

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO)	CASE NO: CR580457
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
-vs-)	<u>RESPONSE TO DEFENDANT'S</u>
)	<u>MOTION FOR A GAG ORDER</u>
MICHAEL BRELO, et al.)	
)	
Defendants)	

Defendant Brelo has filed a request for a gag order in this case, seeking to stop the Cuyahoga County Prosecuting Attorney and his assistants from making any public comment about this matter. He has filed this motion under signature of his counsel, Pat D'Angelo, who has conducted an 18-month public relations campaign in which he has called the unprecedented events leading to the killing of Malissa Williams and Timothy Russell the result of a "perfect chase" and in which he has publicly argued that his clients, members of the Cleveland Police Patrolman's Association ("CPPA"), did nothing criminal and did nothing wrong.

As an advocate for the CPPA, D'Angelo's continuous and prolonged efforts to sway public opinion in favor of defendant Brelo and the police union is not surprising. However, D'Angelo now seeks to enjoin Prosecutor Tim McGinty, who has become the focus of personal attacks in the media since the indictment of his client, is disingenuous. D'Angelo knows that his other client, the CPPA, would be free to continue to make public demonstrations and statements, including public attacks against Prosecutor McGinty without restraint by this Court as the CPPA is neither a party to this case nor an agent of Defendant Brelo.

Defendant seeks to control the media and allow the CPPA in the position to influence the potential witnesses and jury pool and undermined the integrity of the court, the case, and the prosecutor the Prosecutor. This Court should not, and cannot grant any gag order in this case, especially where any public statements by the Prosecutor have been in compliance with the Rules of Professional Conduct; have been made in response to Defendant's organization's and attorney's public commentary; have been factually accurate; relate to material already made public; and have not been intended to materially prejudice any proceeding in this matter.

THE FACTS OF THE CASE

The facts published to date from the Attorney General for the State of Ohio demonstrate that members of the Cleveland Police Department engaged in an extensive police chase through the residential streets and highways of the City of Cleveland and into the residential areas of the City of East Cleveland. In total, the pursuit route was over 20 miles in length, through 222 intersections and 76 stoplights and stop signs. This dangerous chase lasted 22 minutes and involved over 62 police vehicles and over 100 police officers. Police vehicles drove in excess of 100 miles per hour along certain portions of the pursuit. This length of time and speed is excessive by all standards of law and common sense. The systemic failure noted by Ohio Attorney General Mike DeWine led to the deaths of the occupants of the vehicle Timothy Russell and Malissa Williams in a hail of cross fire by members of the Cleveland Police Department. The end of this dangerous pursuit came when Police Supervisors and Patrol Officers followed the victims' vehicle into a middle-school parking and playground area. There was clearly no foreseeable escape route left for the occupants in this vehicle surrounded by dozens of police cruisers and 23 officers on foot when the police fired at least 137 shots.

While 97 police bullets struck the victims' Malibu during the nearly-360-degree firing circle created by the officers, 40 bullets remain unaccounted. It is quite simply a miracle there were no additional injuries or fatalities. There were numerous police policy violations demonstrating the supervisors' violation of the law. The grand jury returned an indictment against five supervisors for dereliction of duty for failing to properly follow the law during the pursuit and for allowing the men and women under their care and charge to violate the law. The indictment itself underscores the community's indignation at the supervisors' lack of care for the residents of Cleveland and East Cleveland and for the care of the patrol officers under their command.

Patrol officers, led by their supervisors, followed Russell and Williams when they mistakenly believed there had been a shot fired from their moving vehicle. This was eventually proved to be inaccurate: no weapons were found inside the vehicle; no scientific evidence indicates a weapon was fired by either occupant from inside the vehicle; and forensic examination reveals that the Malibu was prone to backfires. While there were opportunities to inquire into the pursuit and to disengage, the Supervisors did neither; instead, they ignored the evidence directly in front of them and set aside their training in direct violation of Policy and Law.

Police pursuit policy and unsupervised and undisciplined chases account for an unreasonable number of deaths. Not only to suspects, but to civilians and officers. In this matter, a motorcade of over 60 police vehicles chased a suspect for over 20 miles, over 20 minutes, and at speeds exceeding 100 MPH. This was not the "perfect chase" as claimed by D'Angelo's client, the CPPA, it was the perfect storm. And this storm was to be predicted.

