below are numbered one through ten and are located on or about various locations at the Cudell Recreation Center.

Camera numbers are located in the upper left area of each view, for example (Cam 1). The camera views may overlap coverage but are separate and function independently.

- Cam 1 - view of gazebo facing east, located on a utility pole (outside)
- Cam 2 - view of parking lot facing west, located on a utility pole (outside)
- Cam 3 - view east entrance, located on the Cudell Recreation Center (outside)
- Cam 4 - partial view gazebo, parking lot facing south, located on the Cudell Recreation Center (outside)
- Cam 5 - view of indoor basketball court facing south west (inside)
- Cam 6 - view of the second floor indoor hallway, facing west, located inside the Cudell Recreation Center (inside)
- Cam 7 - view of the front desk, facing east, located inside the Cudell Recreation Center (inside)
- Cam 8 - view of the gazebo located in the rear (west), facing north/west located on Cudell Recreation Center (outside)
- Cam 9 - view of the parking lot, facing south/west, located on the Cudell Recreation Center (outside)
- Cam 10 - view of the rear entrance (west) facing west (outside)

All of the cameras listed above are operated and maintained by the Cudell Recreation Center. The DVR recording device is located in the Cudell Recreation Center manager's office. The original DVR was obtained and entered into evidence. The DVR was submitted to the Ohio Attorney General's Office, Bureau of Criminal Investigation (BCI) for further examination. The DVR did not contain the original footage from November 22, 2014. The hard drive was overwritten. It was determined through further examination/investigation that the footage remains on the hard drive for approximately thirty (30) days before it is overwritten.

The following timeline, which was compiled by the Cuyahoga County Sheriff's Department, describes the significant times and events indicated on the surveillance video. The camera views depict Tamir Rice, Tamir's sister, and others identified through further investigation and will be named or described depending on known or unknown identity, clothing description could be used otherwise.

### **CAMERA 1**

11:04:49- Witness #2, Tamir's sister, and Tamir walk north past the gazebo toward the Cudell Recreation Center east entrance. Tamir puts something in Witness #2's backpack. According to Witness #2, Tamir was returning the "Colt target pistol, laser sight" herein referred to as the replica firearm to Witness #2. The three continue walk north toward the Cudell Recreation Center.

11:05:26- Tamir, Tamir's sister, and Witness #2 exit view of camera 1.

13:03:52- Tamir holding replica firearm, Witness #2, and Unknown Male #1 walking on sidewalk southbound. Tamir places replica firearm to Unknown Male #1's head.

13:06:34- Tamir pointing replica firearm at Unknown Male and Witness #2 as they exit view of camera.

13:06:51- Tamir's sister walking southbound on sidewalk by herself.

13:41:24- Tamir's sister walking north on sidewalk by herself.

13:41:56- Tamir walking north on sidewalk alone, no replica firearm visible, appears to be eating something.

13:49:59- Tamir re-enters view, walks into gazebo alone. He appears to have replica firearm in hand. Tamir captured "ducking" down in a crouch position near garbage can (the gazebo.) Walks toward playground area.

13:55:44- Tamir (alone) reappears and is still in playground area, walks behind the gazebo in an east direction.

13:57:34- Tamir exits view of camera 1.

15:02:54- Tamir walks toward the gazebo with Unknown Male #2.

15:03:10- Tamir and Unknown Male #2 walk into playground, exits view of camera 1.

15:05:29- Tamir has replica firearm out, walking with Witness #3, Witness #4, and Unknown Male #2 towards the gazebo.

15:08:26- Tamir, Unknown Male #2, Witness #3, and Witness #4 leave the gazebo and walk northwest toward camera 4.

15:11:52- Witness #1 enters the gazebo from the south and sits at the eastern most table.

15:12:44- Tamir re-enters camera 1 view from the north and walks on the sidewalk in front of the gazebo.

15:13:09- Tamir removes replica firearm from right waistband area and points the replica firearm south. Tamir is on sidewalk.

15:17:08- Tamir still has replica firearm in hand, re-enters from the south with Witness #6 who was wearing a green jacket. Witness #6 is walking on sidewalk northbound. Tamir and Witness #6 appear to have a conversation. Tamir points the replica firearm at Witness #6 as she walks away. Witness #6 is captured on Camera 8 at 14:49:05 talking/hugging with Tamir's sister.



15:17:44- Tamir still has the replica firearm in hand in front of the gazebo on the sidewalk. Tamir pointing the replica firearm in all directions.

15:17:50- Tamir puts the replica firearm in his right waistband.

15:19:00- Replica firearm not visible, Tamir in front of the gazebo playing with snow exits view of camera 1.

15:20:59- Tamir exits view south.

15:25:49- Witness #1 stands up in the gazebo and begins to walk north out of view of camera 1.

15:26:39- As Witness #1 exits the gazebo north Tamir enters the gazebo from the south.

15:27:17- Tamir has the replica firearm in hand and is pointing it south.

15:27:37- Tamir sits at the northeastern most picnic table inside the gazebo. It should be noted there are three tables inside the gazebo.

15:30:13- Tamir stands up and walks northwest towards the edge of the gazebo.

15:30:23- CDP marked unit 115A arrives, Tamir reaches in his right waistband. Patrolman Timothy Loehmann exits the passenger side, draws and points his firearm in the direction of Tamir. Officer Loehmann retreats backwards and stumbles and falls continuing to point his weapon in the direction of Tamir. Officer Loehmann takes cover at the rear of his vehicle.

15:30:27- Patrolman Frank Garmback exits 115A drivers' side.

15:31:00- Officer Garmback approaches Tamir and appears to kick something with his left foot in a westerly direction.

15:31:45- Officer Garmback extends his arms toward Tamir's sister as she enters the camera from the north. This causes Tamir's sister to fall down.

15:31:49- Officer Garmback takes Tamir's sister to the ground.

15:31:53- Officer Loehmann assists with Tamir's sister as Officer Garmback turns his attention to Tamir.

15:31:59- Patrolman William Cunningham enters the view from the north and assists Officer Garmback.

15:32:53- Witness #3 and Witness #4 enter the camera view from the northwest and walk around the backside of the gazebo.

15:32:53- Officer Cunningham walks toward Tamir (out of view) on the ground.

15:33:10- Tamir's sister is being placed into the backseat of drivers' side of unit 115A, Tamir's sister pulls away from Officer Loehmann.

15:34:05- The FBI Agent and CDP Detective Daniel Lentz arrive on scene.

15:34:19- The FBI Agent gets gloves from Officer Garmback and attends to Tamir.

15:35:17- CDP Officers Ken Zverina and Ricardo Roman arrive.

15:37:01- Detective Lentz bends over in the area the magazine from the replica firearm came to rest, as a one man CDP unit arrives.

15:38:10- Cleveland Fire Department (CFD) arrives.

15:40:56- CDP Officer Tom Griffin places a clear plastic bag over the replica firearm.

15:41:22- Most of the Officers on scene are drawn to the southern direction or the right side of the camera view.

15:42:14- Cleveland Emergency Medical Services (EMS) arrives on scene, uniform Officers begin to deploy yellow crime scene tape in the immediate area.

15:42:31- CDP Sergeant Janell Rutherford has a conversation with Officer Loehmann who is now seated in the front passenger seat of the one man CDP unit. Detective Lentz has conversation with Tamir's sister, who is still seated in the backseat of Unit 115A.

15:43:57- Tamir is leaving the gazebo area on a stretcher.

15:46:06- The FBI Agent and Detective Lentz have another conversation with Tamir's sister (still in backseat of 115A.)

15:49:12- The FBI Agent and Detective Lentz have a third conversation with Tamir's sister (still in backseat of 115A.)

15:51:32- Several CDP Officers on scene point up at Camera 1.

15:54:11- Detective Lentz has another conversation with Tamir's sister (still in backseat of 115A)

16:00:00- Surveillance video ends.

## **CAMERA 2**

12:27:21- Tamir's sister (alone) walks from rear (west entrance) of the building walks along sidewalk/side of building east.

15:33:58- the FBI Agent and Detective Daniel Lentz arrive.

15:34:56- CDP two (2) Officers (CDP Officers Ken Zverina and Ricardo Roman) marked unit arrives and parks facing east on the south side of the parking lot.

15:36:50- A second CDP (CDP Officer Lou Kitko) marked unit arrived lights activated.

15:37:19- CFD arrives along with a third marked CDP unit (Sergeant Janell Rutherford.)

15:41:19- CDP Unit/ Sergeant Janell Rutherford (fourth marked unit) arrives via West Boulevard entrance and parks on north side of parking lot. EMS arrives simultaneously.

15:47:12- CFD and EMS leave parking lot.

15:58:46- the FBI Agent and Detective Daniel Lentz leave parking lot.

16:00:00- Surveillance video ends.

### **CAMERA 3**

This particular camera was obstructed with ice. The camera gradually thaws throughout the day. There is very little discernible video. At 15:31:10 one can see Tamir's sister run toward the gazebo with Officer Cunningham following. This camera also ends footage at 16:00:00 hrs.

### **CAMERA 4**

11:04:50- Tamir's sister, Tamir, and Witness #2 walk toward the east entrance of the Cudell Recreation Center on the sidewalk in front of the gazebo.

12:27:46- Tamir's sister, alone, walks from the west end of the building heading east.

13:04:38- Tamir's sister enters the camera view, ties her shoe and exits the view.

13:05:36- Tamir's sister, Witness #2, Tamir and two Unknown Male's enter the camera view from the north and walk along the sidewalk Tamir has the pellet gun in his hand.

13:41:23- Tamir's sister walks on the sidewalk toward the east entrance of Cudell Recreation Center.

13:41:50- Tamir walks from the south on sidewalk toward the east entrance of Cudell Recreation Center.

13:50:00- Tamir enters camera view from the north, ducks down by garbage can located near the gazebo.

15:02:44- Tamir and Unknown Male #2 enter the camera view and walk to the gazebo.

15:05:00- Tamir, Witness #3, Witness #4 and Unknown Male #2 are in the gazebo until 15:08:00.

15:09:01- Tamir, Unknown Male #2, Witness #3, and Witness #4 walk toward the west. The four are met by R.P., and Unknown Male #3. Tamir is seen pointing the replica firearm at R.P. and Unknown Male #3 as he approaches them. Tamir hands the replica firearm to R.P., who in turn points the replica firearm in the opposite direction. R.P. then gives the replica firearm back to Tamir and the group disperses.

15:11:31- Witness #1 arrives in the gazebo.

15:12:36- Tamir walks on sidewalk in front of the gazebo alone.

15:14:38- Tamir alone in playground area.

15:16:00- Tamir, replica firearm in hand, has a conversation with Witness #6 as they walk on the sidewalk northbound. Witness #6 continues to walk as Tamir maintains his position in front of the gazebo.

15:23:00- Tamir in playground area.

15:26:37- Witness #1 leaves the gazebo, Tamir enters the gazebo from the playground.

15:30:02- Headlights appear from the south (West 99th Street off of Madison Avenue), CDP marked unit 115A driving on the grass and sidewalk with CDP Officers Timothy Loehmann and Frank Garmback.

15:30:21- CDP marked unit 115A parks in front (west) of the gazebo.

15:31:45- Tamir's sister is running toward the gazebo.

15:32:28- Witness #3 and Witness #4 appear from the west and walk around the gazebo.

15:34:01- the FBI Agent and CDP Detective Daniel Lentz arrive and park facing north and the eastern most portion of the parking lot.

15:35:00- CDP marked unit (two man unit) CDP Officers Zverina and Roman arrived and parked facing east on the south side of the parking lot.

15:36:54- CDP marked unit (one man unit) CDP Officer Lou Kitko arrived and parked facing east.

15:37:31- CFD arrives.

