

## **Preliminary Expert Report of Jeffrey J. Noble**

1. My name is Jeffrey J. Noble and this is a preliminary expert report on the police shooting of Tamir Rice. If I am provided with additional material, my opinions may be amended.

### **Qualifications of Jeffrey J. Noble**

2. I was a police officer for 28 years and retired in July 2012 as the Deputy Chief of Police with the Irvine Police Department, located in Southern California. As a Deputy Chief, I was directly responsible for all police operations including Patrol, Traffic, Investigations, Emergency Management, Crime Prevention, DARE, K9s, Training, and SWAT. The City of Irvine encompasses over 70 square miles with a population of over 218,000. I served in a wide range of assignments as an Officer, Senior Officer, Sergeant, Lieutenant, Commander and Deputy Chief, including Patrol, Traffic, Detectives, SWAT, Training, Internal Affairs, Emergency Management and Crime Prevention.
3. In April 2014, I was hired by the Westminster, California Police Department as an interim Deputy Chief of Police. My employment with the Westminster Police Department was by means of a temporary contract and I was asked to review the department's Internal Affairs unit, use of force protocols, department policies, conduct department audits and inspections and act as a liaison with a civilian oversight monitor who was hired during the same time period. My employment was at the request of the Chief of Police, was ratified by the City Council and was sought due to the arrest of a police officer for an off-duty criminal sexual assault, the arrest of an on-duty officer for extortion and a lawsuit filed by three Latino officers alleging discrimination and retaliation. I concluded this interim position in January 2015.
4. I have a Juris Doctor degree, with honors, from Western State University College of Law and I am admitted to practice law in the State of California. I have a Bachelor's degree in Criminal Justice with an emphasis on Administration from California State University at Long Beach.
5. The Irvine Police Department had over 200 police officers and over 100 civilian employees. The Westminster Police Department has 87 police officers and 40 civilian employees. I have extensive experience conducting internal administrative investigations on a wide range of issues including use of force, officer misconduct, sexual harassment and sexual assaults. I have extensive experience as an expert on matters involving use of force, police investigative procedures, misconduct and corruption. For example:
  - a. As a consultant, I have reviewed over a thousand use of force investigations to determine the reasonableness and sufficiency of the investigation, including

cases involving then-Commander Jon Burge of the Chicago Police Department and the allegations of widespread police corruption and torture to elicit confessions.

- b. In 2007 and again in 2009, I was retained by the City of Austin, Texas to review the police department's internal homicide and Internal Affairs investigation of two officer involved fatal shootings.
- c. In 2014, I was part of a Carnegie Institute of Peace Think Tank for addressing police use of force in developing countries.
- d. I have consulted with other police organizations on police procedures and investigations. For instance, I was retained in 2004 as an expert to review and evaluate the internal investigation conducted by the San Francisco, California, Office of Community Complaints of the case widely known as "Fajitagate" involving the indictment of seven command staff and three line officers of the San Francisco Police Department.
- e. I have been retained as both a defense and a plaintiff's expert in over 70 cases and have testified as an expert in state court in California, Washington, Tennessee and Connecticut and in federal court in Illinois, Tennessee, and Georgia. I have prepared expert reports for cases in the states of California, Washington, Pennsylvania, Georgia, Illinois, Tennessee, Idaho, Arkansas, Texas, Colorado, New York, Oklahoma, Connecticut, South Carolina, Florida and Missouri.
- c. I served as an independent policy advisor to the Large City Internal Affairs Project, which was funded by the United States Department of Justice. This group consists of the 12 largest police agencies in the United States as well as a select group of independent policy advisors and academics. The project was an effort to develop national best practices in the area of internal investigations for police agencies. I was the chair of a sub-committee whose efforts were focused on the investigation of allegations of officer misconduct. As a result of this project the COPS Office published a document entitled, "Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice."
- d. I have given presentations at the International Association of Chiefs of Police conference in 2004, 2009, 2012, and 2014; the national COPS conference on Internal Affairs issues and the Academy of Criminal Justice Sciences annual meeting on tactical reckless decision making in 2009; the American Psychological Association annual conference in 2013; and National Tactical Officers' Association annual conference in 2004.