That pursuit of fleeing suspects by police creates risk to the suspect, the officers, and the public is known. However, the amount of damage and loss of life such pursuits cause remains relatively unknown. Police chases result in 1 death a day. The November 29th, 2012 CPD chase

was one of many that ended in unnecessary death. According to the Federal Bureau of Investigation, police pursuits are a significant problem:

Police pursuit records provide some frightening statistics. First, the majority of police pursuits involve a stop for a traffic violation. Second, one person dies every day as a result of a police pursuit. On average, from 1994 through 1998, one law enforcement officer was killed every 11 weeks in a pursuit, and 1 percent of all U.S. law enforcement officers who died in the line of duty lost their lives in vehicle pursuits. Innocent third parties who just happened to be in the way constitute 42 percent of persons killed or injured in police pursuits. Further, 1 out of every 100 high-speed pursuits results in a fatality.²

Evidence-Based Decisions on Police Pursuits, The Officer's Perspective, David P. Schultz, et al., FBI Law Enforcement Bulletin, available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march-2010/evidence-based-decisions-on-police-pursuits> (Citing at fn. 2, ² John Hill, "High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction," *FBI Law Enforcement Bulletin*, July 2002, 14-18.)

Nationally, most police chases are for a minor offense. *Id.* Further, whether or not a fleeing suspect has committed a serious violation is "mere speculation." In this case, the evidence revealed that Russell was unarmed. The basis for the pursuit that escalated to "Blues Brothers" proportions was in reality, unfounded. That the supervisors did not control the pursuit and participated in the chase across town at dangerous speeds and in a reckless manner is obvious. In this case, there was time to identify the suspect, identify his address, and determine to later apprehend him in a safe and effective manner without the risk of injury to police and civilians alike. In fact, Russell's identity could have been confirmed during the chase or shortly after a logical termination by later photo identification. He was a petty criminal that could easily be located. Without regard to public safety, without regard to their officer's safety, and with no regard to Williams, an unwilling passenger, CPD supervisors continued the pursuit and added two lives to the national death toll caused by unreasonable pursuit policy. The CPD supervisors simply ignored a logical course of action, to identify and later apprehend the suspect. Instead, any concern for the safety for their officers was ignored by overzealous and undisciplined police supervisors

intent on an arrest at any cost. That cost proved to be fatal. After releasing his investigation of the pursuit that fueled the actions after the chase and killing, Ohio Attorney General Mike DeWine said that “the system failed everyone” in Cleveland. See, video of statement, http://videos.cleveland.com/plain-dealer/2013/02/attorney_general_mike_dewine_s.html . He further noted the large number of police officers led to the cross-fire that occurred. Id.

The grand jury indicted Patrolman Michael Brelo for two counts of voluntary manslaughter for the deaths of Timothy Russell and Malissa Williams. Defendant Brelo shot his weapon 49 times, reloading the weapon on two separate occasions. While the other shooting officers’ actions have been found not to be criminal, Defendant Brelo’s actions were; he abandoned proper police procedure and was not justified in his actions. After over one hundred rounds had been fired at the victims’ vehicle, and after it had been immobilized and surrounded by at least 23 officers and 10 police cars, Brelo went beyond any justifiable action jumping on the hood of the Malibu and emptying his service weapon into Russell and Williams.

This action was unreasonable. The Malibu was cornered in a school parking lot with no viable means of escape. The passenger was pinned in the vehicle as her door was wedged against the police cruiser. The other police officers stopped shooting. Then Defendant Brelo stood upon the victims’ car’s hood as he fired into the passenger compartment of the Malibu, killing the occupants. The action had stopped for over four seconds when Brelo began firing from the hood of the victims’ vehicle; more than enough time to realize Williams and Russell were no longer a threat. Further, the manslaughter indictment is supported by evidence that a single firearm shot 15 of the last 18 shots after the stop in the action. Police officers stopped firing their weapons while Brelo, less than five feet away from the faces and hands of Russell and Williams, continued to shoot from his exposed vantage point. There is no justification for his actions; Brelo disregarded

proper civilian police procedure and force continuum training when he jumped on the hood of the victims' car and reengaged the occupants by shooting again and again. He used excessive, lethal force without determining if the threat continued and without following his training and proper procedure.

