January 3, 2022

Kristen Clarke
Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Dear Assistant Attorney General Clarke:

We write to provide perspective and input regarding the interpretation and scope of 18 U.S.C. § 242, as you investigate the police shooting death of Tamir Rice on November 22, 2014.

We understand that the Department of Justice is currently evaluating whether the actions of the Cleveland Police officers involved in Tamir's death meet the legal standard set out by Section 242 for criminal charges and warrant convening a federal grand jury. We are a group of legal scholars who have taught or are teaching constitutional, criminal, and civil rights law at universities across the country, and offer our assessment in this case of grave national importance, in a good faith effort to aid the Department in its decision-making process.

As your office is no doubt aware, the requirements of Section 242 have been interpreted across the federal courts over many years. Although there is some variation in Section 242 interpretation and jurisprudence, on the facts of this case, we believe the most persuasive weight of authority favors—and arguably commands—the convening of a federal grand jury and prosecution of the police officers responsible for the death of Tamir Rice.

As set forth more fully below, application of Section 242 in the Sixth Circuit—where we assume criminal charges would most likely be brought—plainly supports a prosecution in this case. Given the information currently available, there is sufficient evidence of probable cause to believe officers used unreasonable and excessive force in violation of Tamir's constitutional rights.[1] Under Sixth Circuit law, the police officers' documented conduct supports the specific conclusion that they acted *willfully* to use such force. And under Section 242—as interpreted by the U.S. Supreme Court and the law of the Sixth Circuit—such conduct requires bringing criminal civil rights charges.

The Shooting Death of Tamir Rice

The facts are well-known, deeply troubling, and largely a matter of public record. Much of this fatal incident is captured on video. On Saturday, November 22, 2014, at approximately 3:30pm in the afternoon, Tamir Rice—a 12-year-old boy—was shot and killed at close range by Cleveland Police officer Timothy Loehmann. The shooting took place at Cudell Recreation Center, a park where Tamir and other children regularly played.

[1] In fact, the first judicial officer to review this case swiftly concluded the convening of a grand jury was necessary. Judge Ronald B. Adrine of the Cleveland Municipal Court stated, after finding probable cause to charge the officers: "The video in question is notorious and hard to watch. After viewing it several times, this court is still thunderstruck by how quickly this event turned deadly."

That afternoon, Tamir had been playing in the park with a toy gun, which had been given to him by another boy. A man who was drinking and waiting for a bus saw Tamir playing with the toy gun and called 911 to make a report. He twice relayed to the 911 officer that the gun was "probably fake" and that Tamir was "probably a juvenile" who was sitting on a swing in the park. He did not report that he or anyone else had been shot at, or that any altercation had taken place. According to the Cuyahoga County Prosecutor's report of the incident, the dispatcher advised Officers Timothy Loehmann and Frank Garmback that someone was sitting on the swings at the park with a gun. The dispatcher did not tell the officers that the gun had been fired or that anyone had been shot or injured.

According to a statement submitted to the Cuyahoga County Sheriff's Department, Loehmann stated that when the officers arrived, they sighted Tamir standing by himself. Tamir was not holding any weapons in his hands. According to a video of the incident, when the officers arrived, they drove into the park and pulled up within a few feet of Tamir. Officer Loehmann jumped out of the car while it was still moving, with his gun drawn, and shot Tamir in the abdomen, *all within less than two seconds*.[2]

Taken as a whole, the weight of evidence contained in the public record demonstrates beyond any reasonable doubt that Officer Loehmann shot Tamir Rice, willfully and intentionally on the sole basis of information provided by a radio dispatcher, information which could not form an objectively reasonable basis for employing deadly force in an instantaneous manner. As the video confirms, the officers pulled up to Tamir in a moving vehicle, Officer Loehmann jumped out while the car was still in motion, his gun was drawn, he aimed the weapon and then intentionally shot and killed Tamir even though neither of the officers or any civilians were in any actual or observable danger. This is the very definition of willful conduct as contemplated by the applicable law.