15:37:16- CDP marked unit (one man unit) CDP Officer Tom Griffin arrived and parked directly behind first two man unit belonging to CDP Officers Zverina and Roman.

15:38:23- CDP marked unit arrives from the same direction and path (West 99th Street off Madison Avenue) that 115A had entered. This CDP marked unit parks between the playground and the gazebo. CDP Officers Chuck Judd and Brian Taylor.

15:41:32- EMS arrives from the West Boulevard entrance and parks on the south side of the parking lot. CDP marked unit (Sergeant Rutherford) arrives from the West Boulevard entrance and parks on the north side of the parking lot.

15:46:16- CFD and EMS leave parking lot using the north exit toward West Boulevard.

16:00:00- Surveillance video ends.

#### **CAMERA 5**

This camera is located in the basketball gym as previously indicated. This camera records intermittent basketball practices with varying age groups throughout the day. Tamir's sister is captured briefly walking inside the gym but not for prolonged periods. The shooting took place at approximately 15:30:20 hrs. It does not appear that persons in the gym are aware of, or react to, the shooting outside. This camera ends footage at 16:00 hrs.

#### **CAMERA 6**

As stated earlier this camera is located inside the Cudell Recreation Center on the second floor. This particular camera does not capture Tamir or Tamir's sister. There are two small children jumping rope in the hallway for short period. There are also two (2) Unknown Male's depicted walking past the camera. This camera ends footage at 16:00 hrs.

#### **CAMERA 7**

11:06:00- Tamir, Tamir's sister, and Witness #2 enter the Cudell Recreation Center. They appear to sign in.

12:19:54- Tamir's sister enters the view of the camera and walks in the gym.

12:20:22- Tamir enters the gym.

12:21:00- Witness #2, Tamir, and Tamir's sister on camera.

12:21:53- Witness #2, Tamir, and Tamir's sister exit Cudell Recreation Center.

12:29:48- Tamir's sister re-enters the Cudell Recreation Center.

12:30:10- Tamir, Witness #2, and Unknown Male #1 re-enter the Cudell Recreation Center.

12:30:22- Witness #2 is holding what appears to be a white cellular phone.

12:30:30- Tamir's sister in gym with Witness #2.

12:32:00- Tamir's sister near front desk area.

13:03:36- Tamir, Tamir's sister, and Witness #2 and two unknown juveniles leave the Cudell Recreation Center.

13:42:14- Tamir's sister enters the Cudell Recreation Center alone.

13:42:49- Tamir re-enters the Cudell Recreation Center eating something from a small bag.

13:44:30- Tamir and Tamir's sister enter the gym.

13:44:57- Tamir's sister exits the gym.

13:47:16- Tamir exits the Cudell Recreation Center alone.

13:59:00- Tamir's sister and Tamir meet in the doorway and both re-enter.

14:01:01- Tamir's sister in the gym.

14:05:22- Tamir exits the Cudell Recreation Center with several people.

14:07:50- Tamir along with four others re-enter the Cudell Recreation Center east entrance.

14:12:00- Tamir outside the Cudell Recreation Center alone.

14:14:16- Unknown person leaves to talk to Tamir outside the east entrance.

14:15:02- Tamir's sister leaves the Cudell Recreation Center.

14:15:02- Tamir pulls the replica firearm outside on Tamir's sister and a small child enters the Cudell Recreation Center east entrance.

14:16:40- Tamir's sister re-enters the Cudell Recreation Center east entrance.

14:33:07- Tamir's sister in the gym.

14:46:49- Witness #6 enters the Cudell Recreation Center east entrance and does not punch a code.

14:48:34- Tamir in gym and then leaves the Cudell Recreation Center (east exit) alone.

14:52:38- Tamir's sister and Tamir meet in the doorway both re-enter the Cudell Recreation Center east entrance.

14:53:02- Tamir in the gym.

15:00:23- Tamir exits the Cudell Recreation Center east entrance.

15:06:00- Tamir's sister in the gym and looks out the east entrance.

15:08:44- Tamir's sister looks outside the east entrance doors.

15:10:19- Witness #3 and Witness #4 enter the Cudell Recreation Center.

15:11:20- Unknown Male #2 runs toward the east entrance and enters the Cudell Recreation Center.

15:19:53- Tamir's sister looks out the east entrance doors.

15:20:16- Tamir's sister returns.

15:21:38- Tamir's sister at front desk counter.

15:26:33- Mailman enters the Cudell Recreation Center.

15:28:50- Mailman exits the Cudell Recreation Center.

15:30:49- Five unknown male juveniles look out the east doors and one of the male juveniles appears to tell CDP Officer Cunningham what he observed.

15:31:25- Tamir's sister walks toward the east exit doors and runs toward the gazebo.

15:31:40- CDP Officer Cunningham exits the Cudell Recreation Center and heads toward the gazebo.

16:00:00- Surveillance video ends.

#### **CAMERA 8**

12:26:05- Tamir's sister leaves west entrance and walks along building.

12:29:15- Unknown Male #4 exit west exit.

12:29:29- Tamir's sister exits west entrance.

14:49:05- Tamir's sister and Witness #6 hug.

14:50:03- Tamir's sister re-enters the west entrance.

15:06:58- Cudell Recreation Center employee J.O. leaves Cudell Recreation Center for lunch.

15:08:01- R.P. and Unknown Male #3 (fur coat) appear and walk south.

15:22:00- Witness #3 and Witness #4 walk west bound.

15:25:20- Witness #3 and Witness #4 re-enter Cudell Recreation Center west entrance.

15:29:08- Witness #3 and Witness #4 exit west entrance.

15:30:26- Tamir's sister and Unknown Male #4 (yellow jacket) and two other males run back inside the Cudell Recreation Center.

15:31:52- Witness #3 and Witness #4 run south then east along the building toward the gazebo.

16:00:00- Surveillance video ends.

### **CAMERA 9**

12:27:21- Tamir's sister appears on camera briefly and then disappears.

15:07:26- Cudell Recreation Center employee J.O. leaves Cudell Recreation Center for lunch.

15:08:28- R.P. and Unknown Male #3 (fur coat) appear and walk along sidewalk.

15:32:14- Witness #3 and Witness #4 appear walking on the sidewalk and begin to run toward the gazebo.

15:33:58- the FBI Agent and Detective Daniel Lentz arrive in the parking lot via the West Boulevard entrance.

15:34:54- CDP marked unit arrives, Officers Ken Zverina and Ricardo Roman (no overhead lights), two man unit.

15:36:46- CDP marked unit arrives, CDP Officer Lou Kitko, 1C21 (overhead lights activated.)

15:37:18- CFD arrives from the West Boulevard entrance.

15:39:10- CDP marked unit arrives, CDP Officer Tom Griffin (overhead lights activated.)

15:41:17- EMS arrives at the same time CDP marked unit (Sergeant Rutherford.)

15:43:09- Officers on scene draw their attention to the south to include several Officers walk in that direction.

15:47:15- CFD leaves Cudell Recreation Center property.

15:47:27- EMS leaves property.

15:53:47- CDP marked unit arrives, CDP Officer Bob Sweaney, 1B27.

15:58:48- the FBI Agent and Detective Lentz appear to leave property.



16:00:00- Surveillance video ends.

#### **CAMERA 10**

12:27:03- Tamir's sister exits Cudell Recreation Center (west) and walks south along building.

14:49:06- Tamir's sister and Witness #6 (green jacket) appear to have a brief conversation, Tamir's sister and Witness #6 hug, Witness #6 leaves.

14:50:00- Tamir's sister re-enters west entrance alone.

15:22:02- Witness #3 and Witness #4 walk out west exit and continue to walk west.

15:24:57- Witness #3 and Witness #4 re-enter camera view from the west.

15:29:10- Witness #3 and Witness #4 exit Cudell Recreation Center west exit with Unknown Male #4.

15:30:13- Tamir's sister appears on camera briefly.

15:30:25- Two (2) Unknown Male's exit the west exit and sit at picnic table.

15:30:25- Two (2) Unknown Male's run back in building in a hurry one (1) Unknown Male loses his shoe.

15:31:51- Witness #3 and Witness #4 run southwest toward the gazebo.

16:00:00- Surveillance video ends.

(Cuyahoga County Sheriff's Department Report documenting review of Cudell Recreation Center Surveillance Cameras, May 12, 2015).

#### **g. Ohio State Highway Patrol Accident Reconstruction**

The accident reconstruction report of the scene at Cudell Recreation Center was completed by Sergeant John Thorne of the Ohio State Highway Patrol. Sgt. Thorne has a Master's Degree in Criminal Justice and has been a crash reconstruction supervisor for the Ohio State Highway Patrol since 2010. Sgt. Thorne is additionally certified as a traffic crash Reconstructionist, and he has a certification in forensic crime/crime scene mapping. Furthermore, Sgt. Thorne has testified numerous time as an expert witness in courts across Northeast Ohio.

The accident reconstruction report was conducted to determine the vehicle's speed and deceleration as it approached Tamir Rice at the Cudell Recreation Center. In making this report, Sgt. Thorne used measurements taken by himself, and Lieutenant Kinn (Ohio State Highway Patrol), of Cudell Park, along with surveillance video of the incident on November 22, 2014 and photos of the scene at Cudell Park on November 22, 2014. Sgt. Thorne additionally references in his report measurements taken of the crime scene by CDP.

Sgt. Thorne notes that the patrol car driven by Officer Garmback had an Automated Vehicle Locator (AVL) which is capable of recording the vehicle location and speed. However, Sgt. Thorne did not rely on this device in his analysis as it only refreshed its data every 9-10 seconds and the speed shown on the AVL appeared to lag behind the vehicle's movement.

In determining the speed of the vehicle, Sgt. Thorne's report employed a slide to stop calculation, which is an equation that can determine the speed of the vehicle based on the distance of the deceleration area and the frictional value of the surface vehicle was decelerating on. Based on video evidence and measurement taken at the scene by the CDP, and measurements taken, Sgt. Thorne determined that the vehicle slid to a stop at a minimum of 40.3 ft. in 3.5 seconds, or at a maximum of 73.3 ft. in 4.5 seconds.

The frictional value of the surface the vehicle decelerated on was determined using a formula using the distance the car traveled and the time it took the car to travel that distance. Sgt. Thorne noted in his report that the ground the vehicle covered was a grassy area that was covered by wet snow. The formula indicated a frictional value of the surface consistent with the testing done by the Ohio State Highway Patrol of objects traveling over wet grass and additionally consistent with the testing done of objects passing over wet snow by the Institute of Police Technology and Management.

The slide-to-stop calculation in Sgt. Thorne's report was determined using both the minimum distance the vehicle may have slid to a stop, 40.3 ft., and the maximum distance the vehicle may have slid to a stop, 73.3 ft. The slide-to-stop calculation showed that the vehicle was traveling at a speed of between 15 and 22 mph when it began its deceleration based on the minimum and maximum distance that the vehicle may have traveled. Using a hybrid calculation, which assumes a middle point between the minimum and maximum distance based upon the video surveillance evidence, the vehicle driven by Officer Garmback was determined to be traveling approximately 19 mph as the vehicle began its final deceleration in sliding to a stop.

#### **h. BCI Report**

BCI was engaged to assist the CCSD to utilize their advanced knowledge of crime scene analytical techniques to this case. Specifically, BCI did a "360" laser scan, magnified the video at the time of the shooting and utilized a computer program that demonstrated a view from inside the police car (1-Adam-25) as it approached the gazebo located at the Cudell Recreation Center.

BCI utilized what is known as a 3-D scan of the Cudell Recreation Center created from a laser that covered the relevant areas of the park. The scan shows a digital 3-D picture of the area which contains markers of the evidence gathered on the scene including two cartridge cases, a cell phone, a magazine, and an air soft gun. The location of the vehicle and evidentiary items are based on video surveillance taken of the Cudell Park and on the measurements of the CDP. The images details the appropriate measurements of where the replica firearm was found in relation to the concrete edge of the gazebo, where the magazine was found relative to the concrete edge of the gazebo, distance from the edge of the gazebo to 99th Street, the distance from the gazebo to the entrance of the Recreation Center, and the distance from the edge of the gazebo to West 98th Street.