- e. In 2013, I gave a presentation in Mexico and the request of the Mexican government on preventing corruption in police institutions.
  - g. I have published 21 articles on policing including the subject matters of: Internal Affairs, personnel issues, pursuits, use of force issues and investigative procedures. Those articles are listed in my attached resume.
  - h. I have published two chapters for policing textbooks on tactical recklessness and the code of silence.
  - i. I have co-authored, along with Geoffrey Alpert, Ph.D., a textbook on police Internal Affairs investigations titled, "Managing Accountability Systems for Police Conduct: Internal Affairs and External Oversight."
  - j. As evidence that the opinions in our book are accepted by other experts of police administrative investigations, my book was cited extensively in the COPS 2009 publication, "Building Trust Between the Police and the Citizens They Serve: An Internal Affairs Promising Practice Guide for Local Law Enforcement."
  - k. I have used force during my career as a police officer including the use of deadly force.
6. My experience, training and background are more fully described in my attached resume.
  7. My areas of expertise in policing include but are not limited to: police use of force; pursuits; police administration; training; police operations; criminal investigations; interviews and interrogations; civil rights violations and investigations; internal/administrative investigations; criminal investigations; police discipline; citizen complaints; and police policies and procedures.
  8. I reviewed the following material in making my opinions:
    - Surveillance video of the incident
    - Ohio State Highway Patrol – Reconstruction Report 2015-304-00
    - United States Department of Justice Civil Rights Division - Investigation of the Cleveland Division of Police (December 4, 2014)
    - October 16, 2015 letter from Emery, Celli, Brinckerhoff & Abady, LLP to Timothy McGinty, Cuyahoga County Prosecutor's Office
    - November 9, 2015 letter from Emery, Celli, Brinckerhoff & Abady, LLP to Timothy McGinty, Cuyahoga County Prosecutor's Office
    - November 16, 2015 letter from Emery, Celli, Brinckerhoff & Abady, LLP to Timothy McGinty, Cuyahoga County Prosecutor's Office

- Cuyahoga County Sheriff's Department Investigative Report (portions redacted)
  - Judge Adrine Ruling: Probable Cause to Arrest Officer Loehmann and Garmback
  - Expert Report of Ken Katsaris
  - Expert Report of Kimberly Crawford
  - Expert Report of S. Lamar Sims
  - Timothy Loehmann Independence Police Department Personnel File
  - Second Amended Complaint and Jury Demand by Plaintiffs Winston, Rice and T.R. with Jury Demand
  - Defendant City of Cleveland's Answer to Second Amended Complaint
  - Separate Answer of Defendants Loehmann and Garmback to the Second Amended Complaint of Plaintiffs Winston, Rice and T.R.
9. This report is based on materials reviewed to date. Should any subsequent information cause me to expand, add or revise any of my opinions, I will supplement this report.
  10. At this point in the development of this case, I do not know whether I will be using any demonstrative aids during my testimony. Should I decide to use any such tool, I will assure that they are made available for review, if requested, prior to their use.
  11. The opinions that follow are made within a reasonable degree of certainty within the field of police practices.

### **Background**

12. On Saturday, November 22, 2014, at about 3:30 in the afternoon, Tamir Rice, who was 12-year-olds, was at Cudell Park playing by himself. The park is immediately adjacent to an elementary school and a youth recreation center. Tamir was playing with a plastic airsoft toy gun that had been given to him by a friend. A man in the park who was seated at a picnic table under an open gazebo saw Tamir playing with the toy gun and not knowing if the gun was real called 911.
13. The man told the dispatcher that "There's a guy with a pistol. It's probably fake, but he's like pointing it at everybody." The man said Tamir kept "pulling the gun in and out of his pants." The caller described Tamir's clothing and race and told the call taker, "He's probably a juvenile."
14. The dispatcher assigned the call to Officers Garmback and Loehmann who were working together in a patrol car. Officer Garmback was a field training officer and Officer Loehmann was his trainee. The dispatcher radioed the officers, "It's at Code One, Rec Center, 1910 West Boulevard. [Redacted] is calling he said in the park by the youth center, there is a black male sitting on the swing. He is wearing a camouflage hat, a grey jacket with black sleeves. He keeps pulling a gun out of his pants and pointing it a

people. It's a Code One ... 1528 (3:28pm).” The dispatcher never told the officers the caller said the gun was probably fake or that the subject was a juvenile.

15. The officers approached the park by driving eastbound Madison to northbound W. 99<sup>th</sup> Street. 99<sup>th</sup> Street terminates at Cudell Park and the officers entered the park by driving onto a concrete sidewalk that is on the east side of 99<sup>th</sup> Street and is adjacent to the Marion Seltzer Elementary school.<sup>1</sup> The police vehicle left the sidewalk and drove across the grass, crossed another sidewalk before returning to the grass, until its termination point adjacent to the gazebo.<sup>2</sup> The path of the vehicle was immediately west of a playground/swing set area in the park. Sergeant Thorne, who later conducted a reconstruction investigation, estimated the speed of the patrol vehicle at 19 mph at the start of the final deceleration – the point just before Officer Garmback hit the brakes and skidded to a stop in front of the gazebo.<sup>3</sup>
16. As the police vehicle comes to a stop, Officer Loehmann confronts Tamir from between 4.5 and 7 feet away and fires two rounds from his handgun. One of those rounds struck Tamir in the stomach and Tamir died early the next morning at the hospital.
17. A surveillance camera captured the shooting, but the video is grainy, filmed from a distance, and the patrol car partially blocks the view of Tamir at the moment of the shooting.