THE 18-MONTH MEDIA CAMPAIGN LED BY D'ANGELO AND THE CPPA TO SWAY PUBLIC OPINION

The CPPA, its members, and its advocate D'Angelo have been vocal and taken every manufactured media opportunity allowed to interpret law and provide conclusions as to the actions of the CPPA membership since the killing of Timothy Russell and Malissa Williams. Starting after the 62-car chase over 20 miles that ended in the neutralization of any threat prior to Defendant Brelo's final firing of 15 rounds into Russell and Williams, the CPPA and its advocate made the following public assertions before any indictment and during public debate and official investigations, designed to influence the public perception of his clients' actions in engaging in a police pursuit that contained an excessive number of police vehicles travelling through the city and its streets in a reckless manner.

After the lengthy chase and shooting of Williams and Russell, who were determined to be unarmed, CPPA President Jeff Follmer defended his membership to the public:

"I don't understand where the bad guys aren't still bad, and now it's the police officers," Jeffery Follmer, president of the Cleveland Police Patrolmen's Association, said during a news conference at the CPPA hall Saturday afternoon.

Follmer said McGrath should not comment on the shooting, which killed Timothy Russell, 43, and Malissa Williams, 30, until the investigation is complete.

Still, Follmer had a lot to say about the 13 officers who opened fire on Russell and Williams -- unloading 137 rounds at them after a three-city car chase that ended near an East Cleveland middle school.

"The officers involved are experienced and professional police officers," Follmer said. "For anyone who was not there to judge them without knowing all the facts, or to blame anyone else but the two occupants of that car for their own death, is ignorant and self serving.

"Our officers did a great job."

Cleveland police union official defends officers in fatal shooting after chase into East Cleveland, Brandon Blackwell, December 01, 2012, updated December 3, 2012, available at http://www.cleveland.com/metro/index.ssf/2012/12/cleveland_police_union_officia.html (Emphasis added.)

In complaining about the Police Chief calling for federal assistance in investigating the chase and eventually killing of Russell and Williams, D'Angelo publicly asserted:

But the lawyer for the Cleveland police union scoffed. He called McGrath's comments ill-advised, adding that they tainted the officers involved.

"Why does he have to call anyone?" Patrick D'Angelo, the Cleveland Police Patrolmen's Association lawyer said in an interview Monday. "He knows things aren't swept under the carpet, and they're not going to be in this case. For him to ask for federal assistance is inappropriate."

D'Angelo said he welcomes a local task force's investigation.

"We have nothing to hide," D'Angelo said. **"These officers' lives were literally on the line. They acted in dangerous and difficult circumstances."**

Cleveland police chief's remarks about shooting may place his department under greater scrutiny, John Caniglia, The Plain Dealer, December 03, 2012 at 6:19 PM (updated December 03, 2012 at 7:15 PM) available at http://www.cleveland.com/metro/index.ssf/2012/12/post_75.html (Attached hereto) (Emphasis added.)

The CPPA continued to cast blame on the victims in this matter, stating there was no fault on the part of its membership:

Relatives of Williams on Monday demanded an apology from Cleveland Police Patrolmen's Association President Jeffery Follmer, who referred to the deceased as "bad guys" and praised police for doing a "great job."

Follmer said in an interview Monday that his comments were merely to defend his officers against accusations that they overreacted in their use of deadly force. He said he did not mean to cast judgment on the dead.

He added, however, that "they're not good for what they did — running through the city, firing a gun.

"Why didn't the driver stop?" Follmer said. "Why try to escape with four or five police cruisers blocking your way? **Our officers really felt their lives were in danger, and they did everything they should have done.**"

Cleveland police ordered to terminate chase 5 minutes before deadly shooting, radio recordings reveal, Leila Atassi, Northeast Ohio Media Group, December 03, 2012, updated December 04, 2012, http://www.cleveland.com/metro/index.ssf/2012/12/cleveland_police_ordered_to_te.html

In February, 2013, regarding the 62-car chase through city streets which exceeded speeds of 100 MPH CCPA, President Follmer stated:

A top police union official called a Nov. 29 police pursuit that included dozens of vehicles "the perfect chase."