BCI also magnified Camera #1 pertaining to the time of the shooting and created a video of the view Officers Garmback and Loehmann would have had as they approached the gazebo.

#### **i. Coroner's Report**

Dr. Thomas P. Gilson, Chief Pathologist (Coroner), did the autopsy of Tamir Rice on November 24, 2014. Dr. Gilson found the cause of death to be a single gunshot wound that tore the inferior vena cava which is a primary vein that controls 2/3 of body blood flow to the lower part of a person's body. He also found that the direction of the bullet traveled front to back, left to right, and downward. The bullet lodged in the pelvis approximately 26 inches below the top of the head and one inch right of the midline.

#### **j. Trace Evidence**

Curtiss L. Jones is a Forensic Scientist and the Supervisor of the Trace Evidence Department at the Cuyahoga County Coroner's Office. Mr. Jones inspected and cataloged the clothing worn by Tamir Rice on the day of the incident. Mr. Jones also performed a test firing using the same "Glock" model used by Officer Loehmann that day to determine the distance from the gun to the bullet hole. Based upon the condition of the bullet hole, found on Tamir's jacket, Mr. Jones determined the muzzle-to-target distance was five feet, meaning that Tamir was at least five feet away from Officer Loehmann when he discharged the weapon.

#### **k. Experts**

The State of Ohio engaged three use of force experts – Kimberly Crawford, Lamar Sims, Esq., and Ken Katsaris – as well as a Forensic Video Examiner, Grant Fredricks. The attorneys representing the Rice family in a pending § 1983 civil suit against the City of Cleveland also retained two use of force Experts – Jeffrey Noble and Roger Clark – as well as an accident reconstructionist with a Ph.D. in Biomechanical Engineering, Jesse L. Wobroch.

##### **i. Use of Force Experts**

##### **a) Kimberly Crawford**

Ms. Crawford is an Associate Professor at Northern Virginia Community College who was an ex-FBI Agent that taught use of force at Quantico, Virginia for 19 years. Her opinion stated:

"According to the Supreme Court, the standard that must be used to evaluate a law enforcement officer's use of deadly force is one of objective reasonableness. The question is not whether every officer would have reacted the same way. Rather, the relevant inquiry is whether a reasonable officer, confronting the exact same scenario under identical conditions could have concluded that deadly force was necessary. Based on the proceeding discussion, and in light of my training and experience, it is

my conclusion that Officer Loehmann's use of deadly force falls within the realm of reasonableness under the dictates of the Fourth Amendment. "

b) Ken Katsaris

Mr. Katsaris is a certified law enforcement officer and instructor for over 50 years and a consultant. His opinion stated that the shooting was objectively reasonable based on the threat the officers faced at the time they encountered Tamir Rice.

c) Lamar Sims Esq.

Mr. Sims is the Senior Chief Deputy District Attorney of the Denver County District Attorney's Office. Mr. Sims was a District Attorney for 31 years and teaches the use of force training to local police. His opinion stated:

"I agreed to review the case file and I have now completed that review. The factual determinations made below are based solely on the materials you provided. Based upon my review of those facts and the legal doctrines discussed below, I conclude that Officer Loehmann's actions were objectively reasonable as that term is defined by controlling Federal case law."

d) Jeffrey Noble

Mr. Noble is a retired Deputy Chief of Police, with a Juris Doctor Degree and he is a law enforcement consultant. His opinion stated that based upon the officers' reckless tactics, that created the danger the use of force was objectively unreasonable.

e) Roger Clark

Mr. Clark is a former Lieutenant of the Los Angeles County Sheriff's Department who has been a police consultant for 27 years. His opinion stated that the shooting of Tamir Rice was inconsistent with generally accepted standards and that it was an unreasonable, and excessive, use of force.

ii. Other Experts

a) Dr. Jesse Wobrock

Mr. Wobrock is an accident reconstructionist with a Ph.D. in Biomechanical Engineering. His opinion stated that, based on his observations of the video, Tamir Rice had his hands in his pockets at the time of the shooting and was not reaching for his waist.

b) Grant Fredricks

Mr. Fredricks is a former police officer who is a certified Forensic Video Examiner that teaches at the FBI Academy in Quantico, Virginia. His opinion stated:

“After carefully examining the video images and other materials listed in this report, I have formed the opinion that at the time of the shooting Tamir Rice lifted his jacket with his left hand, and with his right hand, he reached for his gun.”

The complete opinions of all of the above experts can be found on the CCPO website.

#### **4. Standard of Review in Police Use of Deadly Force Cases.**

##### **a. Role of the Prosecuting Attorney and Grand Jury.**

In police use of deadly force cases, the prosecutor is required to investigate whether an officer’s actions violated the law. Ohio law gives the county prosecuting attorney the authority to “inquire into the commission of crimes within the county” and to “prosecute, on behalf of the state, all complaints, suits and controversies in which the state is a party[.]” R.C. 309.08(A). “[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 54 L. Ed. 2d 604, 98 S. Ct. 663 (1978); *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 661 N.E.2d 180 (1996).

A prosecutor cannot initiate a felony case in Ohio without a grand jury. Ohio’s Constitution provides that no citizen may be prosecuted for a felony without “presentment or indictment of a grand jury.” Ohio Constitution, Article I, Section 10. To that end, Ohio law states that a county grand jury shall “proceed to inquire of and present all offenses committed within the county.” R.C. 2939.08. To assist the grand jury, “[t]he prosecuting attorney or assistant prosecuting attorney may at all times appear before the grand jury to give information relative to a matter cognizable by it, or advice upon a legal matter when required.” R.C. 2939.10. Further, “[t]he prosecuting attorney may interrogate witnesses before the grand jury when the grand jury or the prosecuting attorney finds it necessary[.]” *Id.*

Both Ohio and federal law provide that a grand jury, in addition to issuing indictments, also has an investigative role. The Supreme Court of Ohio has explained that the Grand Jury’s power to investigate “does not depend on a case or controversy for power to get evidence but [it] can investigate merely on suspicion, that the law is being violated, or even just because it wants assurance that it is not.” *In re Coastal States Petroleum, Inc.*, 32 Ohio St. 2d 81, 84, 290 N.E.2d 844, 847 (1972), citing *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643, 70 S.Ct. 357, 94 L.Ed. 401 (1950); see also *In re Original Grand Jury Investigation (Kaiser)*, 3d Dist. Mercer No. 10-02-20, 2003-Ohio-1670, ¶ 9. “The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush.” *Id.* “A grand jury’s investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed[.]” *U.S. v. Stone*, 429 F.2d 138, 141 (2d Cir.1970).

The grand jury's traditional investigative role was meant to safeguard citizens from unwarranted charges. The U.S. Supreme Court has held that "fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process." *Branzburg v. Hayes*, 408 U.S. 665, 690, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). "The function of the grand jury in our society is critical to protecting the citizens of our country, both from crime and from unwarranted criminal prosecution." *In re August 28, 2002 Grand Jury*, 151 Ohio App. 3d 825, 2003-Ohio-1184, 786 N.E.2d 115, ¶ 9 (3d Dist.). "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." *Branzburg*, 408 U.S. at 688. The grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 63 L.Ed. 979 (1919).

Because the grand jury's investigative role ensures a full, fair, and unbiased review by a group of independent citizens, the Cuyahoga County Prosecutor's Office enacted a policy that the grand jury must review all fatal police deadly force incidents:

To ensure public confidence in the integrity of the Criminal Justice System, the policy of the County Prosecutor's Office will be to present the facts of every fatal police shooting and of all other fatal uses of deadly force by law enforcement officers in Cuyahoga County to the Grand Jury for review. We are committed in these cases to conducting a thorough investigation that satisfies both the high standards of this office and the needs of the Grand Jury.

All relevant facts that are gathered by the police and, if necessary, by our own investigators will be presented to the Grand Jury in its traditional investigative role.

In addition, during the course of its investigation, the County Prosecutor's Office will listen to and consider credible evidence from any source, including defense attorneys and lawyers who may be representing the deceased's family in civil litigation against the city.

At the conclusion of an investigation and Grand Jury presentation, the decision to charge or not charge ultimately rests with the Grand Jury.

If at the conclusion of the Grand Jury presentation, the County Prosecutor's Office does not believe there is sufficient evidence to charge the police officer or officers with a crime or believes that the use of deadly force was justifiable by law or necessary by duty, the Grand Jury is informed that it has the final say. If they disagree with the assessment of the County Prosecutor's Office, Grand Jurors can ask for a true bill-no bill opportunity or they can ask to hear additional witnesses and evidence.<sup>2</sup>

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<sup>2</sup>*Policy of The Cuyahoga County Prosecutor's Office Regarding Fatal Use of Deadly Force by Law Enforcement Officers*, available at <http://prosecutor.cuyahogacounty.us/en-US/use-of-deadly-force-policy.aspx> (last viewed November 19, 2015).

**b. Legal standard governing the use of deadly force by law enforcement officers.**

**i. Police officers may not be criminally charged in deadly force incidents unless their conduct violates the Fourth Amendment.**

The Fourth Amendment guarantees that “[t]he right of the people to be secure in their persons \* \* \*, against unreasonable searches and seizures, shall not be violated \* \* \*.” Whenever a law enforcement officer restrains the freedom of a person to walk away, he or she has seized that person. *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Id.* All claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigation stop, or other ‘seizure’ of a free citizen must therefore be analyzed under the Fourth Amendment and its ‘reasonableness’ standard. *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L.Ed.2d 443 (1989).

To determine whether a law enforcement officer is justified in using deadly force, Ohio follows the rule set forth in *Garner*. *State v. White*, 142 Ohio St.3d 277, 290, 2015-Ohio-492, 29 N.E.3d 939. Law enforcement officers can only use deadly force in making an arrest where the police have probable cause to believe that the suspect poses a threat of death or serious bodily harm to the police or to public. *Id.*, citing *Garner*, 471 U.S. at 11 (referred to as the “justification doctrine”). The Supreme Court of Ohio has explained that “*Garner* requires that the officer have ‘probable cause to believe that the suspect poses a threat of serious physical harm’ to the officer or others. *Id.*, citing *Garner*. The *Garner* Court “gave two examples of the constitutional use of deadly force: ‘if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.’” *White*, at 282-83, quoting *Garner*, at 11-12.

When determining whether a law enforcement officer had probable cause to believe that a suspect posed a threat of serious physical harm to the officer or others, the required perspective is that of the “reasonable officer on the scene,” standing in the *officer’s* shoes, perceiving what *he* then perceived and acting within the limits of *his* knowledge or information as it then existed. *Graham v. Connor*, 490 U.S. at 395. The reasonableness of the officers’ actions must be judged from the perspective of “the reasonable officer on the scene and not through the lens of 20/20 hindsight, allowing for the fact ‘that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.’” *Id.* The Sixth Circuit U.S. Court of Appeals has used a non-exhaustive list of three factors to evaluate whether an officer’s actions are reasonable: “(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.” *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir. 2006). These factors inform the ultimate inquiry, which is always “whether the totality of the circumstances” justified the use of force.” *Mullins v. Cyranek*, 805 F.3d 760, 2015 U.S. App. LEXIS 19485, \*10 (6th Cir.2015), citing *Livermore v. Lubelan*, 476 F.3d 397, 404 (6th Cir. 2007).