Convening a Federal Grand Jury and Prosecution Under Section 242 is Warranted

Section 242, which was enacted as part of the Civil Rights Act of 1866 following the Civil War, provides that:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different

[2] Importantly, the video footage contradicts the key claims made by the officers, including Loehmann's statement—given to the Sheriff's Department prior to the release of the video—that he came upon "an active shooter situation." Officer Loehmann claimed that he made repeated commands to Tamir to show his hands, which is unlikely given the less than two seconds that elapsed, and the fact that the officers' car windows were rolled up. Even if he had shouted those commands, he gave Tamir no time to comply with them. Additionally, the officers' claims that Tamir turned toward their car—presumably meant to imply that he was moving towards them in a threatening manner—are also contradicted by the video, which shows the car speeding up to Tamir, rather than Tamir turning to face the car. An expert in kinetic analysis hired by the Rice family, Dr. Jesse Wobrock, concluded from the video that, rather than putting his hands in his "waistband" to grab a weapon—as claimed by the officers—Tamir's hands remained in his jacket pockets during the entirety of the one to two seconds in which the shooting took place.

> punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both[.]

A prosecution under Section 242 requires the government to prove that a person acting under color of law acted willfully to deprive an individual of their constitutional rights. This intent requirement— "willfully"—was examined by the Supreme Court in *United States v. Screws*, in which the Court considered a precursor statute to Section 242. 325 U.S. 91 (1945). In *Screws*, the plurality of the Court explained that "[t]he fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees." *Id*. at 106. The Court found that it was necessary for the jury "to find that petitioners had the purpose to deprive the prisoner of a constitutional right" and that "in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstance—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like." *Id.* at 107.

Following *Screws*, several Circuits have interpreted the intent requirement as satisfied by a showing that the officer acted with "reckless disregard" for the victim's constitutional rights. *See United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986) ("It is not necessary for the government to prove the defendant was thinking in constitutional terms at the time of the incident, for a reckless disregard for a person's constitutional rights is evidence of specific intent to deprive that person of those rights."); *United States v. Johnstone*, 107 F.3d 200, 208-09 (3d Cir. 1997) ("In simpler terms, 'willful[ ]' in § 242 means either particular purpose or reckless disregard. Therefore, it is enough to trigger § 242 liability if it can be proved—by circumstantial evidence or otherwise—that a defendant exhibited reckless disregard for a constitutional or federal right."); *United States v. Bradley*, 196 F.3d 762, 769 (7th Cir. 1999) ("To show a willful deprivation of a civil right under § 242, the government must establish that the defendant acted 'in open defiance or in reckless disregard of a constitutional requirement' …. A defendant need not 'have been thinking in constitutional terms' to willfully violate a constitutional right…. Willfulness may be shown by circumstantial evidence so long as the purpose may "be reasonably inferred from all the circumstances attendant on the act.").[3]

In *Johnstone*, the Third Circuit upheld a jury instruction that included the following description of the intent requirement: "You may find that a defendant acted with the required

[3] In *Johnstone*, the Third Circuit found it unnecessary to reach the question of whether "reckless disregard" required an objective or subjective analysis, because, in the case of a police officer using excessive force, it is "obvious" that, "a trained police officer, was aware that federal and state law (recall that [the officer] was employed by a municipal police department that operated under state law) set boundaries within which the use of force is permissible and was surely aware that any use of force presented some risk of falling outside those boundaries."). 107 F.3d at 209 n.11. *See also United States v. Cossette*, 593 F. App'x 28, 30 (2d Cir. 2014) ("at least since *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), law enforcement officers have been on notice that the Fourth Amendment prohibits their use of excessive force during an arrest.").

