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OAKLAND BART SHOOTING: A TRAGEDY, YES -- BUT IS IT *MURDER*?

It's not the first time that a cop accidentally drew a gun



By *Julius (Jay) Wachtel*. On March 10, 2001 Sacramento (Calif.) police arrested a “very drunk” Steven Yount. Hobbled by handcuffs and leg restraints he kept on fighting, prompting an officer to reach for his Taser. That according to the [California Supreme Court](#) was when things went terribly wrong:



pending.

“Officer Shrum pulled what he thought was his Taser and fired it at the back of Yount’s upper thigh. It was only then that he looked down at the weapon in his hand and saw he had mistakenly grabbed his pistol”. Yount survived and sued the police for violating his civil rights. His case is

On September 2, 2002 Rochester (Minn.) police officers tried to arrest a drunk and belligerent [Christofar Atak](#). During the struggle an officer went for his Taser. Or thought he did. Atak wound up with a bullet in his back. [His lawsuit](#) was settled for \$900,000.

On October 27, 2002 [Everardo Torres](#) was sitting in the back of a Madera (Calif.) police car, handcuffed and under arrest. When he wouldn’t stop trying to kick out the windows an officer drew her Taser. Or thought she did:



[Officer Noriega](#)...reached down with her right hand to her right side, where she had a Glock semiautomatic pistol in a holster in her officer belt and,

immediately below, a Taser M26 stun gun in a thigh holster. She unholstered a weapon, pointed the weapon's laser at Everardo's center mass, and pulled the trigger of her similarly-sized-and-weighted Glock....There is no question that Officer Noriega intended to draw her Taser but mistakenly drew her Glock.

An instant later Torres was dead of a bullet wound. His family sued.

On October 23, 2003, a Somerset County (Maryland) deputy sheriff was trying to arrest [Frederick Henry](#) for failure to comply with a child support order. Henry ran off before he could be handcuffed. The officer drew his Taser. Or thought he did.

[Moments later](#) Henry had a hole in place of his elbow:

[The officer] did not realize he had fired the handgun until after the weapon discharged. He immediately told Henry and another witness at the scene that he had not meant to shoot Henry and that he had grabbed the wrong weapon.

Henry survived to sue the police.

In these examples officers were carrying Tasers on the same side as their pistols. To prevent such tragedies most departments now require that stun guns be worn "cross draw," meaning on the officer's weak side. That's how ex-San Francisco Bay Area transit cop [Johannes Mehserle](#), 27, was carrying his Taser X-26 on January 1, 2009 when he helped other officers detain four subway riders who were allegedly involved in a disturbance.

What happened next was captured on a [bystander's cell phone](#). About halfway through the video the officers wrestle one of the suspects, Oscar Grant, to the ground. During the struggle (Grant is on his stomach, supposedly resisting being handcuffed) Mehserle draws his pistol, stands up and fires once into Grant's back, killing him. Mehserle's hands instantly go to his head. He and his colleagues seem stunned.

Days of protests and disturbances follow. Mehserle resigns from the force and goes into seclusion. He is eventually charged with second-degree murder and released on \$2 million bail.

While no one can know exactly what was going through Mehserle's mind it's highly unlikely that he intended to use deadly force. Transit officers had only been carrying stun guns for three months. Anxious and overly excited, he probably reverted to habit: [intending to grab the Taser](#), Mehserle robotically reached for the far more familiar holster -- the one that held the gun. According to [news reports](#), bystanders overheard him tell his colleagues that he intended to Tase the suspect. (His

comments after the shooting were supposedly contradictory. Still, it's his state of mind at the time of the incident that's crucial.)

There is little precedent for accusing a blundering officer with murder. An [incident in California](#) that led to a lesser charge took place in January 2006, when a badly rattled San Bernardino County Sheriff's deputy shot and wounded an unarmed passenger after a car chase. Audio from a bystander video suggests that the deputy told the victim, whom he had ordered to the ground, to get up. But when the man did so the deputy shot him three times. The officer steadfastly denied giving the victim permission to rise and said that he thought he was about to be assaulted.

Prosecutors charged the officer with attempted voluntary manslaughter. During trial an [expert defense witness](#) gave examples of officers behaving oddly during a crisis: "Their analytical process began to collapse. They had so much to do that, literally, they were overloaded." One officer repeatedly told a suspect openly wielding a knife "show me your hands!" Why? Because that (instead of "drop the knife") was the command he remembered from training.

Taking this testimony to heart, jurors promptly [acquitted the deputy](#). As one said, "police officers have to be given the right to make their decisions. If they make a bad decision in the line of duty, should we...incarcerate them for it? I don't think so."

Ultimately, that's the point. The deputy was fired, as he should have been, and was sued, as was the victim's right. But prosecuting an officer for a felony when they unintentionally make a terrible call serves no purpose, other than to perhaps soothe an angry public. Unlike [U.S. Attorneys](#), who cannot prosecute unless they believe that someone is in fact guilty and there is evidence to prove it in court, California D.A.'s are bound by the [ABA's far less stringent guidelines](#), which require only that they "refrain from prosecuting a charge that [they] know is not supported by probable cause." It's precisely that discretion that enables politically timid prosecutors to ignore their consciences and leave the tough calls for a jury.

Let's hope that the Alameda County D.A.'s extraordinary step of charging a cop with murder is based on much more than what on first glance seems to be a tragic yet not unprecedented mistake. If not perhaps Oakland jurors will prove, like their San Bernardino counterparts, to be sufficiently wise to know the difference.