### **Summary of Opinions**

18. Contrary to the statements of the prosecutor’s experts, the proper standard for the evaluation of Officer Loehmann’s use of deadly force includes a review of their reckless tactical decision making that placed the officers in danger.
19. Officers Garmback and Loehmann 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.
20. Officer Loehmann has a history of untruthfulness as a police officer and his prior acts of untruthfulness impact his credibility. In this matter, the credibility of Officer Loehmann is also questionable due to his alleged statements at the scene to other officers that he gave Tamir commands, yet the video and the fact the patrol car’s windows were rolled up call into question such claims.

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<sup>1</sup> Ohio State Patrol – Reconstruction Report at 32.

<sup>2</sup> Ohio State Patrol – Reconstruction Report at 37.

<sup>3</sup> Ohio State Patrol – Reconstruction Report at 43.

21. Officer Loehmann should have never been employed by the Cleveland Division of Police due to his prior acts of untruthfulness as a police officer and his apparent unfitness for duty.
22. Officers Garmback and Loehmann acted in a callous disregard for Tamir's life when they failed to make any attempts at providing basic first aid to Tamir after he had been shot and after he had been secured. These very basic first aid efforts would have included efforts to use direct pressure to stop any bleeding and to ensure Tamir had an open airway by adjusting his neck.

### **Standard for Determining the Reasonableness of the Use of Deadly Force by a Police Officer**

23. Police officers are trained that the U.S. Supreme Court in its landmark decision *Graham v. Connor* held that to determine whether the force used to affect a particular seizure is reasonable, one must balance the nature and quality of the intrusion on the individual's rights against the countervailing government interests at stake. This balancing test is achieved by the application of what the Court labeled the objective reasonableness test. The factors to be considered include: 1.) The severity of the crime; 2.) Whether the suspect poses an immediate threat to the safety of the officers or others; and 3.) Whether the suspect is actively resisting or attempting to evade arrest by flight.
24. Whether one's actions were objectively reasonable cannot be considered in a vacuum, but must be considered in relation to the totality of the circumstances. The standard for evaluating the unreasonable use of force reflects deference to the fact that peace officers are often forced to make split-second judgments in tense circumstances concerning the amount of force required. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

### **Prosecutor McGinty's Experts Misstate the Law When They Claim that a Jury Cannot Consider the Officers' Tactics that Led Up to the Use of Deadly Force Against Tamir Rice**

25. Contrary to what Crawford<sup>4</sup> and Sims argue, the *Graham* test certainly does not mean that a jury cannot assess the officer's tactics that led up to the use of force. If the officer used reckless tactics that a reasonable officer would not have used under those circumstances, then a jury can conclude that the officer acted unreasonably.<sup>5</sup>

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<sup>4</sup> Ms. Crawford's argument is based on the 7<sup>th</sup> Circuit's opinion in *Plakas v. Drinski*, 19 F.3d 1143 (7<sup>th</sup> Cir. 1994), rather than the opinions of the 6<sup>th</sup> Circuit which are controlling in this matter.

<sup>5</sup> The Circuits are divided on the issue of whether or not tactics should be considered as part of the review for reasonableness. See, Noble, Jeffrey J. and Geoffrey P. Alpert, "*State-Created Danger: Should Police Officer be Accountable for Reckless Tactical Decision Making?*" (Updated) Dunham, R. and G. Alpert (Eds.). *Critical Issues in Policing: Contemporary Readings*. Prospect Heights, IL, Waveland Press. Seventh Edition (2015).

26. As the Sixth Circuit has explained: “Where a police officer unreasonably places himself in harm’s way, his use of deadly force may be deemed excessive.”<sup>6</sup> In *Kirby*, the Circuit held that a police officer “placed himself in potential danger” when he moved towards a suspect’s reversing car “instead of fleeing or simply remaining where he was.”<sup>7</sup> Because a reasonable officer would not have affirmatively moved towards a reversing car and placed himself in harm’s way, a jury could find that the officer’s use of force (fatally shooting the driver to stop the car from hitting him) was unreasonable.<sup>8</sup>
27. Mr. Sims’ reliance on *City and County of San Francisco v. Sheehan*<sup>9</sup> is not on point. In *Sheehan*, the police officers shot a developmentally disabled woman after they entered her room at her group home, she attacked them with a knife, and their attempts to subdue her with pepper spray failed.<sup>10</sup> The question presented to the Court was whether the officers were required by the American with Disabilities Act to accommodate the plaintiff’s mental disability under these circumstances.<sup>11</sup> The Court held that there was no clearly established law requiring the officers to “try to accommodate for the mental illness of a person who is armed and making threats,” therefore the officers were entitled to qualified immunity.<sup>12</sup> The case had nothing to do with assessing the police officers’ tactics that led up to the shooting and the Court was clear that the portion of the decision quoted by Sims was not binding dicta.<sup>13</sup>
28. Indeed, police officers are trained how to evaluate and manage potentially violent field situations and how to apply tactics to minimize the danger of risk to themselves and others. Officers are trained to formulate a plan whenever possible by gathering information, considering risk factors, assembling sufficient resources, communicating with other officers, and using available time to their advantage. Reasonable officers understand the value of cover and concealment, contact and cover strategies, and calm and effective negotiation skills. They are well-versed in containing scenes, setting perimeters, isolating suspects, and evacuating those in harm’s way. Modern police officers are also provided a wide range of tools (including less lethal options like pepper spray, Tasers, and impact projectiles) to minimize the necessity of using serious or deadly force. Police officers are taught tactics in the police academy and through continuing professional training throughout their careers. Supervisors debrief tactical situations with their officers and apply lessons to real-life situations. Police tactics are routinely discussed, emphasized, and reviewed at all levels of a police organization. This

