

## TIMOTHY J. MCGINTY CUYAHOGA COUNTY PROSECUTOR

## A letter to the community from the Cuyahoga County Prosecutor regarding Police Use of Deadly Force cases

When I ran for Cuyahoga County Prosecutor in 2012, I promised to change the way we handled investigations when a police officer shoots and kills a civilian in the line of duty. It used to be that the prosecutor personally reviewed the police investigation of a civilian death and made a decision whether or not to charge. If there was an investigation, it likely was just a series of police reports, none of them shared with the public. That allowed suspicions to develop as to what actually happened. Community confidence suffered, and the opportunity to learn practical lessons regarding tactics, training and equipment was lost. The last thing anyone wants is for history to repeat itself if an error or a crime occurred.

Killings by police officers in the line of duty are traumatic events for the family and loved ones of the victim, for the officers involved and for the community at large. That is why I pledged to treat investigations into the use of deadly force by police officers with far more transparency than has been more customary or than the law requires. It is also why I pledged to present every police fatal use of deadly force case to the Grand Jury. That way the final decision on charging in these cases would be made by a panel of citizens who reviewed all the relevant evidence.

I fully understand the frustration felt by the family and friends of a person killed by police; they want immediate answers and closure for this terrible loss of life. So do the general public and the officers involved. But answers and closure do not come without work, effort and time. Some cases, especially those with high quality dashboard or body camera evidence, are relatively clear-cut; some are far more complex.

Cases involving police use of deadly force first should be investigated with diligence by a law enforcement agency without direct ties to the officers involved. My office and I then will further review that investigation and seek additional evidence as necessary. Only after that is complete will the office present all the facts to a Grand Jury, which will then initiate its own, totally separate investigation into the fatal police shooting.

As The Plain Dealer noted in an editorial on Sunday, November 29:

"[McGinty] has been methodical and transparent in releasing not just legal experts' opinions but also, in an unusual move, the full Sheriff's Department investigation and, more recently, a second surveillance video...

"There is no indication that McGinty has been less than thorough or honest, or has exhibited bias or mishandled that duty in any way. McGinty is the same prosecutor, after all, who earlier this year aggressively tried Cleveland Police Office Michael Brelo for felony manslaughter – even though the judge hearing the case acquitted Brelo."

To foster this more transparent process, we now make public the completed law enforcement investigative report on these cases. Thereafter, any new evidence or reports generated also will be released. This openness enables the entire community to better understand the facts and legal issues surrounding a fatal use of force. It also provides an opportunity for the families of those killed to provide additional, relevant evidence that they believe the Grand Jury should consider as part of its investigation.

If there is an error or we missed something, we have a chance to correct it before the Grand Jury's decision is made.

Every Grand Jury investigation is a search for the truth. And knowing the truth is what our community expects and deserves – especially in use of deadly force cases. The investigatory function of a Grand Jury that I rely upon in reviewing police use of deadly force is embedded in our Constitution. It protects citizens by ensuring that criminal charges are brought only when there are solid facts to support them. As a young prosecutor 30 years ago, I routinely invited the defense to provide evidence of innocence so that we did not charge the wrong person.

This process, although at times lengthy, will help the public understand what goes into a Grand Jury's decision to charge police or not. Difficult as it may be,

patience is necessary in these complex cases. They require time to assemble. They require not only a look at the surface facts of what happened, but an analysis of whether the police officer's use of deadly force was criminal as defined by the U.S. and Ohio Supreme Courts. The U.S. Supreme Court requires that "we must judge the reasonableness of the use of force from the perspective of a 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—about the amount force that is necessary in a particular situation." *Mullins v. Cyranak*, No. 14-3817, p. 6, (6<sup>th</sup> Cir. 2015), quoting *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). "In making this judgment, we must be careful not to substitute 'our personal notions of proper police procedure for the instantaneous decision of the officer on the scene." *Mullins*, at 6, quoting *Smith v. Freland*, 954 F.2d 343, 347 (6<sup>th</sup> Cir. 1992).