Jeff Follmer, president of the Cleveland Police Patrolmans Association, praised the actions of the officers who he said made split-second decisions to join the chase, which ended with a dangerous crossfire and two dead suspects. The state attorney general has said they violated department policy doing so.

Follmer said, "For 25 minutes our police officers were able to keep the public safe, have no property damage, and bring the chase to a close without any officer injuries." He said many of those officers were blocking intersections to keep citizens safe, not chasing the suspects.

"When an officer is shot at, every car is going," Follmer said. "We're coming in numbers. We're going home together."

Police union chief defended officers who joined November chase, Rachel Dissel, The Plain Dealer, February 06, 2013, updated February 07, 2013 at 3:10 PM, available at http://www.cleveland.com/metro/index.ssf/2013/02/police_union_chief_defended_of.html (Emphasis added.)

In responding to the criticisms of the CPD and its actions by Attorney General DeWine, the D'Angelo publicly concluded, despite the AG report:

Patrick D'Angelo, the police union attorney, said the shooting would be found to be justified. The chase reflects the risks officers face daily, he said.

“The driver of the car tried to run over numerous police officers, he intentionally rammed other patrol cars and officers were in fear of their life, and they did what they were trained to do,” D’Angelo said.

DeWine: Deadly police chase in Cleveland result of ‘lack of control’, Thomas Sheeran, The Columbus Dispatch, Wednesday February 6, 2013, available at <http://www.dispatch.com/content/stories/local/2013/02/06/deadly-chase-in-cleveland-result-of-lack-of-control.html>

In contrast to D’Angelo’s comments and publicly stated legal conclusions, Prosecutor McGinty made no substantive comments:

He [DeWine] turned over the report to Cuyahoga County Prosecutor Timothy McGinty, who said he would take the case to a grand jury to determine whether any of the officers should face criminal charges.

Officials didn’t announce a timeframe for the grand jury review, and McGinty said he hadn’t drawn any conclusions about charges.

Id.

In May, 2013, Prosecutor McGinty again made no public comments on the facts of the matter, nor did he state any conclusions regarding the matter when the City of Cleveland announced the Cuyahoga County Prosecutor’s Office will review CPD shooting cases. However, the CPPA used this announcement to again pronounce its conclusion that there was no misconduct on November 29, 2012:

McGinty declined to comment on the significance of the new policy Tuesday. But spokeswoman Maria Russo said the prosecutor intends to put every case in the hands of a grand jury, as he pledges to do with the Nov. 29 shooting that killed Timothy Russell, 43, and his passenger, Malissa Williams, 30.

Cleveland Police Patrolmen's Association President Jeffery Follmer said Wednesday that he believes all of the police shootings in question were justified, but he supports the move to direct all cases to McGinty for review. "I don't see any problems with this decision," Follmer said. "The county prosecutor has always been fair with us, and it removes these cases from City Hall politics."

Cuyahoga County Prosecutor to review all future Cleveland police use of force cases that result in suspect's death, Leila Atassi, Northeast Ohio Media Group, May 1, 2013, updated May 1, 2013 at 6:22 PM, available at

http://www.cleveland.com/metro/index.ssf/2013/05/all_future_cleveland_police_us.html
(Emphasis added.)

One year after the deadly shooting of Russell and Williams, Follmer continued the campaign to present his organization's legal conclusion that his membership did nothing wrong in the chase, the stop, and the shooting:

Thirty seconds later, in what Ohio Attorney General Mike DeWine described as a chaotic scene, 13 officers had fired their weapons 137 times – including one officer who fired 49 shots. Russell was shot 24 times, and Williams 23 times. No weapon belonging to the two was ever located, and gunpowder residue collected at the scene was inconclusive, DeWine said.

Jeff Follmer, president of the Cleveland Police Patrolmen's Association, said the officers' actions were justified by those of Russell and Williams, which Follmer said led officers to believe they were dealing with "an active shooter."

"The facts are the facts, and you can't take away the officers' perceptions in that parking lot," Follmer said. "(Russell and Williams) were still creating a threat with their actions. None of the officers were looking to get into this type of situation."

Seeing 'no justice,' community groups hold vigil to mark one year anniversary of deadly Cleveland police chase, Cory Shaffer, Northeast Ohio Media Group, November 29, 2013 at 2:30 PM, updated November 29, 2013 at 9:40 PM, available at http://www.cleveland.com/metro/index.ssf/2013/11/seeing_no_justice_community_gr.html
(Emphasis added.)