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<sup>6</sup> *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008).

<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> 135 S. Ct. 1765 (2015).

<sup>10</sup> *Id.* at 1770-71.

<sup>11</sup> *Id.* At 1775.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1777

focus on officer safety stems from the recognition that when officers perform poorly an officer, a community member, or a suspect may suffer a severe or fatal injury.<sup>14</sup>

29. While Ms. Crawford and Mr. Sims avoid discussing the tactical reckless decision making of Officers Garmback and Loehmann based on their misunderstanding of the law, Mr. Katsaris simply ignores the officers' reckless tactics without explanation. Regardless of the reasons for the prosecutor's experts' failure to address the officers' tactical recklessness that created the danger, the tactics alone make Officer Loehmann use of deadly force unreasonable.

**Officer Loehmann's Use of Deadly Force Against Tamir Rice Was Excessive, Objectively Unreasonable and Inconsistent With Generally Accepted Police Practices**

30. The officers engaged in reckless tactical decision making, they unreasonably placed themselves in harm's way and Officer Loehmann's use of deadly force was excessive, objectively unreasonable, and inconsistent with generally accepted police practices.
  - a. As Officers Garmback and Loehmann entered Cudell Park from 99<sup>th</sup> Street, the playground area that included the swing sets and the gazebo were clearly visible. On that November afternoon there was snow on the ground and the deciduous trees had lost all of their foliage allowing for a view only obstructed by the thin tree trunks.<sup>15</sup>
  - b. There is no evidence that anyone other than Tamir was in the park at the time the officers arrived. Tamir was seated by himself at a picnic table under the gazebo. There is no evidence that anyone was at imminent risk of death or serious bodily injury at the time the officers entered Cudell Park.
  - c. There was no evidence that staying back would gravely endanger the lives of the officers or the lives of others.
  - d. Reasonable police officers responding to a man with a gun call would have stopped their vehicle prior to entering the park to visually survey the area to avoid driving upon a subject who may be armed. This serves not only to protect the officers, but also serves to protect others who may be in the area and it provides both time and distance for the officers to evaluate the situation and develop a plan. It also allows time for other officers to arrive to provide assistance.

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<sup>14</sup> "State-Created Danger: Should Police Officers Be Accountable for Reckless Tactical Decision Making?" Noble, Jeffrey J. and Geoffrey P. Alpert (2009).

<sup>15</sup> I have conducted walk-through of the path of the officers' vehicle on November 24, 2015 via video conference.

- e. Instead of stopping, surveying the scene, waiting for additional officers, developing a plan, calling out to Tamir from a position of cover behind their car doors as police officers are trained, Officer Garmback and Loehmann rushed to the gazebo at such a speed that emergency braking caused them to skid their vehicle to a stop, placing Officer Loehmann between 4.5 and 7 feet of Tamir as he exited the police vehicle.
  - f. Because Officer Loehmann was so close to Tamir and because he had no cover, Officer Loehmann was forced to make a split-second decision regarding the most serious decision a police officer can make – the decision to use deadly force.
  - g. Although Officer Garmback was in control of the vehicle and he was the training officer, every officer has the responsibility to speak out should they see another officer engage in reckless tactical decision making. Absent any evidence that Officer Loehmann took any action to prevent Officer Garmback from driving up to Tamir, suddenly hitting the brakes, coming to stop, leaving Officer Loehmann without cover and within a few feet of Tamir, both officers are responsible for the reckless tactical decisions that created the danger and directly led to Tamir's death.
  - h. The officers' grossly reckless tactics placed Officer Loehmann in a position where he was within a few feet of Tamir. Any claim by Officer Loehmann that he had to make a split-second decision was a result of his and Officer Garmback actions. Their actions were counter to virtually all police training that counsels officers to develop a plan prior to confronting a subject, to take their time and proceed cautiously and slowly in attempting to resolve a situation, to remain calm, to remain at a safe distance from a subject, to wait for back up when possible, and to employ tactics focused on de-escalation.
  - i. Had the officers acted as they were trained and as a reasonable police officer would under similar circumstances, it is likely that Officer Loehmann would not have used deadly force and Tamir would not have been killed.
31. Even if the officers' reckless tactical decision making is not considered and one only considers the moment of the use of deadly force by Officer Loehmann, a reasonable jury could find his use of deadly force to be excessive, objectively unreasonable, and inconsistent with generally accepted police practices. In fact, a review of the video provides evidence that the shooting was presumptively unreasonable in that the shooting occurred within 1.7 seconds with no possibility of commands from the officer to the child.
- a. The lack of eyewitnesses or statements by either Officer Garmback or Officer Loehmann creates a situation where the surveillance video is being relied upon by the prosecutor's experts to render opinions regarding Officer Loehmann's use