What is a “reasonable” belief in light of the officer’s perceptions could also be a *mistaken* belief, and the fact that it turned out to be mistaken does not detract from its reasonableness when considered within the factual context and compressed time-frame of his decision to act. *State v. White*, 6th Dist. No. L-10-1194, 2013-Ohio-51, ¶ 77, citing *Saucier v. Katz*, 533 U.S. 194, 205-206, 121 S.Ct. 2151, 150 L.Ed.2d. 272 (2001). “The officer must also be given some leeway when a court analyzes the reasonableness of his decision. It is firstly important to remember what is a ‘reasonable’ belief could also be a mistaken belief, and that the fact it turned out to be mistaken does not undermine its reasonableness as considered at the time of the acts.” *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir.2008). “If an officer reasonably perceived a threat of attack by a suspect, apart from the actual attack, to which the officer may respond preemptively. If his perceptions were objectively reasonable, he incurs no criminal liability even if no weapon was seen, or the suspect was later found to be unarmed, or if what the officer mistook for a weapon was something innocuous.” *White* at ¶ 65. (Citations omitted).

Courts are generally hesitant to second-guess the decisions made by police officers in the field. *Vaughan v. Cox*, 343 F.3d 1323, 1331 (11th Cir. 2003). “A court must avoid substituting its personal notions of proper police procedure for the instantaneous decision made by the officer at the scene.” *Gammon v. Blakely*, 8th Dist. Cuyahoga No. 72175, 1997 Ohio App. LEXIS 5424, \*12. This constitutional standard applies to the criminal prosecution of police officers that allegedly used excessive force when arresting a suspect. *State v. White*, supra; *United States v. Reese*, 2 F.3d 870 (9th Cir. 1993); *State v. Mantelli*, 42 P.3d 272, 131 N.M. 692, (N.M. App. 2002); *United States v. Brugman*, 364 F.3d 613 (5th Cir. 2004) (Border patrol agent sentenced to 27 months imprisonment for beating illegal immigrant after arrest).

## ii. The prosecutor’s role in the grand jury.

In his dissent in *U.S. v. Williams*, 504 U.S. 36, 69-70, 112 S. Ct. 1735, 1753-1754, 118 L. Ed. 2d 352, 379, (1992), Justice Stevens explained:

Requiring the prosecutor to ferret out and present all evidence that could be used at trial to create a reasonable doubt as to the defendant’s guilt would be inconsistent with the purpose of the grand jury proceeding and would place significant burdens on the investigation. **But that does not mean that the prosecutor may mislead the grand jury into believing that there is probable cause to indict by withholding clear evidence to the contrary.** I thus agree with the Department of Justice that “when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.” U.S. Dept. of Justice, United States Attorneys’ Manual P9-11.233, p. 88 (1988).

(Emphasis added).

The Ohio Rules of Professional Conduct offer guidance to prosecutors as to when such evidence must be presented to a grand jury. They state that “[t]he prosecutor in a criminal case shall not \* \* \* pursue or prosecute a charge that the prosecutor *knows* is not supported



by probable cause.” Prof.Cond.R. 3.8(a) (emphasis in original). Likewise, Prof.Cond.R. 3.3(d) states that “[i]n an *ex parte* proceeding, a lawyer shall inform the *tribunal* of all material facts *known* to the lawyer that will enable the *tribunal* to make an informed decision, whether or not the facts are adverse.” (Emphasis in original).<sup>3</sup> Whenever the prosecutor is proceeding *ex parte*, as in a grand jury hearing, the ethics rules require that he or she should offer the tribunal “all material facts” whether or not adverse. Ronald D. Rotunda, *Legal Ethics The Lawyer’s Deskbook on Professional Responsibility* § 29-2.2 (ABA 2000) (citing ABA Model Rule of Professional Conduct 3.8(d)). It is therefore incumbent upon a prosecutor presenting a case involving a law enforcement officer’s fatal use of deadly force to a grand jury to explain the legal doctrine of justification and present all of the facts that could negate probable cause in such a case.

Without a clear legal authority regarding the burden of proof on Fourth Amendment compliance, policy must ultimately decide who determines whether a law enforcement officer’s fatal use of deadly force is constitutionally justified. At the pre-indictment stage, the policy in all fatal use of deadly force cases requires that decision be left in the hands of the grand jury. If the grand jury determines the officer’s actions violated the Fourth Amendment, it will then consider what criminal charges should be brought against the officer.

If the Grand Jury did not first review the issue of justification, the result would be a criminal indictment against every law enforcement officer who fatally applied deadly force in the line of duty, regardless of the facts. Since every fatal use of deadly force incident necessarily qualifies as a homicide, a reviewing and charging process that did not address whether an officer’s actions were justified would automatically result in a criminal trial for every officer in every case. Such a system would be unworkable and unfair.

**iii. Under the Fourth Amendment, the tactics used by the officers prior to the use of deadly force cannot be the basis for finding the use of deadly force itself unreasonable.**

The plaintiffs’ attorneys representing the Rice family have provided the prosecution with reports from two police procedure experts who have argued that it is appropriate to judge the officers tactics leading up to the shooting. These experts both rely on a 2008 Sixth Circuit case, *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir.2008), in which the court wrote that “[w]here a police officer unreasonably places himself in harm’s way, his use of deadly force may be deemed excessive.” *Kirby* involved police officers who shot an unarmed driver who was attempting to flee. The *Kirby* Court explained prior to the incident, the decedent’s vehicle “was moving slowly and in a non-aggressive manner, could not have hit any of the officers, and was stationary at the time of the shooting. Consequently, reasonable police officers in defendants’ positions would not have believed that Kirby ‘pose[d] a threat of serious physical harm, either to the officer[s] or to others.’” *Id.*, quoting *Garner*, 471 U.S. at 1.

This interpretation of *Kirby* has not, however, been adopted by the Sixth Circuit in deadly force cases where police officers believed a suspect had a firearm. In another Sixth

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<sup>3</sup> The relevant language in Ohio Rules of Professional Conduct 3.3(d) and 3.8(a) and ABA Model Rules of Professional Conduct 3.3(d) and 3.8(a) substantially mirror one another.

Circuit deadly force case involving a suspect with a firearm, the court rejected a claim that the officers recklessly created the circumstances that led to the deadly confrontation:

Livermore also asserts that [the police officer] \* \* \* intentionally or recklessly created the circumstances leading to Rohm's death.

\* \* \*

The proper approach under Sixth Circuit precedent is to view excessive force claims in segments. *Gaddis v. Redford Twp.*, 364 F.3d 763, 772 (6th Cir.2004); *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir.1996). That is, the court should first identify the “seizure” at issue here and then examine ‘whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances.’ *Dickerson*, 101 F.3d at 1161 (quoting *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992)). The *Dickerson* court reasoned:

**The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.**

*Id.* (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994)); *see also id.* at 1161-62 (citing with approval *Drewitt v. Pratt*, 999 F.2d 774, 778-80 (4th Cir. 1993) (rejecting a claim that an officer who resorts to deadly force in self-defense violates the Fourth Amendment if he unreasonably provokes the shooting by failing to identify himself as a police officer)); *Id.* at 1162 (citing with approval *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (scrutinizing “only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment” because the “Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general.”)).

\* \* \*

*Dickerson* instructs us to disregard these events and to focus on the “split-second judgments” made immediately before the officer used allegedly excessive force. *See Dickerson*, 101 F.3d at 1162 (citing *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) and *Sherrod v. Berry*, 856 F.2d 802, 805-06 (7th Cir. 1988) (en banc)).

*Livermore v. Lubelan*, 476 F.3d 397, 406-407 (6th Cir.2007) (emphasis added). The *Livermore* court then held that “[u]nder *Dickerson*, the preceding decisions made by [the police officer] are immaterial and not a sufficient basis for a claim under the Fourth Amendment.” *Id.*

The suggestion that it is appropriate to analyze the tactics leading to a deadly confrontation contradicts clearly-established Sixth Circuit precedent concerning whether it is appropriate to scrutinize the police tactics that led to a deadly force incident. A careful reading of *Kirby*, *Mullins* and *Livermore* demonstrates that the actions of the officers during the events leading up to the deadly force encounter fall outside of the Fourth Amendment analysis. And while *Kirby* does stand for the proposition that unreasonable

conduct *during the seizure itself* may result in liability for the officers, the necessary inquiry focuses on the split-second judgments made immediately before the deadly force incident. *Livermore*, at 407.

The U.S. Supreme Court recently rejected this argument when it explained that a person alleging that an officer used excessive force “cannot ‘establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.’” *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015), quoting *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir.2002). “Courts must not judge officers with ‘the 20/20 vision of hindsight.’” *Sheehan*, 135 S.Ct. at 1777, quoting *Graham*, 490 U. S., at 396.

*Sheehan* involved police officers responding to a group home where a mentally disabled woman was behaving erratically and threatening to kill her social worker. When the officers entered her room, the woman lunged at them with a knife. The officers retreated and closed the door, then re-entered the room. The woman again lunged at the officers, who unsuccessfully pepper sprayed and then shot the woman several times. The woman survived and sued the officers, claiming that the officers use of deadly force violated her Fourth Amendment rights and failed accommodate her disability under the Americans with Disabilities Act. *Id.* at 1769-1772. The Court declined to decide whether the officer’s specific failure to accommodate the woman’s disability under the ADA violated the Fourth Amendment, and instead held that the officers were generally entitled to qualified immunity under 42 U.S.C. § 1983. *Id.* at 1778.

One of the Rice family plaintiffs’ experts attempts to evade *Sheehan*’s prohibition on reviewing tactics by claiming that “that portion of the decision \* \* \* was not binding dicta.”<sup>4</sup> (Noble Report at 7, ¶ 27, fn 13, citing *Sheehan*, 135 S.Ct. at 1777). The expert cites to page 1777 of the *Sheehan* opinion to support his dismissal of the Supreme Court’s prohibition on reviewing officer’s tactics. A review of the entire passage from *Sheehan*, however, demonstrates that the tactics language is central to the Court’s holding that the officers should receive qualified immunity for not violating any of the plaintiff’s clearly established Fourth Amendment rights:

Under Ninth Circuit law, an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. See *id.*, at 1189-1190. Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. Indeed, even if Reynolds and Holder misjudged the situation, ***Sheehan* cannot “establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.”** *Id.*, at 1190. Courts must not judge officers with “the 20/20 vision of hindsight.” *Ibid.* (quoting *Graham*, 490 U. S., at 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443).

When *Graham*, *Deorle*, and *Alexander* are viewed together, the central error in the Ninth Circuit’s reasoning is apparent. The panel majority concluded that these three

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<sup>4</sup> “‘Dicta’ is defined as ‘expressions in court’s opinions which go beyond the facts before court and therefore are \* \* \* not binding in subsequent cases as legal precedent.’” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003 Ohio 5849, P85, 797 N.E.2d 1256, (Sweeney, J., dissenting) quoting Black’s Law Dictionary (6th ed.1990).

cases “would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry.” 743 F. 3d, at 1229. But even assuming that is true, *no precedent clearly established that there was not “an objective need for immediate entry” here*. No matter how carefully a reasonable officer read *Graham*, *Deorle*, and *Alexander* beforehand, that officer could not know that reopening Sheehan’s door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit’s test, even if all the disputed facts are viewed in respondent’s favor. Without that “fair notice,” an officer is entitled to qualified immunity. See, e.g., *Plumhoff*, 572 U.S., at \_\_\_, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069.

Nor does it matter for purposes of qualified immunity that Sheehan’s expert, Reiter, testified that the officers did not follow their training. According to Reiter, San Francisco trains its officers when dealing with the mentally ill to “ensure that sufficient resources are brought to the scene,” “contain the subject” and “respect the suspect’s “comfort zone,” “use time to their advantage,” and “employ non-threatening verbal communication and open-ended questions to facilitate the subject’s participation in communication.” Brief for Respondent 7. Likewise, San Francisco’s policy is “to use hostage negotiators” when dealing with “a suspect [who] resists arrest by barricading himself.” *Id.*, at 8 (quoting San Francisco Police Department General Order 8.02, §II(B) (Aug. 3, 1994), online at <http://www.sf-police.org> (as visited May 14, 2015, and available in Clerk of Court’s case file)).

Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, **so long as “a reasonable officer could have believed that his conduct was justified,” a plaintiff cannot “avoi[d] summary judgment by simply producing an expert’s report that an officer’s conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.”** *Billington*, *supra*, at 1189. Cf. *Saucier v. Katz*, 533 U. S. 194, 216, n. 6, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (Ginsburg, J., concurring in judgment) (“[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently” (quoting *Roy v. Inhabitants of Lewiston*, 42 F. 3d 691, 695 (CA1 1994))). Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified.

*Sheehan*, 135 S. Ct. at 1776-1778 (emphasis added).

Perhaps more important that a prohibition on reviewing tactics, *Sheehan* also makes clear that in a use of deadly force case, a Fourth Amendment violation cannot be based solely upon “an expert’s report that an officer’s conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.” *Id.* Yet that is exactly what the plaintiffs’ experts offer when they claim that these officers “engaged in reckless tactical decision making that created the danger, thus the use of deadly force was excessive, objectively unreasonable and inconsistent with generally accepted police practices” (Noble Report, p. 5, ¶ 19) whose actions were “reckless, unreasonable, provocative, and dangerous” (Clark Supplemental Report, p. 2). Given the disagreement between the police procedure experts

who reviewed this case (Katsaris, Sims, Crawford, Noble, and Clark), this case seems to fall squarely under *Sheehan's* admonition that “a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently.” *Id.*

## 5. Analysis

### **a. Officers Loehmann and Garmback were dispatched to handle a Code-1 call involving a man with a gun threatening people at Cudell Recreation Center.**

On November 22, 2014, at approximately 3:24 p.m., Officers Loehmann and Garmback received the Dispatch call for officers to respond to a Code-1 incident involving a man with a gun at Cudell Recreation Center. Within the Cleveland Police dispatch system, a Code-1 was the highest priority call and designated the incident as a significant public risk. The officers were notified (1) that a named individual had called 911, (2) the caller reported that a black male sitting in the swing kept “pulling a gun out of his pants and pointing it at people,” (3) the male with the gun was “wearing a camouflage hat, a gray jacket with black sleeves.” Because the 911 call-taker had not transmitted any information to the Dispatcher about the suspect possibly being a juvenile, or the gun possibly being a fake, Officers Loehmann and Garmback only knew that a man in a camouflage hat and a gray jacket with black sleeves was sitting at the Cudell swings pulling a gun out of his pants and pointing it at people. When Officers Loehmann and Garmback saw Tamir at the Gazebo as they approached Cudell Recreation Center, his appearance matched the description provided by the Dispatchers.

Although Tamir was only 12 years old, all of the officers who saw him on November 22, 2014 mistook him as an older male. The Medical Examiner’s report lists Tamir as weighing 195 pounds at the time of autopsy. The clearest indication of the Officers’ mistaken belief that Tamir was much older comes when Officer Garmback radioed Dispatch for an ambulance nearly 40 seconds after the shooting, describing him as a “black male, maybe 20 [years old].” The FBI Special Agent who treated Tamir at the scene was also surprised to learn that Tamir was only 12, as were the other officers who saw him on November 22, 2014.

### **b. Officer Garmback’s decision to use the West 99th Street approach to quickly confront what he had been informed was an armed suspect near the Recreation Center was reasonable.**

On November 22, 2015, Officer Loehmann was a trainee officer assigned to Officer Garmback, whose responsibility was to supervise and train Loehmann. Loehmann and Garmback were a two-man unit, and Garmback drove the vehicle both men used to patrol. As the senior officer, Garmback was responsible for both the decision to take the West 99th Street approach in responding to the Code-1 call at Cudell, as well as the tactics used by the officers to confront the suspect they believed was pulling a gun out and pointing it at people at the recreation center.

The Sixth Circuit has set down non-exhaustive list of three factors to evaluate whether an officer’s actions are reasonable: “(1) the severity of the crime at issue; (2) whether the

suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.” *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir.2006). When analyzed according to the information that Officers Loehmann and Garmback had at the time of the incident, both the first and second factors weigh heavily in favor of the officers.

**i. A suspect pointing a gun at people at a recreation center poses a severe threat to the safety of officers and the public.**

According to the information known to the officers at the time, the suspect in this case was believed to be engaging in extremely serious criminal behavior: pointing a gun at people at a recreation center. In *Mullins v. Cyranek*, *supra*, the Sixth Circuit examined another suspect’s decision to pull out a gun in a public place, and explained the seriousness of the incident:

Turning to the reasonableness factors, we find that the severity-of-the-crime inquiry weighs in favor of Cyranek. We measure the reasonableness of the use of deadly force at a particular time based on an “objective assessment of the danger a suspect poses *at that moment*.” *Bouggess v. Mattingly*, 482 F.3d 886, 889 (6th Cir. 2007) (emphasis added). Thus, in analyzing the reasonableness of Cyranek’s use of force, we must look at Mullins’s behavior immediately prior to the moment he was shot. Although Cyranek admits that, at the outset, he had probable cause to believe only that Mullins had a weapon—a first degree misdemeanor if possessed without a permit, *see* Ohio Rev. Code § 2923.12—Mullins removal of a handgun in Cyranek’s presence without Cyranek’s permission constituted a much more serious offense. *See, e.g.*, Ohio Rev. Code § 2923.12(B)(3), (F)(5) (making it a fifth degree felony for someone with a concealed handgun license to remove their firearm without permission during a law enforcement stop). The district court noted that Mullins’ actions may also fall within Ohio’s felonious assault statute. *Mullins*, 2014 U.S. Dist. LEXIS 98736, 2014 WL 3573565, at \*11 n. 17 (citing Ohio. Rev. Code § 2903.11).

*Mullins v. Cyranek*, 2015 U.S. App. LEXIS 19485, \*11, 805 F.3d 760 (6th Cir. 2015).

In this case, Officers Loehmann and Garmback had been given information from a citizen-caller who gave both his name and his telephone number, which is generally the most reliable form of information an officer can receive from an informant. *See* Lewis R. Katz, *Ohio Arrest, Search and Seizure*, 2015 Ed., § 2:22, p. 93 (“[r]eliable information obtained from credible informants suffices to establish probable cause. \* \* \* A report of a crime by an identified victim or a disinterested, identified witness may be taken at face value and acted upon without further checking the veracity of the source of information”). Officers Loehmann and Garmback therefore had probable cause, based on the information provided by Dispatch, that the suspect at Cudell had violated Ohio’s felonious assault statute, R.C. 2903.11, by taking a gun out and pointing it at people.

The security video<sup>5</sup> evidence demonstrates numerous instances corroborating the 911 caller’s concern about a man pointing a gun at people at the Recreation Center:

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<sup>5</sup> The State hired Forensic Video Solutions, a company located in Spokane Washington, to perform forensic video analysis of the Cudell Recreation Center Security Video. Grant Fredericks, the



Rice is first visible on Camera 4, emerging from the area of the community center. At 13:05:55, he is seen pointing a gun toward the right side of the video screen.



At 13:06:04, Rice is pointing the gun directly at the head of a male.



Gun

(Grant Fredericks' Report at p. 16).

company's analyst, prepared the magnified camera views of the incident cited in this report. Fredericks is the only forensic video analyst to have provided a report in this case. Fredericks has served as a Team Leader for the Law Enforcement & Forensic Services Video Association (LEVA) Video Analysis Certification Program, a Team Leder for LEVA's Curriculum Development Committee, has served for the past 12 years as an instructor of Forensic Video Analysis and Digital Multimedia Evidence Processing for the FBI National Academy in Quantico, VA. A copy of Fredericks' complete credentials is contained within his report, available on the Prosecutor's Office website.



(Slide 496, Video 4, Timestamp 15:09:01).



(Slide 161, Video 5, Timestamp 15:13:09).





(Slide 633, Video 5, Timestamp 15:17:14).



(Slide 689, Video 5, Timestamp 15:17:42).

Just three minutes before Officers Loehmann and Garmback arrived, the security video recorded Tamir under the Gazebo at timestamp 15:27:14, again pulling out the replica firearm and pointing it:



It is clear from the foregoing evidence that during the hours and minutes before his contact with Officer Loehmann, Tamir had been seen pulling the replica firearm in and out of his waist. Seeing this caused the 911 caller such concern that he told the 911 call taker that Tamir was “scaring the shit” out of him.

**ii. The incident conforms to the Cleveland Police Department Active Shooter policy.**

Since the 1999 mass-shooting incident at Columbine High School in Colorado, police departments throughout the United States have generally re-assessed a strategy that called for containment and reliance on specialized SWAT teams to handle gunmen and public threats. See generally, *Responding to An Active Shooter*, available at <http://www.cbsnews.com/news/responding-to-an-active-shooter-60-minutes-anderson-cooper/> (last viewed December 23, 2015). Instead, police departments have shifted from the contain-and-wait-for-backup strategy towards a strategy that calls for the first officers responding to a scene to quickly engage and attempt to neutralize active shooters. *Id.* This new approach is intended to lessen the loss of life caused by active shooters while waiting for SWAT teams and backup to arrive.

Consistent with this general trend, the Cleveland Police Department enacted an active shooter policy “[t]o empower the patrol officer or first responder to confront an active shooter when any delayed response or a failure to act constitutes a greater risk than waiting for a specialized response.” (Cleveland Police Department Active Shooter Policy, p. 1). The Department’s Active Shooter policy, which went into effect on October 18, 2011, defines an active shooter scenario:

**The suspect’s activity and use of a firearm** (or any other deadly instrument, device, machine, dangerous ordnance, or deadly hazard) is causing **or attempting to cause** immediate **death and/or serious physical harm in a well populated area (target rich environment), such as a school, church, business, or any other public place.** The activity is continuing and there is an immediate and ongoing threat of death or serious physical harm to potential victims.

(Cleveland Police Department Active Shooter Policy at pp. 1-2, emphasis added). The policy states in relevant part:

In order to prevent death or serious harm to innocent persons, **officers responding to an active shooter incident shall have the authority to and shall attempt to make immediate contact with and stop the active shooter.** Secondly, responding officers shall deny the active shooter access to additional victims and shall rescue injured/potential victims. Officers shall rely on their Rapid Action Immediate Deployment (RAID) training to quickly and efficiently mount an immediate response prior to the availability of a tactical unit. In active situations, delayed response can result in additional loss of life or serious physical harm.

(Cleveland Police Department Active Shooter Policy at p. 1, emphasis added).

Applying the policy to this situation, Officer Garmback provided a statement to the Sheriff's Department in which he explained that when he approached the suspect from W. 99th Street, "[p]art of [his] intentions [were] to keep him away from entering the Recreation Center Building." (Garmback Statement at p. 1, ¶ 7). Garmback had reasonable grounds to believe he was facing a potential active shooter. Based upon the information Dispatch had provided to the officers, they had reason to believe that a suspect who kept pulling a gun out and pointing at people was attempting to cause death and/or serious physical harm at a target rich environment, Cudell Recreation Center. Read within a policy that authorized officers to prevent death or serious harm to innocent persons by making immediate contact with and stopping an active shooter, Garmback's actions – according to the information he had at the time – fit within the stated policy.

Contrary to what some have claimed, there were numerous people at Cudell Recreation Center at the time of the incident. At the precise moment of the shooting, approximately 20 people were gathered in the Cudell gymnasium, whose entrance is 200 feet away from the gazebo. The following image was taken by the Cudell Recreation Center security video system at 15:30:22:





At 15:30:32, the recreation center's security video system recorded four people standing outside of the main entrance:



During the ten minutes prior to the incident, numerous people could be seen walking past the Recreation Center's security cameras. For example:





As an experienced First District officer, Garmback would have known that during business hours, the Recreation Center would be crowded with children and adults. It was therefore reasonable for Garmback to believe that an armed suspect was easily capable of gaining access to the Recreation center and threatening lives.