specific intent even if you find that he had no real familiarity with the Constitution or with the particular constitutional right involved, here the right to be free from the use of unreasonable or excessive force, provided that you find that the defendant intended to accomplish that which the constitution forbids." 107 F.3d at 210. The Second Circuit has approvingly cited these instructions as well. *See United States v. Pendergrass*, 648 F. App'x 29, 33 (2d Cir. 2016) ("the plain text of *Screws* does not *require* judges to instruct juries using both phrases, 'bad purpose' and 'evil intent,' to adequately define the term 'willful,' and we know of no authority that supports such an interpretation.") (citing *Johnstone,* 107 F.3d at 209–10); *see also United States v. Walsh*, 194 F.3d 37, 52 (2d Cir. 1999) (holding that the "jury did not have to find that the defendant acted with knowledge of the particular provision of the Constitution at issue").

Other courts have employed standards with similar mechanics without using the "reckless disregard" language, finding that the "willful" standard is met if the defendant intended his physical actions, and those actions violated the victim's constitutional rights. *See United States v. Cobb*, 905 F.2d 784, 785 (4th Cir. 1990) (upholding a jury instruction stating that "[i]f you find that a defendant knew what he was doing and that he intended to do what he was doing, and if you find that he did violate a constitutional right, then you may conclude that the defendant acted with the specific intent to deprive the victim of that constitutional right."). *See also United States v. Cowden*, 882 F.3d 464, 474 (4th Cir. 2018) ("Willfulness may be shown by circumstantial evidence, provided that the defendant's purpose reasonably may be inferred from all the connected circumstances.") (citing *Screws*, 325 U.S. 91 at 106); *United States v. Harrison*, 671 F.2d 1159, 1162 (8th Cir. 1982) (upholding jury instruction that excessive force would evidence intent only if the officers used "greater force than that which would appear reasonably necessary").

Only the Fifth Circuit arguably requires a stricter standard: that the officer must knowingly intend to violate the victim's constitutional rights with "bad purpose" or "evil motive." *See United States v. Kerley*, 643 F.2d 299, 303 (5th Cir. 1981) ("The district court's failure to charge the jury that willfully, as used in Section 242, means acting with bad purpose or evil motive was reversible error."); *United States v. Garza*, 754 F.2d 1202, 1210 (5th Cir. 1985) (upholding an instruction that included a reference to "bad purpose or evil motive" and determining that the "term willfully in 18 U.S.C. § 242 implies *conscious purpose* to do wrong and intent to deprive another of a right guaranteed by the Constitution, federal statutes, or decisional law.") (emphasis added). The Fifth Circuit does not appear to have addressed whether circumstantial evidence can establish intent under Section 242, or how the *Screws* court's inclusion of "reckless disregard" in the legal standard fits within its analysis. The Fifth Circuit's law is therefore less complete and out of step with that of the Second, Third, Fourth, Seventh, Eighth, and Ninth Circuits as discussed above. It also stands apart from the law of the Sixth Circuit.

While cases interpreting Section 242's intent requirement in the Sixth Circuit are limited, at least two cases demonstrate the facts here would satisfy the requirement, which appears most similar to the interpretations of the Third, Seventh, and Ninth Circuits. In *United States v. Couch*, the Sixth Circuit upheld jury instructions that explained the intent element to include

"reckless disregard" of constitutional rights, and that intent could be inferred from circumstantial evidence. Specifically, the jury instructions in *Couch* included the explanation that "intent is a state of mind and can be proven by circumstantial evidence" and that it is "not necessary for you to find that the defendants were thinking in constitutional terms at the time of the incident, as a reckless disregard for a person's constitutional rights is evidence of a specific intent to deprive that person of those rights." 59 F.3d 171, 1995 WL 369318 at *3 (6th Cir. 1995). The Court clarified that "[a]s long as the accused specifically intends to use more force than is reasonable under the circumstances, he acts willfully and thus runs afoul of § 242." *Id*. at *4 (citing *United States v. Reese*, 2 F.3d 870, 885 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994)). The defendant "must have intended to use unreasonable force, that is, he must have intended to deprive [the victim] of his constitutionally protected right to be free from the use of unreasonable force." *Id*.