On the one-year anniversary of the chase, stop, and shooting matter that lead to Defendant Brelo's indictments in this case, D'Angelo said he would not comment on the matter, but had recently did so, attempting to shift any blame from his CPPA clients:

Out of respect for the grand jury process, Patrick D'Angelo, the attorney for the Cleveland Police Patrolmen's Association, said he didn't want to publicly discuss his current thoughts on the city and county investigations.

"I'm going to exercise my judgment," D'Angelo said when reached this week. "We don't really have a role in the (grand jury) process, were not in the room so it puts me in a difficult position."

But previously, D'Angelo skewered city officials who contended that officers simply chose not to follow written policies.

"This department is poorly trained, if it is trained at all," D'Angelo said earlier this year.

A year later: Cleveland Nov. 29 police chase and fatal shooting in the hands of a grand jury, Rachel Dissell, The Plain Dealer, November 29, 2013 at 6:00 AM, updated November 29, 2013 at 9:36 AM, available at http://www.cleveland.com/court-justice/index.ssf/2013/11/a_year_later_cleveland_nov_29.html#incart_river_default (Emphasis added.)

A day prior to his decision not to comment on the matter, D'Angelo was quoted as extensively commenting on the matter in conformity with the prior year's campaign to assert justification for his clients actions and to shift potential blame away from them:

Patrick D'Angelo, the attorney for the Cleveland Police Patrolmen's Association, said Russell and Williams would be alive had they stopped.

"But that doesn't end the conversation," he said. **"I believe the facts will reveal that the use of deadly force in this case by all officers was legally justified. The driver of the suspect vehicle attempted to drive over at least three officers who were on foot. He was using his vehicle as a deadly weapon."**

"That coupled with the previous broadcasts and the behavior of the occupants of the vehicle during the course of the pursuit — taking into account the totality of the circumstances and the rapidly unfolding events and the limited time frame in which the officers had to make decisions — **it will show the officers acted appropriately and within the law."**

On the chase, D'Angelo said, the officers acted correctly. He disputed a claim in the lawsuit that alleges officers and supervisors "failed to inquire, assess and broadcast orders as critical events unfolded during the pursuit."

"Officers have been trained by their field-training officers not to interfere or chime in during a pursuit, as it might affect what an officer is trying to say," D'Angelo said. "There were several times when Officer David Siefer told other officers to let him handle it and stay off the air. There is a reason why all these officers didn't all call in at once."

Families of Timothy Russell, Malissa Williams sue Cleveland and police over chase, shooting, John Caniglia, The Plain Dealer, November 28, 2013 at 3:25 PM, updated November 29, 2013 at 8:50 AM, available at http://www.cleveland.com/metro/index.ssf/2013/11/families_of_timothy_russell_ma.html (Emphasis added.)

Again, in contrast to D'Angelo's public statements, Prosecutor McGinty did not comment on the facts of the matter or make public legal conclusions, referring the media to his prior statement from June of 2013:

The day of Jackson's statement, Cuyahoga County Prosecutor Timothy McGinty said: "Our investigation of this case continues, and the Attorney General's Bureau of Criminal Investigation (BCI) has not impeded it. The BCI investigation was thorough and professional, and I had no objection to letting the public see the facts. Police officers are public servants, and this is a matter of great public importance."

Id.

In February, 2014, as the grand jury investigation continued, the CPPA and D'Angelo complained of Prosecutor McGinty's comments responding to a question relating to having to investigate or prosecute people he works with. None of the comments were based on this matter and none presented any facts of any police shooting.

The CPPA President and D'Angelo, however made inferences and publicly accused the Prosecutor of bowing to public pressure. This article underscores that any need for a gag order in this case should silence the Defendant's organization and counsel from continuing to attempt to try this matter in the press:

The Cleveland patrolmen's union said Monday that Cuyahoga County Prosecutor Timothy McGinty has bowed to special interests in the investigation of the high-speed chase that ended with two dead in a hail of gunfire in November 2012.

"We don't want to pick a fight with Tim McGinty, the person who is handling this case, but I'll be damned if we are going to sit back on the sidelines right now," said Patrick D'Angelo, the attorney representing the Cleveland Police Patrolmen's Association.