of deadly force. Unfortunately, the video was filmed from a surveillance camera from a distance, the video is grainy and difficult to see with complete accuracy, and the officers' patrol car partially blocks the view of Tamir at the most critical moment. Despite these serious limitations, Mr. Katsaris, Ms. Crawford and Mr. Sims all based their opinions on their interpretations of the video.

1.) Mr. Katsaris

- a.) Mr. Katsaris first stated Tamir was “**appearing** (emphasis added) to lift his jacket and reach for the waist area of his pants.”<sup>16</sup>
- b.) Mr. Katsaris then abandons his use of the adjective “appearing” and instead concludes that “the actions of Tamir Rice lifting his jacket and reaching for his waist”<sup>17</sup> supported the use of deadly force by Officer Loehmann.
- c.) Mr. Katsaris adds “especially the hand movements, and the movement toward the waist.”<sup>18</sup>
- d.) Yet, Mr. Katsaris concludes his report by backing away from his conclusion of the video evidence and states, “given the specific action of Tamir Rice, **which can be generally seen on the surveillance video** (emphasis added).”<sup>19</sup>

2.) Ms. Crawford

- a.) Ms. Crawford concluded, “[Officer Loehmann] was likely focused on Rice’s hands as they moved to his waist and lifted his jacket.”
- b.) Ms. Crawford also found “Officer Loehmann’s attention would be focused on Rice’s hands as they moved toward his waistband and lifted his jacket.”
- c.) Ms. Crawford opines as to Officer Loehmann’s focus on Tamir’s hands absent any evidence or statement by Officer Loehmann. Moreover, she concludes that Tamir’s “hands (plural)” moved to his waistband and lifted his jacket, while Mr. Katsaris opined Tamir used his “hand (singular)” to lift his jacket.

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<sup>16</sup> Katsaris report at 8.

<sup>17</sup> Katsaris report at 9.

<sup>18</sup> Katsaris report at 9.

<sup>19</sup> Katsaris report at 10.

- 3.) Mr. Sims
  - a.) Contrary to Mr. Katsaris and Ms. Crawford, Mr. Sims does not claim Tamir was reaching for his waistband. Rather, Mr. Sims admits that “the video is grainy and it is unclear - from the video - whether Rice reaches for his gun.”<sup>20</sup>
  - b.) Mr. Sims does not opine if Tamir used one or both hands in making this movement or that he lifted his jacket.

b. My review of the relevant portion of video is as follows:

- 1.) 15:30:10 – Tamir is sitting at the picnic table.
- 2.) 15:30:13 – Tamir stands up.
- 3.) 15:30:14 – Tamir begins to walk around the table.
- 4.) 15:30:17 – Tamir is in front of the table.
- 5.) 15:30:18 – The front of the police vehicle is visible in the frame. Tamir is standing in front of the picnic tables in the concrete gazebo area.
- 6.) 15:30:19 – The driver’s door of the police car is visible in the frame.
- 7.) 15:30:20 – The entire police vehicle is within the frame and there have been no visible movements by Tamir.
- 8.) 15:30:21 – Tamir begins to take a step forward with his left foot.
- 9.) 15:30:23 – Officer Loehmann jumps out of the vehicle pointing his gun. Simultaneously, Tamir’s left hand moves in front of his body and he almost immediately bends at the waist with his upper body moving forward as though he is bending over—presumably this is the moment the bullet struck him.
- 10.) 15:30:24 – Tamir appears to have fallen to the ground and Officer Loehmann moves to the right side of the screen. Officer Garmback’s driver’s door begins to open.
- 11.) 15:30:25 – Officer Garmback exits the driver’s door.

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<sup>20</sup> Sims report at 7.