**iii. Officer Garmback approached the incident using a route commonly taken by First District Officers.**

Given this backdrop, Garback's chosen route to confront the suspect by means of the West 99th Street route was likewise a reasonable choice. Garmback's statement indicates that he knew that the swing set area – the dispatched location of the armed suspect – could be accessed easily from the West 99th Street route. (Garmback Statement, p. 1, ¶ 4). Garmback also knew that the swing set area would be cut off from a parking lot approach because of automobile barriers. *Id.*

Critics of Officer Garmback's West 99th Street route and approach have accused him of recklessness because it led him to drive directly into a point of contact with Tamir, leaving Officer Loehmann in an exposed position that may have contributed to his use of deadly force. The evidence, however, demonstrates that after he saw Tamir at the Gazebo, Garmback intended to stop much earlier than he did, and that his car slid due to the slippery surface conditions. The Ohio State Highway Patrol Accident Reconstruction Report notes "[t]here was some snow on the grass at the time of the video, especially towards the final rest area, but the pre-approach was primarily wet grass with a layer of fallen tree leaves." (Ohio State Highway Patrol Report at p. 39). The State Highway Patrol Report indicates that Officer Garmback applied his brakes a significant distance before his contact with Tamir:

After plotting the vehicle, I added two parallel lines 28'4" south of the vehicle's rear bumper. I added in the vehicle's measured length and obtained a distance of 40.8 ft. (40'9.6") which was consistent with detective Sandoval's measurements. In his narrative, Detective Sandoval indicated this was his observed length of the skid marks leading to final rest of Car #115A.

The scene photography, while limited, appeared to show different. Several images clearly show at least the left tire mark extending south to the concrete sidewalk, adding approximately 11.3 ft. in additional length to the tire marks. Moreover, the tire marks are visible on the opposite side of the sidewalk near the area of impact with the play area, approximately 32.4 ft. south of the measured skid marks.

While the tire marks are visible beyond this area, the video shows evidence of steering input prior to impact with the playground curb. Visible steering input makes the possibility of evasive braking prior to impact with the curb unlikely, even with anti-lock brakes activated.

Based upon the observations of Detective Sandoval, evidence obtained from the surveillance video and scene photography, Car #115A decelerated to a stop over a distance between 40.8 ft. and 73.3 ft.

(Ohio State Highway Patrol Report at p. 39). The report calculated the minimum slide to stop braking time of 3.5 seconds (for a 40.8 foot slide), a maximum slide to stop braking time of 4.5 seconds (for a 73.3 foot slide), and an average slide to stop braking time of 4 seconds (for a 56.9 foot slide). (Ohio State Highway Patrol Report at p. 40). It is therefore clear that when Officer Garmback saw Tamir begin walking towards the officers' route, he immediately applied the brakes, intending to stop well short of the Gazebo.

**c. Credible evidence firmly corroborates Officers Loehmann and Garmback's statements that they saw the suspect with a gun.**

Officer Loehmann and Officer Garmback both gave the Sheriff's investigators statements in which they described having seen the suspect in possession of a gun. Loehmann stated:

As we were even with the swing set, we observed a male matching the description given by the radio seated under the Gazebo. The male was wearing a camouflage hat and grey jacket with black sleeves. \* \* \* I saw the suspect. \* \* \* I saw the suspect pick up an object and stick it down into his waistband and he stood up and walked towards the Recreation Center.

\* \* \*

The suspect lifted his shirt reached down into his waistband.

\* \* \*

The suspect had a gun . . .

\* \* \*

I observed the suspect pulling the gun out of the waistband with his elbow coming up. \* \* \* With his hands pulling the gun out and his elbow coming up, I knew it was a gun and it was coming out. I saw the weapon in his hands coming out of his waistband . . .

(Loehmann Statement at pp. 1-2). Likewise, Officer Garmback stated:

I first saw the gun that the male had a gun about the time Ptl. Loehmann exited the cruiser. The male was pulling it from the right front area of his waistband. I thought the gun was real.

\* \* \*

I saw the gun loose on the ground, a few feet from the male after he was shot. I moved it further away from him.

(Garmback Statement at pp. 1-2).

Information gathered during the investigation demonstrates that from the vantage point Loehmann would have had as he traversed the swing set area, it is possible to have

seen the suspect in the manner that Loehmann described. BCI's 360° recreation of the incident in April 2015 produced the following vantage point of the Gazebo as seen from the area adjacent the swing sets:



**i. Forensic video analysis confirms the officers' statements.**

The officers' statements are likewise corroborated by the security video camera's depiction of the shooting. Grant Fredericks assembled slides containing each frame from Cudell Recreation Center Security Cameras 1 and 4, along with time stamp data recorded by the DVR. According to Fredericks, Tamir stood up and began walking 10 seconds before the police vehicle stopped at the Gazebo. The following slide, numbered 75 in Fredericks' sequence, shows a magnification of Camera 1, and unmagnified views of Cameras 1 and 4. As seen in Slide 75, Camera 4 shows that the headlights of Loehmann and Garmback's cruiser could be seen approaching the swingset area as Tamir stood up:





In his report, Fredericks describes what happened next:

Slides 118 to 121 show Rice moving forward toward the police vehicle. His hands are still together at the center of his body. His hands are not in the area of his jacket pockets.

At Slide 122, Rice's right hand has moved downward, toward his waist. His left hand has also moved downward.

Slide 123 shows that Rice's right shoulder has moved upward and that his right arm is slightly bent. The end of his dark sleeve is at his waist area. His left hand is moving toward the center of his waist.

Also at Slide 123, the video shows that the door of the police vehicle is partially opened. The police vehicle has not yet stopped moving.

Slide 124 shows Rice's right shoulder and arm rising upward. His right hand is above the area of his waist.

Rice's left hand is at the center of his stomach area, slightly above his waist. His grey jacket is not at the waist line; it is higher than the waist. Rice has lifted the jacket with his left hand, as he removes the gun with his right hand. This is the same activity that is depicted in each of the previous observations showing Rice manipulating the gun in and out of the waistband area of his pants.

There is no visual evidence at Slide 124 supporting that the shot had been fired prior to this point in time, or at this point in time. The purported timestamp shows this is the first image at 15:30:23.



Slide 125, which represents the second image recorded at 15:30:23, shows Rice reacting to the shot being fired. Rice begins to fall to the ground. The shot is fired slightly before the recorded image.

Slide 126 shows Rice continuing to move downward in the image. Officer Loehmann moves toward the rear of the police vehicle. He appears to have traveled approximately four feet.

At Slide 127, Loehmann is moving to the ground at the rear left corner of the police vehicle. Loehmann remains on the ground for a few images.

(Fredericks Report at pp. 25-26). Based upon this information, Fredericks' states that "[a]fter carefully examining the video images and other materials list in this report, I have formed the opinion that at the time of the shooting Tamir Rice lifted his jacket with his left hand, and with his right hand, he reached for the gun that was located in the waist area of his pants. (Fredericks Report at 29).

Fredericks' magnification work visually depicts the incident in slides 121-125 of Video 6:







Two police procedure experts and an accident reconstruction expert employed by the Rice family plaintiffs' attorneys have opined that Rice did not display the replica Firearm to Officers Loehmann and Garback in the moments before he was shot.<sup>6</sup> None of these

<sup>6</sup> Noble writes that "Officer Loehmann claims Tamir lifted his shirt and reached down into his waistband—facts that are directly contradicted by the video." (Noble Supplemental Report at p. 4, ¶ 4). Clark writes that "Tamir's arm and hand movements were understandably natural and do not demonstrate him deliberately reaching into his waist for a gun or pulling out a gun." (Clark

purported experts, however, have any training in forensic video analysis and have never been recognized as experts in that field. As plaintiffs' police procedure expert Noble concedes at multiple points, the video "picture is grainy and lacks detail." (Noble Supplemental Report at p. 2). Neither Noble, Clark, nor Wobrock have any more qualifications than a layman to express any opinions to a reasonable degree of professional certainty about what the video depicts. Without having been present during the shooting incident itself, these non-expert opinions about what can be seen on video are not reliable, helpful or credible.

**ii. The position of the gun after the shooting and the officers' defensive reaction confirms that they saw the suspect pulling out a gun.**

The video also depicts two crucial facts that confirm the officers' claims that they saw the suspect pulling a gun out of his waistband. First, careful examination of the video during the moments after Officer Loehmann shot Tamir shows a point of dark contrast (circled in red) appear on the Gazebo's concrete floor immediately after Tamir falls, as shown in slide 130's magnification of Camera 1:



The dark area of contrast remains visible until Slides 197-199, when Officer Garmback approaches Tamir and uses his left leg to kick the area where the dark point of contrast (circled in red) can be seen:

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Supplemental Report at pp. 1-2). Dr. Jesse Wobrock writes: "Tamir Rice did not have enough time to remove his hands from his jacket pockets, prior to being shot" and "[t]he video shows that at no point in his encounter with the police did Tamir Rice reach into his waistband." (Wobrock Report at p. 7).





Garmback completes the kicking movement with his leg as of slide 201, when the dark area of contrast is no longer visible:



Again, Officer Garmback explained in his statement that he “saw a gun loose on the ground, a few feet from the male after he was shot. I moved it further away from him.” Careful examination of the aforementioned slides corroborates Garmback’s account and strongly indicates that the darkly contrasted object in the slides was Tamir’s replica firearm, which Tamir dropped out of his hand after being shot by Officer Loehmann. Indeed, the Cleveland Police Department’s scene photos show the replica firearm and magazine on the ground<sup>7</sup> near the spot where Tamir fell:

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<sup>7</sup> Officers at the scene placed plastic over the replica firearm to prevent rain from falling on the evidence. The final location of the replica firearm on the grass is explained by Officer Garmback having kicked the gun away from the Gazebo, as shown above.



The plaintiffs' attorneys' police procedure and accident reconstruction experts make no attempt to account for how the replica firearm ended up on the ground. If, as they have claimed, Tamir was not pulling out the replica firearm when he got shot and his hands had been in his pockets, the replica firearm would have remained concealed under his clothing. Instead, the fact that the darkly contrasted shape appears on the video immediately after Loehmann shot Tamir strongly suggests that Fredericks' observations were correct: Officer Loehmann shot Tamir after Tamir was pulling up his jacket with his left hand and was using his right hand to pull out his replica firearm from his waistband.

The physical evidence also confirms Fredericks' conclusion that Tamir was pulling up his jacket at the time he was shot. The medical examiner's autopsy report noted that Tamir's gunshot wound was found "on the left side of the abdomen slightly above the umbilicus located 23 ½" below the top of the head and ½" **to the left of midline.**" (Medical Examiner's Autopsy Report at p. 1, emphasis added). The Medical Examiner's Trace Evidence Laboratory Report describes the location of the bullet entrance wound on Tamir's jacket: Defect A entrance (3/16 Inch diameter) located 18 Inches below the left mid-shoulder point and **3 3/4 Inches left of the anterior mid-body line.**" (Medical Examiner's Trace Evidence Laboratory Report at p. 3, emphasis added). For the bullet entrance on the jacket (3 ¾" left of midline 18 inches below mid-shoulder) to line up with the bullet wound (1/2" left of midline, above the navel), the jacket would have had to be pulled "up and to the right," as noted by plaintiffs' accident reconstructionist Wobrock. (Wobrock report at p. 7). Although Wobrock believes this was caused by Tamir raising his arms "defensively," with his hands in his pockets, the evidence is nevertheless consistent with Fredericks' conclusion that Tamir was pulling his jacket up with his left hand at the time he was shot by Officer Loehmann.