In *United States v. Corder*, the defendant appealed based on the following jury instruction: "You may find that the defendant acted willfully if you find that he acted in open defiance or reckless disregard of [the victim's] right to be free from unreasonable seizure. In other words, the defendant acted willfully if he seized [the victim] knowing or recklessly disregarding the possibility that the seizure was constitutionally unreasonable." 724 F. App'x 394, 403 (6th Cir. 2018). The court upheld this instruction, including the use of the word reckless, stating that "[w]illful is synonymous with reckless." *Id.* at 404 (citing *Screws*, 325 U.S. at105, for the proposition that one acts willfully when acting "in reckless disregard of a constitutional requirement....").

Here, under Sixth Circuit case law, the information in the public record supports the conclusion that a federal prosecutor should convene a grand jury to present the evidence that the officers used excessive force and acted with reckless disregard for Tamir's constitutional rights, demonstrating their specific intent to deprive Tamir of those rights. The Sixth Circuit has repeatedly held that "only in rare instances may an officer seize a suspect by use of deadly force." *Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir. 2005) (citation omitted). It has been "clearly established in this circuit for the last twenty years that a criminal suspect has a right not to be shot," *id.* at 699, unless "the officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others." *Withers v. City of Cleveland*, No. 15-3110, 640 F. App'x 416, 419 (6th Cir. Jan. 13, 2016) (quoting *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)).

In assessing the reasonableness of an officer's use of force, courts in the Sixth Circuit consider: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir. 2006). None of these factors favor the use of force in this case—openly carrying a weapon is legal in Ohio—and instead, demonstrate the officers' reckless disregard for Tamir's constitutional rights. The officers' actions in shooting Tamir within two seconds of arriving on the scene, even though he had no weapon in his hands and they did not observe him threatening anyone, doing anything illegal, or fleeing, was clearly unreasonable and provide strong

circumstantial evidence of their intent. A reasonable juror could certainly find that the officers' failure to even *attempt* to determine whether Tamir posed a significant threat of death or serious physical injury to themselves or others indicates their reckless disregard for his constitutional rights, and their intent to deprive him of those rights.

For example, in *United States v. Bradley*, the Seventh Circuit upheld a conviction under Section 242 under circumstances highly analogous to the shooting death of Tamir, holding that the willfulness standard was satisfied in a case where the defendant officer claimed he acted out of fear for his own safety rather than a specific intent to deprive the victim of his constitutional rights. 196 F.3d at 769. In *Bradley*, two officers were chasing the victim with a police emergency light flashing while the victim refused to stop. *Id.* The defendant officer leaned out the window of a moving police car and fired a bullet into victim's car. *Id.* Although the defendant officer claimed that he believed the victim may have been reaching for a gun, neither he nor the other officer ever saw the victim of brandish a weapon of any kind or do anything that could be reasonably perceived as life-threatening. *Id.* The court found that the defendant officer's actions "were clearly unreasonable and excessive" and the "jury had ample evidence to reasonably conclude" that the officer willfully violated the victim's Fourth Amendment rights. Like the victim in Bradley, Tamir was not holding a weapon or threatening the officers. And unlike the victim in *Bradley*, Tamir was not fleeing or violating any laws, and the entire altercation took place in less than two seconds.

A Federal Grand Jury is Required to Correct the Tainted Local Grand Jury Process

A federal response is necessary and appropriate because of the multiple, credible, and disturbing allegations that the original grand jury process convened by Cuyahoga County prosecutor Timothy J. McGinty's office was tainted, defective, and aimed at providing a predetermined public exoneration as opposed to a good faith deliberation based on a fair presentation of the facts.