- c. Contrary to the statements of Mr. Katsaris and Ms. Crawford, at no point was I able to see Tamir's hands. While it does appear his left arm moves toward his stomach, the video is not clear whether or not he lifts his jacket, or if he is making any type of motion with his right hand. Among the limitations of videos of this nature is that it does not provide depth perception as one would see in person. So while it may appear that Tamir's left arm moved toward his stomach it is not clear if that arm was near his body or away from it.
  - d. Importantly, none of the prosecutor's experts claim that Tamir displayed the replica handgun,<sup>21</sup> or that he made any threats toward anyone. The video shows that he was alone in the gazebo and not holding anything at the time the officers drove up.
32. While neither officer has provided a statement, Officer Loehmann is alleged to have made three statements to other officers at the scene subsequent to the shooting.
- a. The FBI Special Agent<sup>22</sup> who arrived on the scene a few minutes after the shooting said that Officer Loehmann said that "He had a gun and he reached for it after he told him to show his hands."<sup>23</sup>
  - b. Officer Cunningham said Officer Loehmann told him, "He gave me no choice. He reached for the gun and there was nothing I could do."
  - c. Officer Kitco said Officer Loehmann told him they arrived on scene, he was yelling commands at the kid, they stopped the car, the kid went for the firearm and tried to pull it out.
  - d. It is important to note that all of these officer statements came from interviews that were conducted months after the incident<sup>24</sup> and after many media reports that indicated commands were given to Tamir prior to the shooting. These reports were provided to the media before the video was made public and the video revealed there was not sufficient time for Officer Loehmann to have given Tamir any commands, combined with any opportunity to comply with those commands before the shooting. I list some of these media reports here:
    - 1.) "Police say an officer fired two shots at Tamir Rice after he failed to obey an order to raise his hands" and "Cleveland deputy police chief Ed Tomba

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<sup>21</sup> It is undisputed that the plastic airsoft toy gun is a replica handgun and it has the appearance of an operational firearm.

<sup>22</sup> The agent's name has been redacted from the reports.

<sup>23</sup> Cuyahoga Sheriff's Department report at 125.

<sup>24</sup> Officer Kitco – May 28, 2015; FBI Agent – February 27, 2015; Officer Cunningham – April 8, 2015.

said the boy was shot twice after pulling the gun from the waistband of his trousers. (November 24, 2014)."<sup>25</sup>

- 2.) "Two police officers responded to the scene and ordered the boy to raise his hands, the police said, but he refused and reached for a gun in his waistband. (November 23, 2014)."<sup>26</sup>
- 3.) Deputy Chief Ed Tomba said, "The officers ordered him to stop and to show his hands, and he went into his waistband and pulled out the weapon. (November 24, 2014)."<sup>27</sup>
- 4.) "A first-year officer, who officials have not named, got out of his car and told the boy to raise his hands. Instead, police said he reached for what later proved to be an airsoft-type gun, a replica of a semi-automatic handgun that shoots pellets. (November 24, 2014)."<sup>28</sup>
- 5.) "Authorities said the boy was told to raise his hands and was shot when he pulled the pellet gun from his waistband, though he hadn't pointed it at police or made verbal threats. (November 24, 2014)."<sup>29</sup>

- e. A reasonable jury could consider that these statements were provided to investigators months after the incident which may have impacted the officers' memory and the fact of the widespread media reports that Officer Loehmann gave Tamir commands and the video evidence that showed there was insufficient time for Officer Loehmann to have exited the car, perceived a danger, issue a command, and then make the decision to use deadly force.
- f. Moreover, a jury could consider the fact that all of the windows of the patrol car were rolled up<sup>30</sup> and that Tamir made no movements as the patrol came to a stop.

33. Finally, as discussed below, Officer Loehmann should have never been hired as a Cleveland Police Officer and his prior intentional deceitful misconduct as a police officer would be a relevant factor in assessing the credibility of any statement that may be made by Officer Loehmann.

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<sup>25</sup> <http://www.bbc.com/news/world-us-canada-30172433>

<sup>26</sup> [http://www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html?\\_r=0](http://www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html?_r=0)

<sup>27</sup> <http://www.cnn.com/2014/11/24/justice/cleveland-police-shooting/>

<sup>28</sup> [http://www.cleveland.com/metro/index.ssf/2014/11/cleveland\\_police\\_officer\\_fatal.html](http://www.cleveland.com/metro/index.ssf/2014/11/cleveland_police_officer_fatal.html)

<sup>29</sup> [http://www.huffingtonpost.com/2014/11/24/tamir-rice-boy-shot-cleveland-police\\_n\\_6211064.html](http://www.huffingtonpost.com/2014/11/24/tamir-rice-boy-shot-cleveland-police_n_6211064.html)

<sup>30</sup> Ohio State Patrol – Reconstruction report at 27.