The second significant fact revealed by the video, and which goes unaddressed by the plaintiffs' police procedure experts, is that the security video shows both Officers reacting defensively to Tamir even after he was shot, indicating they both had seen Tamir with what

they thought was a gun. Officers Loehmann and Garmback both took up defensive positions with their guns drawn, even after Tamir had fallen to the concrete Gazebo floor, seen in Video 6, slides 135-200, and illustrated below in the magnified portion of slide 141:



Indeed, as Officer Garmback summoned EMS to the scene, the police dispatch audio recording shows that Loehmann could be heard continuing to yell in the background.<sup>8</sup> The video depicts Garmback raising his hands to the area of his shoulder microphone at slide 204, whose timecode is 15:31:03, or 41 seconds after Tamir was shot.

Even after Tamir had been shot, the security video shows that both Garmback and Loehmann genuinely believed that Tamir continued to pose a threat. Both officers continue to have their guns drawn until Officer Garmback kicked the replica firearm away at slides 197-200. This strongly supports both officers' statements that they saw the suspect pulling a gun out of his waist. If, as the plaintiffs' police procedure experts suggest, neither officer had seen Tamir pulling out a gun, they would not have had a reason to remain in a defensive position after Tamir had fallen to the ground.

Even if Officer Loehmann had not observed Tamir pulling the gun out of his waistband, the Sixth District Court of Appeals explained that a suspect's body language may still give the officer reasonable belief that he poses an imminent risk of harm:

In evaluating reasonableness in the threat-perception cases, courts have also accepted that officers are trained to recognize certain behaviors and "body language" as danger cues. These include obvious attempts to evade the officer, furtive gestures and glances, sudden turns, and the ignoring of commands, such as an order to show one's hands. Because such encounters often occur at night, this limits vision significantly and enhances risk to both the officer and the suspect. *See Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir.2001) (unarmed suspect shot while "look[ing]

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<sup>8</sup>Loehmann's voice can be heard over Garmback's at timecode 4:15 of the Police Dispatch audio recording of the incident.

over shoulder" at officer and "mov[ing] his arms as though reaching for a weapon at waist level." No weapon found); *Reese, supra*, at 500-501 (officer could reasonably believe that suspect in car was reaching for a gun on floorboard. No weapon found); *Slattery v. Rizzo*, 939 F.2d 213, 215 (4th Cir.1991) (officer reasonably felt threatened by suspect turning toward him without left hand in view. No weapon found); *Davis v. Freels*, 583 F.2d 337 (7th Cir.1978) (suspect, ordered to raise hands, shot in back after officer saw "sudden motion with his right elbow in a backward direction." No weapon found).

The motion most commonly identified by courts that prompted the officer to believe preemptive gunfire was needed is the reach toward the waistband or into a pocket. In *Anderson v. Russell, supra*, the officer shot an unarmed suspect who, ignoring the officer's orders, "was lowering his hands in the direction of a bulge" near "[his] waistband." *Id.* 247 F.3d at 130. The bulge was afterward discovered to be a Walkman radio. The Fourth Circuit found "[Officer] Russell's split-second decision to use deadly force \* \* \* reasonable in light of Russell's well-founded, though mistaken, belief that [the suspect] was reaching for a handgun." *Id.* at 132. See also *Sherrod v. Berry*, 856 F.2d 802, 804-05 (7th Cir.1988) (unarmed suspect shot while making a "quick movement with his hand into his coat [as if reaching] for a weapon"); *Lamont v. New Jersey*, 637 F.3d 177, 179 (3d Cir.2011) ("suspect [shot after] suddenly pull[ing] his right hand out of his waistband [as] though he were drawing a gun." Crack pipe found).

*State v. White*, 6th Dist. No. L-10-1194, 2013-Ohio-51, ¶¶ 66-67. Had Officer Loehmann known that Tamir was only 12, that he only possessed a toy gun, it is possible that he would not have found Tamir's movements threatening and may not have chosen to shoot in that moment. But Officer Loehmann did not know those facts, and the law requires that he be judged according to whether he acted reasonably with the only those facts he knew at the time.

Here, the Officers had information from Dispatch that the suspect – whose description matched Tamir exactly – had been pulling a gun out of his waist and pointing it at people. Given those facts, any movement by Tamir towards a bulge or a pocket near his waist could have been mistaken by Officer Loehmann as a movement towards a gun. Since Officer Loehmann had been given information from Dispatch that he had reason to believe was accurate, any movement by Tamir near the area where Loehmann believed him to have a firearm could have led him to a reasonable, but mistaken, belief that Tamir posed an imminent threat of serious physical harm.

**iii. Officers Loehmann and Garmback's subsequent statements are consistent with the evidence in this case.**

Loehmann and Garmback's subsequent statements to fellow officers after the incident also support Fredericks' conclusions. After the shooting, Officer Loehmann made a statement to Officer Cunningham, the off-duty Cleveland Police Officer sitting at the Recreation Center entrance at the time of the incident. Within 90 seconds of the incident, Cunningham asked Officer Loehmann "What happened?" Loehmann responded "he didn't give me a chance... he reached for the gun and he gave me no choice. There was nothing I



could do.” Loehmann’s statement to Cunningham – given while he was still under the stress of the incident – would be admissible as an exception to the general rule against hearsay because it is an “excited utterance.” Evid. R. 803(2) (a statement “relating to a startling event or condition made while the declarant was perceiving the event or condition, or immediately thereafter . . .”). “This exception derives its guaranty of trustworthiness from the fact that [the] declarant is under such state of emotion shock that his reflective processes have been stilled. Therefore, statements under these circumstances are not likely to be fabricated.” Paul C. Giannelli, *Baldwin’s Ohio Practice Rules of Evidence Handbook*, 2014 Ed., p. 651, citing McCormick § 297 (2d Ed. 1972). As explained above, there is no reason to believe that Loehmann’s statement to Cunningham at that moment was not trustworthy.<sup>9</sup>

At the scene, Loehmann also described the incident to the FBI Special Agent, who indicated that Loehmann told him that Tamir “had a gun and he reached for it after he told him to show his hands.” The Special Agent observed that Loehmann “seemed like a guy that was put in a very difficult situation and had to make a very quick decision based upon what he believed was an imminent fear of death or serious physical injury to himself and reacted to it.” Officer Lou Kitko, another officer at the scene, recounted that Loehmann stated that he had shot Tamir after “yelling commands at the male, they stopped the car and the male went for the firearm and tried to pull it out.” Officer Thomas Griffin, also at the scene, told Sheriffs’ Investigators that he had spoken to Loehmann within a week of the incident, and that Loehmann was still emotional about the shooting. Officer Loehmann told him that “the suspect pulled up his sweatshirt and then pulled a gun out of his waistband and that he saw the gun in the suspect’s hand and it really looked big.”

Garmback also spoke with Griffin during the week following the incident. According to Griffin, Garmback stated that “that they pulled up saw a suspect furthering the description and thought he might run, as they pulled up the suspect started to walk toward them and he attempted to stop but could not and slid up to the gazebo. As he walked up [the suspect] pulled up his shirt and drew a gun from his waistband.” Officer Garmback also stated to Officer Griffin that he as well as Officer Loehmann were yelling commands “to “put up your hands” as they slid.

#### **iv. Independent evidence shows that throughout the day on November 22, 2014, Tamir was pulling the gun in and out of his waistband.**

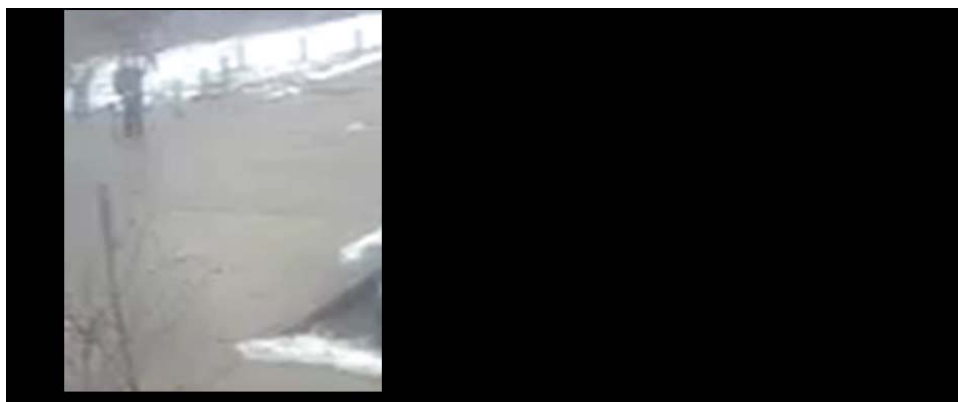
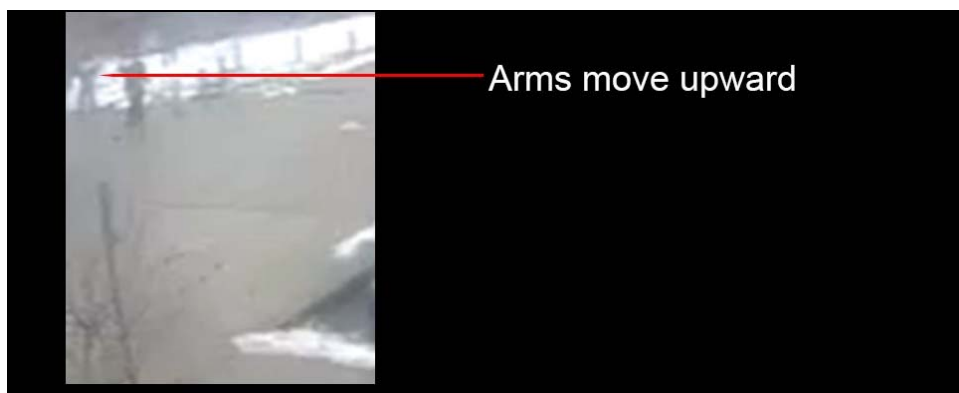
A great deal of independent evidence indicates that Tamir kept the gun in his waistband throughout the day on November 22, 2014. Minutes before his encounter with officers, the 911 caller described several times seeing Tamir “kee[p] pulling [the gun] in and out of his pants.” Likewise, Witness #4, a young friend of Tamir, said that on the day of the incident, Tamir would pull the gun in and out of his pants “like robbers do.” Likewise, Witness #3, another young friend of Tamir, said Tamir kept his gun inside his waist band

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<sup>9</sup> The Rice family plaintiffs’ lawyers, through their police procedure experts, suggest that Loehmann’s employment history shows that his statements are unworthy of belief. This ignores the fact that Garmback also said he saw Tamir pulling what he thought was a gun out of his waist. As shown above, however, Loehmann’s statement is strongly supported by independent evidence and it is unnecessary to rely upon his credibility to determine whether his statement to Officer Cunningham was truthful.

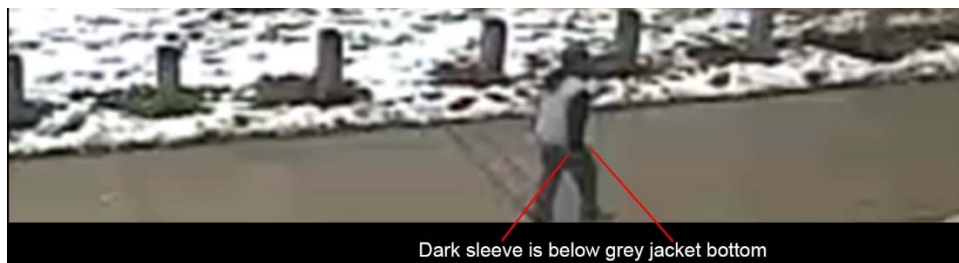
with the barrel pointing downward and that Tamir had to lift up his jacket to pull it out when he was with him.