Again, we rely on widely reported information that supports the view that McGinty's actions were highly irregular. He publicly attacked Tamir's mother in a press conference and suggested that she was motivated by greed instead of accountability for the death of her son. His office hired three experts to explain to the grand jury that the officers' actions were justified, and then punctured the secrecy of the grand jury by sharing those reports with the media. In addition, local prosecutors allowed the officers to read prepared statements to the grand jury and then impermissibly permitted them to invoke the Fifth Amendment to avoid cross-examination. This was in violation of clear Supreme Court law. *See Brown v. United States*, 356 U.S. 148, 155–56 (1958) (a witness can "not take the stand to testify in [his] own behalf and also claim the right to be free from cross-examination on matters raised by [his] own testimony on direct examination."). At the same time, prosecutors appear to have cross-examined expert witnesses who testified that the shooting was unjustified in a highly biased, unprofessional, and unfair manner. Perhaps most egregiously, at the end of the grand jury process, McGinty's office recommended to jurors that they should not indict the officers.

Conclusion

In our view, the tragic and unnecessary shooting death of Tamir Rice presents an important opportunity for the Department to clarify and cement a clear, fair, and proper interpretation of Section 242 that fully realizes the purpose of the statute as enacted by Congress. A decision not to present this case to a federal grand jury on the grounds that the facts here do not meet the requirements of Section 242 would be unwise, both because of the governing law and because a failure to proceed could be interpreted to mean that the statute has less import than it does.

Curing a defective state process—in this case, one that appears to have been impermissibly slanted to protect local white law enforcement officials from accountability in the shooting death of a young black child—is consistent with the fundamental purpose of the federal civil rights laws and squarely within the mandate of the DOJ. Only an uncorrupted, fairly administered federal grand jury process can ensure justice and restore public confidence in the rule of law, both of which have been substantially diminished by the actions of local officials and police officers in this case.

We thank the Department for its consideration of this writing.

Respectfully submitted,

/s/
Bryan A. Stevenson
Aronson Family Professor of Criminal Justice
New York University School of Law
Founder and Executive Director, Equal Justice Initiative

/s/
Mary Frances Berry
Geraldine R. Segal Professor of American Social Thought Emerita
University of Pennsylvania

/s/
Laurence H. Tribe
Carl M. Loeb University Professor and Professor of Constitutional Law *Emeritus*
Harvard Law School

/s/
Kimberlé W. Crenshaw
Isidor and Seville Sulzbacher Professor of Law
Columbia Law School

/s/
Kim Taylor-Thompson
Professor of Clinical Law Emerita
New York University School of Law

/s/
Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley, School of Law

/s/
Burt Neuborne
Norman Dorsen Professor of Civil Liberties Emeritus
New York University School of Law
Founding Legal Director, Brennan Center for Justice

/s/
Angela J. Davis
Distinguished Professor of Law
American University Washington College of Law

/s/
Robin Walker Sterling
Mayer Brown-Robert A. Helman Professor of Law
Northwestern Pritzker School of Law

/s/
Paul Butler
The Albert Brick Professor in Law
Georgetown University Law Center

/s/
Richard T. Ford
George E. Osborne Professor of Law
Stanford Law School

/s/
Herschella G. Conyers
Lillian E. Kramer Clinical Professor of Public Interest Law
Director: Juvenile & Criminal Justice Clinic
University of Chicago Law School

/s/
Carol S. Steiker
Henry J. Friendly Professor of Law
Harvard Law School

/s/
Theodore M. Shaw
Julius L. Chambers Distinguished Professor of Law
Director of the Center for Civil Rights
University of North Carolina School of Law

/s/
Kristin Henning
Blume Professor of Law
Director, Juvenile Justice Clinic and Initiative
Georgetown University Law Center

/s/
Randolph Stone
Retired Clinical Professor of Law
University of Chicago Law School

/s/
Ronald S. Sullivan Jr.
Jesse Climenko Clinical Professor of Law
Director, Criminal Justice Institute
Director, Trial Advocacy Workshop
Harvard Law School

/s/
Angela Onwuachi-Willig
Dean and Ryan Roth Gallo & Ernest J. Gallo Professor of Law
Boston University School of Law