**Officer Loehmann Should Have Never Been Hired by the Cleveland Division of Police Due to Untruthful Statements Officer Loehmann Made While a Police Officer at the Independence Police Department and His Apparent Unfitness For Duty that Led to his Resignation from the Independence Police Department. Officer Loehmann's History of Untruthful Statements as a Police Officer Impacts His Credibility in This Matter**

34. Police officers are required to be trustworthy, honest, and maintain the highest level of integrity. Police officers are held to a higher standard than nonpolice as they represent the government as agents of the law and the criminal justice system. Police officers who engage in intentional, malicious, deceptive action in a formal setting such as during a criminal or administrative investigation will permanently destroy an officer's credibility. Indeed, under *Brady v. Maryland*, and the cases that followed, evidence of a police officer's untruthfulness is deemed exculpatory evidence and police departments must provide this information to prosecutors anytime the subject officer is a witness in a criminal matter. Because an officer who engages in intentional, malicious, deceptive misconduct lacks the credibility to testify in court, an essential job function, there is no alternative in an employment context other than termination or permanent removal from any possible activity that requires a reliable truthful person.<sup>31</sup>
35. The importance of police officer honesty cannot be overstated. Every person involved in the criminal justice system relies on police honesty: police officers rely on the validity of information provided to them by fellow officers; supervisors render decisions based on information received from officers; citizens are urged to communicate and cooperate with law enforcement officials, if they trust and respect police officers the ability to garner public support will be enhanced; prosecutors rely on honest reports, statements, and affidavits when prosecuting criminals; judges rely on honesty when evaluating warrants, and jurors determine guilt or innocence and often liability based on an officer's investigation and testimony. As a matter of public policy, a police officer who is intentionally, maliciously, deceitful about a material matter connected to their profession must be terminated from their position as they are no longer useful as a law enforcement officer and bring harm the community.
36. While an officer at the Independence Police Department, Officer Loehmann made intentional untruthful in statements to his Field Training Officer (FTO). In policing, a FTO is a direct supervisor of a new police officer and provides the officer with field training that complements the officer's academy training after the officer has completed the police academy. In this case, Officer Loehmann's FTO was also a sergeant with the Independence Police Department, thus he also had the role of a supervisor.

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<sup>31</sup> See e.g., Noble, J., and G. Alpert, *Lies, True Lies and Conscious Deception: Police Officers and the Truth*. Police Quarterly, Volume 12, Number 2 (June 2009) and Noble, J., *Police Officer Truthfulness and the Brady Decision*, Police Chief Magazine (October 2003).

- a. When Officer Loehmann was issued his firearm he was told that it needed to be secured when he was not working. If the weapon was not with him, then it needed to be secured in his locker or the arsenal. Officer Loehmann was given a locker assignment, and he was later asked by Sergeant Tinnirello whether he had a lock for his locker to ensure the locker would be secured. Officer Loehmann told Sergeant Tinnirello, "Yes." The next day when Sergeant Tinnirello was in the locker room he noticed that Officer Loehmann's locker did not have a lock on it. Sergeant Tinnirello asked Officer Loehmann if he had a secured locker. Officer Loehmann then told Sergeant Tinnirello that he had a lock, like he was asked, but he did not have time to put it on the locker because it was at home. Officer Loehmann had left his firearm in his locker overnight, unsecured, after being told that was not acceptable and he was intentionally untruthful with his supervisor as he knew the context of the conversation was regarding his ability to lock his locker.
  - b. In another incident, Sergeant Tinnirello told Officer Loehmann to sit in the Dispatch Center for part of his orientation and he would come and get him later. Later, Sergeant Tinnirello went into the Patrol Room and saw Officer Loehmann. Sergeant Tinnirello asked Officer Loehmann why he was not in the Dispatch Center and he told Sergeant Tinnirello that the dispatchers said he was done and to go upstairs. Later in the day, Officer Loehmann confessed to Sergeant Tinnirello that he lied and that he had come upstairs from Dispatch on his own and "that the Dispatchers never told him to come upstairs."<sup>32</sup>
  - c. In the first case, Officer Loehmann engaged in malicious deceitful misconduct when he implied to his supervisor that he would maintain his locker secured with a lock when his firearm was enclosed inside. While police departments are generally secured facilities, these facilities are not limited to police officers. Indeed, police departments are comprised of civilian staff members, volunteers, juveniles who may be engaged in programs like police explorers, and other guests of the facility. Police officers are trained that their firearm should never be unsecured and not only did Officer Loehmann leave his firearm unsecured he did so after deceiving his supervisor that his locker would be locked.
  - d. In the second instance, Officer Loehmann engaged in intentional malicious misconduct by lying to his supervisor about his assignment to the Dispatch Center. In this case, Officer Loehmann admitted to his serious misconduct.
37. On November 20, 2012 Officer Loehmann was taken to the police firing range in order to be qualified with his handgun. Sergeant Tinnirello said Officer Loehmann was distracted and not following simple instructions. Sergeant Tinnirello said Officer Loehmann went to the back of the range to reload his magazines and Sergeant

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<sup>32</sup> IND000061.

Tinnirello saw that Officer Loehmann was emotionally upset and appeared to be crying. Sergeant Tinnirello felt that Officer Loehmann was so upset and he was so concerned that he took Officer Loehmann's gun belt and handgun from him and secured it in a safe location.