In his analysis of the video, Fredericks identified additional instances where Tamir could be seen performing similar movements. In slide 465-68 of Frederick's fourth video, bearing timestamps 15:08:45 to 15:08:47, Fredericks magnified a view from camera #4:





In slide 153-160 of Frederick's fifth video, bearing timestamps 15:13:05 to 15:13:09, he identified another similar movement by Tamir, in which Tamir can clearly be seen removing the gun from his waist and pointing it:





It should be noted that during the preceding slides, the 911 caller was present and sitting at the Gazebo.

Fredericks also noted a third instance of similar movement by Rice, again within view of the 911 caller. Between slides 698 and 710 of Fredericks' fifth video, between timestamps 15:17:49 and 15:17:52, he documented the following movement by Tamir:



(Slide 698)



(Slides 703-705)



(Slide 710).

As shown above, both officers' statements are largely corroborated by Fredericks' forensic video analysis, independent witnesses, and physical evidence. The only remaining question is to what extent Tamir could have heard the officers' commands. It is unclear whether the officers initially gave the commands from inside a closed vehicle. In his statement, Garmback stated that he "believe[d] the cruiser windows were up at the time of these events" but was "not sure." (Garmback statement, p. 1, ¶ 10). Loehmann, in his statement, described giving commands: "[a]s car is slid, I started to open the door and yelled continuously 'show me your hands' as loud as I could. The security video shows Officer Loehmann opening the door approximately one second before shooting Tamir. Officer

Garmback was also yelling “show me your hands.” (Loehmann Statement, p. 1). In *White*, the Supreme Court stated that under *Garner*, warnings are required “when feasible.” *State v. White*, 142 Ohio St.3d 277, 282-3, 29 N.E.3d 939, 2015-Ohio-492, quoting *Garner, supra*, at 11-12. The fact that Tamir may not have heard the officers’ commands to show them his hands does not place the incident outside of the Fourth Amendment.

Even assuming Tamir could not have heard Loehmann’s warnings given from inside the car, Loehmann felt he had no choice in the instant he used deadly force. Garmback’s approach – skidding to a halt directly in front of where Tamir was standing – had left him dangerously exposed to what he believed was a suspect drawing a gun. “The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists. \* \* \* Officers need not be absolutely sure [of] the suspect’s intent to cause them harm - the Constitution does not require that certitude precede the act of self-protection.” *State v. White*, 6th Dist. No. L-10-1194, 2013-Ohio-51, ¶ 64, quoting *Elliott v. Leavitt*, 99 F.3d 640, 643-44 (4th Cir.1996).

Likewise, the law requires that the officer’s actions be reviewed from the standpoint of “the reasonable officer on the scene and not through the lens of 20/20 hindsight.” *Graham v. Connor, supra*, 490 U.S. at 395. There is no evidence to contradict Loehmann’s account that he shouted commands as he opened the door and drew his weapon on Tamir. Although the time frame from Loehmann exiting the vehicle and firing his weapon on Tamir was compressed, the evidence does not show that his decision to shoot was unreasonable, or that it was feasible to give more commands than he did. Again, Loehmann was facing a suspect pulling an object from his waist that Loehmann thought was a real gun. The law does not require an officer to wait until being fired upon to confirm whether the gun is real or to give the suspect additional time to open fire to draw and fire upon the officer.

**v. Tamir’s replica firearm was functionally identical to a real firearm.**

During their investigation, Cuyahoga County Sheriff’s Investigators purchased a replica firearm identical to the one used by Tamir on November 22, 2014. The condition of Tamir’s replica firearm had changed since the time of its purchase, having had the orange tip and laser sight removed. As depicted in the following advertisement collected by the Sheriff’s Investigators during their investigation, the replica firearm could be purchased for \$10.97 from a local Wal-Mart store:



## Colt 1911 Target Pistol with Laser Sight

3 reviews Q&A By: Colt Walmart # 550956484



**\$10.97** at Mayfield Heights



Quantity: 1

Add to list

Add to registry

Sold by Walmart store

Shipping  
Not available

FREE pickup  
In-store purchase only

Showing options for 44109

Made of plastic

Location: Springfield, MO 65804

Mayfield Heights 44109

6594 Mayfield Rd

South Euclid - 10 mi

1868 Warrensville Center Rd

Out of stock

Learn more about FREE pickup

Availability may change. You'll see exact pickup dates when you check out.

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You searched:

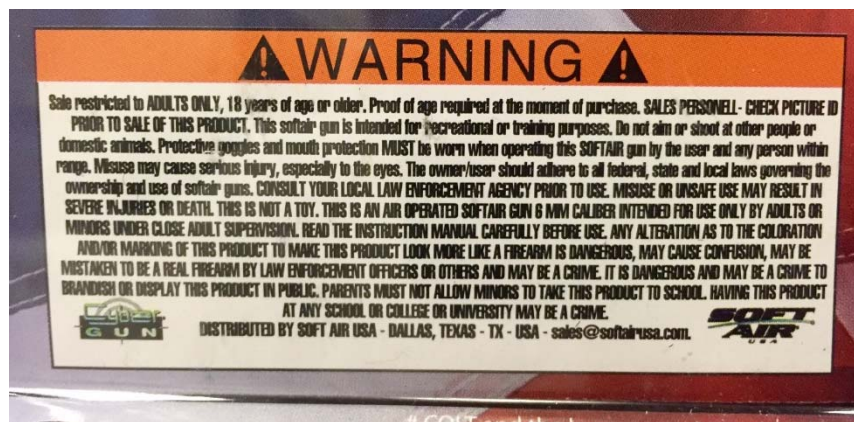
44109

Find

Popular items available online

“Colt 1911 Target Pistol with Laser Sight”, available at <http://www.walmart.com/ip/Colt-1911-Target-Pistol-with-Laser-Sight/22360212> (last viewed May 25, 2015).

As packaged, the replica firearm had a warning on the packaging stating: “Any alteration as to the coloration and/or marking of this product to make this product look more like a firearm is dangerous, may cause confusion, may be mistaken to be a real firearm by law enforcement officers or others and may be a crime. It is dangerous and may be a crime to brandish or display this product in public”:



Even with magnification, the warning on the replica firearm packaging was extremely hard to read. Although there is evidence that on the day of the incident, at least two people warned Tamir about the dangerousness of using the gun in a public place, there is no evidence that Tamir ever saw any warnings from the gun’s packaging.

To an untrained eye, Tamir’s replica firearm and an actual .45 Colt M1911 (“M1911”) semi-automatic pistol are nearly indistinguishable. The following photograph depicts Tamir’s replica firearm side by side with the actual M1911:



Even to a trained eye, careful side-by-side comparison is required to notice the differences between Tamir's replica firearm and the actual firearm. In their statements to the Sheriff's Department, Detective Lentz, as well as Officers Zverina, Roman, Kitko, and Griffin all stated that they saw the gun at the shooting scene and believed it was a real gun. Detective Lentz stated that it wasn't until he inspected the gun closely that he realized that Tamir's gun was not a real firearm. It is indisputable that the difficulty distinguishing between a real and toy gun under the relatively calm circumstances of an office or courtroom become a functional impossibility for the officer confronted with a stressful, dangerous situation in the field.

During the tense, uncertain, and rapidly unfolding moments of an actual encounter, the officer facing a suspect carrying what appears to be a gun often does not know if it is real or fake. Worse, the officer will know that if he guesses wrong, that may be the end of his life. When an officer faces a suspect displaying what clearly appears to be a real firearm – even when that turns out to be a mistaken belief – the law does not prevent the officer from using deadly force to defend himself, other officers, or the public from what the officer believes is a suspect with a deadly weapon. “A police officer need not wait for a suspect to open fire on him, much less wait for the suspect to actually hit him, before the officer may fire back.” *Greathouse v. Couch*, 433 Fed. Appx. 370, 373, 2011 U.S. App. LEXIS 15357, \*8 (6th Cir.2011).

Tragically, similar incidents have occurred when officers mistook suspects' replica firearms for actual firearms and believed the suspect posed an imminent risk of harm. In another local case, the Sixth Circuit Court of Appeals reviewed the actions of an East Cleveland Police officer who shot a teenage boy while the boy was carrying a BB gun:



In light of the facts confronting Officer Rodgers when he shot Jeffrey Bell, it is clear that Officer Rodgers' actions were reasonable. Officer Rodgers had been told that a young boy was carrying a gun in his front pocket. When he located Jeffrey Bell and determined that he matched the description of the boy carrying the gun, he stopped his car behind him. He commanded the boy with the gun in his front pocket to drop down. The boy, whose back was to Officer Rodgers, did not follow the commands. Instead, he pulled up his shirt with his left hand, put his right hand in front of his body beyond Officer Rodgers' view, and turned toward Officer Rodgers with what appeared to be a gun in his hand. He was pointing the gun at Officer Rodgers when Officer Rodgers shot him. Witnesses who saw the gun on the ground near Jeffrey Bell's right hand stated that it appeared to be real.

The plaintiff contends that Bell may have been trying to show Officer Rodgers that the gun he was carrying was not real. However, the issue is whether a reasonable officer in Officer Rodgers' shoes would have feared for his life, not what was in the mind of Jeffrey Bell when he turned around with the gun in his hand.

*Bell v. City of E. Cleveland*, 1997 U.S. App. LEXIS 28738, \*8-9 (6th Cir.1997). Much like this case, the officer in *Bell* had a report from a citizen complaint of a suspect brandishing a gun, had a specific description of the suspect, and saw the suspect pointing what the officer believed was a real gun. Under those facts, the Sixth Circuit determined that the officer's use of deadly force had been reasonable, even though the suspect's weapon turned out to be a BB gun. *Id.*

## **6. Conclusion.**

This case is the culmination of a tragic confluence of events. A young boy, who appeared older than his 12 years, spent hours playing at a Recreation Center with a toy gun that looked just like the real thing. No one who saw him doing it was willing or able to intervene and make him stop. Unfortunately, the security cameras that showed him frightening people with the toy gun were left unmonitored and unseen by any security officer. The caller who notified police about Tamir told the 911 operator that Tamir might have been a juvenile, and that the gun might have been a fake, but that Tamir was "scaring the shit" out of him.

The 911 operator never told the Dispatcher about the possibility Tamir was a juvenile or that the gun was a toy, which led the two responding officers to believe a real man with a real gun was threatening innocent people's lives at a recreation center. When the officers approached Tamir, he unexpectedly moved in their direction and began pulling out the gun from his waistband. The officers, who had no idea that the gun was fake or that Tamir was only 12, thought he was going to pull the gun out at them.

In *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir.2008), the Sixth Circuit explained that "[t]he officer must also be given some leeway when a court analyzes the reasonableness of his decision. It is firstly important to remember what is a 'reasonable' belief could also be a mistaken belief, and that the fact it turned out to be mistaken does not undermine its reasonableness as considered at the time of the acts." Here, Officer Loehmann and Officer Garmback were tragically mistaken about the key facts of this case. They did not know until it was too late that Tamir was not a real threat to their safety or to the public's safety. But

the law requires that they be judged according to what they knew at the time, and whether their actions based upon what they knew were reasonable under the Fourth Amendment.

We have recommended against bringing any criminal charges to the Grand Jury because we do not believe that any reasonable judge or jury would find criminal conduct in Officer Loehmann's reaction to a suspect pulling what he thought was a gun. Nor has any viable theory of criminal conduct been offered to explain why Officer Garmback would be criminally liable for Officer Loehmann's use of deadly force. We are mindful of the profound impact that any police use of deadly force has on the community, and we are acutely aware of the pain and suffering experienced by the family of a 12 year-old boy whose life was so abruptly ended. But justice requires a thorough and evenhanded examination facts and law. In this case, there is no basis to charge a criminal offense.

Respectfully submitted,

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