/s/
Katie Tinto
Clinical Professor of Law
Director, Criminal Justice Clinic
University of California, Irvine School of Law

/s/
Miriam Gohara
Clinical Associate Professor of Law
Yale Law School

/s/
Robin A. Lenhardt
Professor of Law
Co-Founder and Co-Director of the Racial Justice Institute
Georgetown University Law Center

/s/
Geoffrey R. Stone
Edward H. Levi Distinguished Professor of Law
University of Chicago Law School

/s/
Trina Jones
Jerome M. Culp Professor of Law
Duke University School of Law

/s/
Lenese C. Herbert
Professor of Law
Howard University School of Law

/s/
Monica C. Bell
Associate Professor of Law
Yale Law School

/s/
Barry Friedman
Jacob D. Fuchsberg Professor of Law
Faculty Director, Policing Project
New York University School of Law

/s/
Eisha Jain
Assistant Professor of Law
University of North Carolina School of Law

/s/
Brandon Hasbrouck
Assistant Professor of Law
Washington and Lee University School of Law

/s/
Issa Kohler-Hausmann
Professor of Law and Sociology
Yale Law School

/s/
Kimani Paul-Emile, J.D., Ph.D.
Professor of Law
Fordham University School of Law
Associate Director, Center on Race, Law & Justice
Faculty Co-Director, Stein Center for Law & Ethics

/s/
Brenda V. Smith
Professor of Law
Director of Community Economic and Equity Development Clinic
American University Washington College of Law

/s/
Steve Zeidman
Professor, Director of the Criminal Defense Clinic
City University of New York School of Law

/s/
L. Song Richardson
Dean and Chancellor's Professor of Law
University of California, Irvine School of Law

/s/
Isabelle R. Gunning
Professor of Law
Southwestern Law School

/s/
Craig B. Futterman
Clinical Professor of Law
University of Chicago Law School

/s/
Michael Pinard
Francis & Harriet Iglehart Professor of Law
Co-Director, Clinical Law Program
University of Maryland Francis King Carey School of Law

/s/
H. Timothy Lovelace, Jr.
John Hope Franklin Research Scholar
Professor of Law
Duke University School of Law

/s/
Brandon L. Garrett
L. Neil Williams Professor of Law
Director, Wilson Center for Science and Justice
Duke University School of Law

/s/
Deborah N. Archer
Professor of Clinical Law
Co-Faculty Director, Center on Race, Inequality, and the Law
Co-Director, Arthur Garfield Hays Civil Liberties Program
New York University School of Law

/s/
Vincent M. Southerland
Assistant Professor of Clinical Law
Co-Faculty Director, Center on Race, Inequality, and the Law
New York University School of Law

/s/
Joanna C. Schwartz
Professor of Law
University of California, Los Angeles School of Law

/s/
Lewis R. Katz
John C Hutchins Professor Emeritus of Law
Case Western Reserve University School of Law

/s/
Myron Orfield
Earl R. Larson Professor of Civil Rights and Civil Liberties Law
Director, Institute on Metropolitan Opportunity
University of Minnesota Law School

/s/
Bryan L Adamson
Associate Dean for Diversity and Inclusion and
David L. and Ann Brennan Professor of Law
Case Western Reserve University School of Law

/s/
Ralph Richard Banks
Jackson Eli Reynolds Professor of Law
Stanford Law School

/s/
Tony Thompson
Professor of Clinical Law Emeritus
New York University School of Law

/s/
Randy A. Hertz
Vice Dean, Professor of Clinical Law
Director, Clinical and Advocacy Programs
New York University School of Law

/s/
Randall L. Kennedy
Michael R. Klein Professor of Law
Harvard Law School

/s/
Alan K. Chen
Thompson G. Marsh Law Alumni Professor
Sturm College of Law
University of Denver

/s/
Trevor G. Gardner II
Treiman Professor of Law
Washington University in St. Louis, School of Law