- a. Sergeant Tinnirello said that Officer Loehmann told him that he was having issues with his girlfriend. Sergeant Tinnirello said Officer Loehmann remained emotionally upset during a 40 minute drive and that Officer Loehmann told him that he had a similar breakdown during the police academy. Sergeant Tinnirello said that he tried to counsel Officer Loehmann and that Officer Loehmann became agitated and said, "What I want is for you to shut up."
  - b. Sergeant Tinnirello said that Officer Loehmann was sent home for the day and offered professional counseling, but Officer Loehmann declined.
  - c. Sergeant Tinnirello spoke with Captain Barnard at the police academy and Captain Barnard told him he did counsel Officer Loehmann during the police academy for sleeping during class and Officer Loehmann told him he was falling asleep due to a situation with his girlfriend. Captain Barnard said he was not aware of any other issues with Officer Loehmann during the Academy.<sup>33</sup>
38. The instances of intentional malicious deceitful misconduct and apparent unfitness for duty were properly documented in Officer Loehmann's personnel file at the Independence Police Department. Indeed, Officer Loehmann's dishonesty combined with an apparent unfitness for duty led to a recommendation that he be terminated from his employment with the Independence Police Department and Officer Loehmann resigned in lieu of termination.<sup>34</sup> Yet, less than a year later, the Cleveland Police Division hired Officer Loehmann as a police officer.
39. No reasonable chief of police would have hired Officer Loehmann knowing that less than one year prior Officer Loehmann had engaged in acts of dishonesty as a police officer with his supervisor and who suffered with emotional issues so serious that the officer could not perform basic tasks related to his duties as a police officer and that cause such concern to his supervisor that his supervisor took Officer Loehmann's firearm for Officer Loehmann's own safety. Moreover, it was these very issues that led to a recommendation for Officer Loehmann's termination from the Independence Police Department.

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<sup>33</sup> IND000060-61.

<sup>34</sup> IND000059.

**The Failure to Render Immediate and Potentially Life Saving Aid to Tamir Rice was Inconsistent With Generally Accepted Police Practices and No Reasonable Police Officer Would Have Failed to Immediately Render Emergency Aid to a Wounded Individual After that Individual Was Secured**

40. Police officers are trained in basic first aid and CPR and they have a duty to render aid particularly when their use of force created the injury to the individual and when the individual is in their custody and has no means to otherwise seek medical aid.
41. In this case, none of the officers made any efforts to provide Tamir with any lifesaving emergency medical aid until the arrival of an FBI agent over three minutes after Tamir was shot.
42. The FBI Special Agent<sup>35</sup> said, “At approximately 3:30pm we heard a broadcast over the CPD 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 like 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.”<sup>36</sup>
  - a. The Special Agent said when he arrived on scene his main concern was Tamir. From a distance he could see parts of Tamir’s small intestines were eviscerated (coming out of his abdomen). The Special Agent described the injury as “particularly disturbing.”
  - b. The Special Agent said he immediately began to assess Tamir to identify life threats and addressed his airway as Tamir was having difficulties maintaining an airway.
  - c. The Special Agent said that he is a trained paramedic.<sup>37</sup>
43. Sergeant Rutherford said none of the Cleveland Police vehicles are equipped with first aid kits, nor do police officers with the Cleveland Police Division receive any medical training other than CPR training they received in the academy.<sup>38</sup>

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<sup>35</sup> His name has been redacted from the reports.

<sup>36</sup> Cuyahoga Sheriff's Department report at 124.

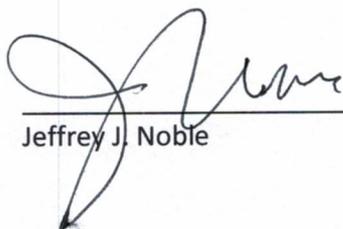
<sup>37</sup> Cuyahoga Sheriff's Department report at 124-125.

<sup>38</sup> Cuyahoga Sheriff's Department report at 145.

44. It is my opinion that Officer Loehmann and Officer Garmback exhibited a callous disregard for the life of Tamir. Police officers have a duty to render aid to those in their custody and they are provided training in basic first aid and CPR, yet not a single officer did anything to check on Tamir's welfare.

#### Conclusion

45. It is my opinion the reckless tactical decision making by Officers Garmback and Loehmann created the danger that led to use of deadly force by Officer Loehmann and absent their reckless tactics it is likely that force would not have been necessary; thus, his use of deadly force was excessive, objectively unreasonable and inconsistent with generally accepted police practices.
46. I am of the opinion that if one only reviews the incident from the perspective of the moment the deadly force was used by Officer Loehmann, a reasonable jury could find his use of deadly force to be excessive, objectively unreasonable, and inconsistent with generally accepted police practices.
47. It is my opinion that Officer Loehmann should not have been employed by the Cleveland Division of Police and that Officers Garmback and Loehmann exhibited a callous disregard for the life of Tamir by failing to provide immediate basic first aid after Tamir was shot and in their custody.



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Jeffrey J. Noble

11/27/15  
Date