McGinty, in a statement, fired back: "This office has been thoroughly reviewing and reconstructing the events of that night. We have retained outside experts to assist in that continuing effort. We want a complete understanding that will serve the interests of justice and avoid unnecessary deaths in the future, either civilian or police. We will follow the evidence, wherever it leads[.]

"This investigation will not be driven by any special interests -- including the police union."

Cleveland patrolmen's union spars with McGinty over investigation into chase, shooting, John Caniglia, The Plain Dealer, February 17, 2014 at 6:32 PM, updated February 18, 2014 at 1:58 AM, available at

http://www.cleveland.com/metro/index.ssf/2014/02/cleveland_patrolmens_union_say.html

In March, 2014, a reconstruction of the scene of the fatal shooting was conducted. In conformity with law and with respect for the matter, Prosecutor McGinty made no conclusions regarding the reconstruction. "Prosecutor Timothy McGinty's office repeatedly said Saturday's activity was not a re-enactment of the shooting, rather an examination of what happened. 'We are gathering information, running some tests,' said Joseph Frolik, the office spokesman. Asked if anything gleaned from the exercise will be presented to the grand jury, Frolik said, 'I think that is a safe assumption.'"

Officials reconstruct scene of Cleveland police shooting that ended long pursuit, James Ewinger, The Plain Dealer, March 08, 2014 at 5:40 PM, updated March 09, 2014

at 8:28 AM, available at

http://www.cleveland.com/metro/index.ssf/2014/03/officials_reconstruct_scene_of.html. In

contrast, CPPA President Follmer escalated his criticism of the Prosecutor and his disdain for a continuing investigation to determine the facts of November 29, 2012:

One person who was there and watching closely was Jeff Follmer, president of the Cleveland Police Patrolmen's Association. He spoke critically of the exercise, describing it as a "McGinty production" and a "media production."

"They are doing this during the day. If this is any kind of re-enactment, there are no lights, no sirens. You can't come away with the officers' perceptions, and the threat they felt that night."

He added, "They are in the middle of a grand jury session, and they are doing this now?"

Id.

In April, 2014, the Cuyahoga County Prosecutor released its policy regarding the handling and determination of its review and investigation of police shootings. No public comment was made as to the facts of this matter, nor any facts or legal conclusions. However, CPPA and

D'Angelo's campaign to present legal conclusions as to the CPPA membership as to the November 29, 2012, fatal shooting, complained of a policy that would subject police conduct to the scrutiny of a grand jury, going so far as to call for the public revelation of grand jury testimony and its voting (an act that is illegal under the Ohio Revised Code and prohibited by the Crim.R. 6):

Critics of the process, including an attorney representing the Cleveland police union and an attorney who represents several families of people killed by police, say McGinty is not acting transparently and, conversely, is hiding behind the grand jury instead of reviewing evidence and making a decision.

McGinty is setting up a double standard for cases involving police officers in choosing to take all deadly force cases – no matter how clear cut – to a grand jury, said attorney Patrick D'Angelo, who represents the Cleveland Police Patrolmen's Association, the union that represents the 13 officers who fired their weapons at the conclusion of the Nov. 29 chase.

Instead, he said, **McGinty should simply review the evidence and make the tough decisions about whether or not officers should be charged and tell the public what he decided and explain why.**

"He's claiming he's above the fray but he's allowing politics to infect the process and hiding behind the secrecy of the grand jury," D'Angelo said.

McGinty's recently released policy on his review of deadly force cases states that the prosecutor will listen to and consider evidence from any source, "including defense attorneys and lawyers who may be representing the deceased's family in civil litigation against the city."

D'Angelo said that is not true because McGinty has met with black clergy and families and attorneys of the two people fatally shot by police but would not take D'Angelo's calls about the case. He also contends that inappropriate public comments by McGinty prove the union's contention that the prosecutor -- regardless of the grand jury process -- has made up his mind about charges.

D'Angelo is referring to a quip McGinty made during February a speech to the Civic Leader Institute saying "the buffalo are coming." The union took that as a reference to impending indictments.

Asked about D'Angelo's criticism previously, McGinty stood behind the thoroughness and fairness of his office's investigation and said it wouldn't be "driven by special interests – including the police union."