Sometimes that is an obvious call, but often it is not. And a comprehensive, fair investigation is what we all expect and deserve in such important events.

The transparency with which I undertake these cases has allowed the public and the police to examine policy and take immediate steps to improve procedure. This benefit was shown by the prosecution of a Cleveland police officer (later acquitted) following the high-speed, prolonged chase of Timothy Russell and his passenger Malissa Williams. That chase led to their deaths. But as the facts became known, Cleveland police updated their protocol for chases, and since then the number of dangerous chases has fallen dramatically. Further, the public saw that many questions about the chase would have been resolved if only police had dashboard cameras and body cameras. And now Mayor Jackson is providing body cameras for all police officers.

With that same goal of collecting better evidence, we have allocated approximately \$1 million forfeited by criminals to purchase dashboard cameras for the Cleveland Division of Police and suburban departments that do not have them. We will spend even more in 2016. This will benefit both the public and the police. Cities all over the nation have found that when police are equipped with dashboard and body cameras, complaints drop significantly. As prosecutors we have already seen the superior evidence these cameras can produce.

Despite my record investigating allegations of criminal activity by police and the benefits that have resulted from my release of information as it is available, there have been suggestions that this office should recuse itself from these use of deadly force investigations.

That suggestion echoes calls heard throughout the nation from very well-intended activists who want county prosecutors removed from cases where the police used deadly force. Presumably they believe that a different set of eyes would give them a better opportunity for the outcome they desire. Some states are exploring setting up statewide agencies to handle police use of deadly force cases. But in Ohio, those calls run counter both to the prosecutor's mandate to serve their communities and to current law.

Since I became prosecuting attorney in Cuyahoga County, we have been called on to review 20 police use of deadly force cases. Just last week, officers in two separate incidents were shot in the chest by persons in custody and those assailants were themselves then killed by other officers. We have or will investigate them all using the same transparent approach.

We also have prosecuted dozens of police officers for crimes since I became the county prosecutor with absolutely no issue of claims of bias in favor of police. A request now to have this office removed from these cases is without basis in fact and belies the record.

We will always follow the evidence wherever it leads us.

Upon becoming your county prosecutor, I took an oath to "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party[.]" As a judge and prosecutor for more than 30 years, I have handled many cases in which a police officer was charged with crimes — up to and including murder. Given my experience in the criminal justice system, I simply will not walk away from any case because it is difficult or complex or controversial — or because to do so would be politically expedient.

It is true that in rare cases, a prosecutor may ask the court to appoint a special prosecutor as a substitute on his behalf. But those cases are limited to circumstances in which a prosecutor has an actual conflict of interest. The courts have never found an inherent conflict of interest when a prosecutor investigates a police officer simply because the office often works with the police agency. If they did, all 20 use of deadly force cases would have to be referred to special prosecutors.

Instead, this office has the obligation and duty to present the facts and the law of a case to the Grand Jury to allow it to decide if charges are warranted. And a

prosecutor cannot remove himself from performing his statutory duty in a case merely because he wants to do so. Bringing in an unelected prosecutor – even if I could – would mean walking away from my duty to investigate and prosecute crime in Cuyahoga County. It would also violate the trust given to me by the public. So absent a true conflict, I must and will do my duty as prosecutor, even when it is difficult, challenging, or controversial.

In every case, after the Grand Jury's investigation is complete, our office will make a recommendation on charges, but the final say rests with the Grand Jury. Our policy has been consistent since 2013 and is available for anyone to see on our Cuyahoga County Prosecutor's website.

I trust the members of the Grand Jury to make the right decision. Judge David Matia recently told a local reporter that if you don't trust the Grand Jury, you don't trust your neighbors. I do trust them and I have every confidence in the Constitution and our American system of justice.

Timothy J. McGinty

Cuyahoga County Prosecutor

December 16, 2015