D'Angelo said if McGinty truly wants to be transparent he should disclose what his position is on the case – and when it is over, he should publish any grand jury transcripts on this website for the public to review.

"He should be open about it and let people know how the grand jury voted."

Frolik declined to directly respond to D'Angelo's remarks.

However, Friday, he did say in an emailed comment that, "There is no question that police officers have the toughest job in the world. There are occasions when they may have to make split-second decisions on whether to kill or be killed."

The office has repeatedly said it cannot discuss any specifics on witnesses, evidence or discussions being had within a grand jury because that process, by law, is secret.

Ohio law and past court cases seem to support that contention. A court does have the power to release information, such as grand jury transcripts, but only in very narrow circumstances, according to previous court rulings on the issue.

Grand debate: Are citizen grand juries the best way to decide police deadly force cases?, Rachel Dissell, The Plain Dealer, April 25, 2014 at 8:00 AM, updated April 25, 2014 at 4:48 PM, available at http://www.cleveland.com/court-justice/index.ssf/2014/04/post_6.html (Emphasis added.)

The Cuyahoga County Prosecutor's Office announced the indictments in this matter on May 30, 2014. In public statement, the Prosecutor made reference to the indictments, the offenses found by the grand jury to be committed, the defenses involved, the identity of the persons involved, and presented information contained in the public record. This statement has been criticized by D'Angelo, who has long publicly stated that his clients did nothing wrong:

But Patrick D'Angelo, an attorney for the union, lambasted the prosecutor and the indictment. He said McGinty's office had the benefit of hindsight, spending about 18 months dissecting the movements of Brelo made in seconds.

"His rendition of the facts is a gross distortion of the reality of the dangerous events that Officer Brelo faced," D'Angelo said. "He is using soundbites to fit his theory of the case."

Cleveland police chase and shooting grand jury: Patrolman and 5 supervisors are indicted, John Caniglia, The Plain Dealer, May 30, 2014 at 7:13 PM, updated May 31, 2014 at 8:05 AM, available at http://www.cleveland.com/court-justice/index.ssf/2014/05/cleveland_police_chase_and_sho.html (Emphasis added.)

D'Angelo went further, and represented any facts, denigrating the grand jury process and its finding as related by the Prosecutor as "a fairy tale." He publicly presented his defense, in accord with the prior 18 month campaign, as:

Here are five takeaways from the press conference.

1. D'Angelo believes public pressure led to the charges. "There was a big hue and cry," he said. "Sometimes people have agendas or just don't like the police. A certain race card that's played." He said African-American and Hispanic officers said they would have fired at the car but didn't have a good angle.
2. There was no cease fire followed by Brelo firing, which Prosecutor Timothy J. McGinty claimed, and people should listen to the tapes from the incident. "I state categorically that evidence will not show there was a cease fire," he said. "It will not show that out of anger Brelo got on the vehicle and fired another round. The events took place over about 40 seconds and it is a gross distortion of the truth to say there was a break."
3. It is significant that 12 officers who used deadly force in the parking lot were not indicted, because it showed what they and Brelo did were justified. "The 12 officers fired approximately 90 shots," he said. "One officer fired a shotgun." He said they were threatened with indictments.
4. McGinty's comments did not reflect an accurate portrayal of what occurred. "What he presented was a fairy tale," D'Angelo said. "He has reinvented history and presented this case as a stop and shoot. It is not the reality that Mike Brelo and the other officers faced."
5. Don't make a rush to judgment. "We look forward to our day in court," D'Angelo said. "We have been dealing with kangaroo courts since this began."

On Friday, June 13, 2014, the CPPA and its membership appeared en masse in support of Defendant Brelo and the CPD supervisors at the arraignment hearing held on the 12th floor of the Justice Center. Dozens of these officers appeared in uniform in support (before being removed from the courtroom by Sheriff's Deputies) of Defendant Brelo. Such appearance is in violation of CPD uniform policy and was intentionally done to intimidate future jurors and witnesses and show solidarity and support of Defendant. To believe that such demonstration of force was not

orchestrated or coordinated by the CPPA and its members to sway public opinion is to be naïve. Such use of uniforms is a move to intimidate potential jurors and witnesses, and imply police solidarity and support for the defendant. Such tactics should not be allowed by this Court.

THE PROSECUTOR AND HIS STAFF HAVE NOT VIOLATED THE RULES OF PROFESSIONAL CONDUCT

Defendant Brelo selectively quotes the rules of professional conduct. He notes that Rule 3.6(a) of the Rules of Professional Conduct provides:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This rule is only presented by Defendant Brelo in part; his brief conveniently omits the remainder of the rule which allows for public comment and statements by an attorney participating in litigation of a matter. The remainder of Rule 3.6 of the Rules of Professional Conduct provides that public commentary may be made in the following instances:

(b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6, a lawyer may state any of the following:

- (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest;

(7) in a criminal case, in addition to divisions (b)(1) to (6) of this rule, any of the following:

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest;

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding division (a) of this rule, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this division shall be limited to information necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to division (a) of this rule shall make a statement prohibited by division (a) of this rule.

In adopting these rules, the official comment explicitly notes that “Division (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of division (a). Division (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to division (a).”

Further commentary is provided that explicitly notes that:

[E]xtrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting

adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.”

Id.

As noted above, Prosecutor McGinty did not comment on this case or its facts in any substantive manner prior to the indictments. Further, Prosecutor McGinty did not release any factual information that has not been publicly available, and did not make any statements that were false or misleading about the law. See, Rules of Prof. Cond. 3.6. All statements that have been made are well within the bounds of ethical standards. Id. Further, any statements made at the time of the indictment served to correct and rebut the CPPA criticism and D’Angelo’s statements that have publicly concluded that members of the CPPA have done nothing wrong.

For Defendant Brelo now to seek an order restraining public comment on the case by the Prosecutor, having had 18 months of continued media presence proclaiming his and his colleagues actions were justified is disingenuous. This Court should note that the CPPA and his Attorney have continually attempted to try this case in the media, have attacked Prosecutor McGinty for presenting this matter to the grand jury, and have gone so far as to describe the indictment and its underlying facts to be “a fairy tale” in the media. Moreover, D’Angelo, as an officer of the court has gone farther, seeking to imply that Prosecutor McGinty should release grand jury testimony and votes; actions that any licensed attorney knows would violate the laws of Ohio and the Rules of Criminal Procedure. See, Crim.R. 6(E); R.C. 2903.06. This call to illegal action by D’Angelo demonstrates the need not to silence public comment by the Prosecutor, but to prohibit D’Angelo and the CPPA in this matter from making reckless statements that misstate the law in an attempt to hamper the administration of justice.

As demonstrated above, Prosecutor McGinty, his assistants, and his staff have not publicly stated anything in violation of Rule 3.6 of the Rules of Professional Conduct. Although Defendant

Brelo and his counsel believe otherwise, a review of the public record and the media generated around the fatal shooting of Williams and Russell demonstrates a concerted and protracted effort on the part of the officers involved in Williams' and Russells' homicides to sway public opinion in their favor. In contrast, Prosecutor McGinty has stated only facts about this case that are in the public record, has not commented on the grand jury investigation in any substantive manner, and has made no statements regarding the CPPA, its President, its Counsel, or its membership, despite the personal attacks on the integrity of Prosecutor McGinty and the integrity of the grand jury system.

For these reasons, the State does not believe a gag order on the Prosecutor or his Office would serve the interests of justice; especially in light of the statements made by Brelo, his attorney, and his organization that have been intended to sway public opinion and influence the potential jury pool. There has been no restraint in public statements by Defendant's representatives in the months leading to the indictment, and since, no restraint has been shown. Rather, there is a concerted effort to continue to attempt to sway the jury and intimidate potential witnesses; including a show of uniformed officers en masse and in violation of CPD uniform policy to influence public opinion and intimidate those who seek to administer justice. If this Court gags the parties to the case, Attorney D'Angelo's second client, the CPPA, will be allowed to make unfettered public comments. If the State is unable to appropriately respond to such comments as needed, then the CPPA's comments will result in an unfair advantage to the Defendant Brelo. The motion by Defendant for gag order should be denied.

Respectfully submitted,

/s/Timothy J. McGinty
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CERTIFICATE OF SERVICE

A copy of the foregoing Response to Defendant's Motion for Gag Order has been filed and served this 19th day of June, 2014 both electronically to the following Attorneys or where no so represented to the Defendant by U.S. Mail:

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