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IT'S NOW L.A.'S PROBLEM

A cop's tragic fumble turns into a cause célèbre. What will happen if he's acquitted?



By Julius (Jay) Wachtel. In a few weeks the murder trial of former Bay Area Rapid Transit police officer Johannes Mehserle will get underway. [As we reported earlier](#), Mehserle, who shot passenger Oscar Grant to death at an Oakland subway platform one year ago, argues that he meant to use a Taser but in the confusion pulled his pistol instead. Although we found his claim credible, it didn't sit well with [Alameda County Judge C. Don Clay](#), whose hostile remarks at the preliminary hearing ("there is no doubt in my mind that Mr. Mehserle intended to shoot Oscar Grant with a gun and not a Taser") made it perfectly clear to the ex-cop's lawyers that he desperately needed a change of venue.

And he got one. But the raucous protests greeting Mehserle's recent appearance at Los Angeles Superior Court show that the heat's still on. In effect, Oakland's problems have become L.A.'s. No matter: we're confident that once the evidence in this grossly overcharged case is in jurors will conclude that the shooting was unintended. Indeed, that's what has us worried.

Let's recap. About 2:00 am on New Year's day 2009 Mehserle and other BART officers detained four riders who had allegedly created a disturbance on a subway train. For reasons that aren't perfectly clear they wrestled Oscar Grant to the ground then struggled to handcuff him. A [bystander's cell phone video](#) shows Mehserle fumbling for his gunbelt. As he stands Mehserle draws his pistol and fires once into Grant's back, instantly killing him.

Witnessed by scores of bystanders, accounts of Mehserle's inexplicable deed spread like wildfire. It would take a month, when defense lawyers filed a [motion to set bail](#), for their client's version of what happened to come out. Too late! Within hours of the incident gangs of toughs rampaged through downtown Oakland. Disturbances continued for days. Meanwhile media outlets busily pumped out an avalanche of inflammatory coverage, with one television station promptly broadcasting both the cell phone video and an interview with the Grant family attorney that essentially portrayed the officer as a cold-blooded killer. With dispassionate, even-handed analysis going out the window it seemed as though the officer was already tried and convicted.

Why wait? String him up now!

Mehserle was soon arrested for murder. Ironically, his bail application was based mostly on what prosecutors dug up. Witnesses confirmed that Grant, who had not yet been searched, resisted attempts to get his hands out from under his stomach. Mehserle was overheard warning other cops that Grant might be hiding a gun and that he intended to deploy the Taser, and no less than seven citizens reported that Mehserle went into shock right after firing the fatal shot. Here is an extract from the interview with citizen witness Alika Rogers:

Officer Mehserle put his hands up to his forehead and he appeared to be in shock.

Rogers did not see Mehserle put his gun away. Rogers read Officer Mehserle's lips, which appeared to say "Oh my god, Oh my god." The shooting really looked like a total accident.

The expression on Officer Mehserle's face was as if, "Oh my god, I can't believe that just happened."

Here is another, with civilian witness Karina Vargas:

Vargas said the Officer who shot Grant had a surprised, dumbfounded look, like he was in shock. "After the shot, he stood there a few seconds trying to take in what had just happened. He had placed his hands to his head."

In June 2005 airman Elio Carrion was riding in a car that crashed while fleeing police. The first officer on the scene, [San Bernardino County sheriff's deputy Ivory Webb](#), ordered Carrion onto the ground. Carrion complied, but soon asked for

permission to get up. Alone and frightened, Deputy Webb tried to tell Carrion “don’t get up,” but in his excitement apparently left out “don’t” twice. [A sequence captured by an amateur videographer](#) shows Carrion getting up, prompting Webb to shoot him three times.

Carrion miraculously survived his wounds. At his trial for attempted voluntary manslaughter, Webb testified that if he said “get up” it was only because he had been too scared to articulate clearly. His account was supported by [defense psychologist William Lewinski](#), who said that when officers are under great stress their analytical processes can shut down. Lewinski described other situations in which officers feared for their lives. “Their analytical process began to collapse,” he testified. “They had so much to do that, literally, they were overloaded.”

Is that what happened to Mehserle? Another officer said that he had never seen him so scared. Our [earlier post](#) mentioned past instances when stressed-out officers mistakenly drew and fired their duty weapons when they actually meant to use a Taser. That’s not as far-fetched as it seems. Tasers commonly used by police feel and operate much like a pistol. For convenience and to keep from confusing them with real guns they’re usually worn, as Mehserle did, on one’s weak side. But while officers frequently drill with their issue handguns, which they take home, care for and not infrequently draw while on duty, they get far less practice with Tasers. That was especially true for the BART police, where the weapons were a recent innovation and, with few on hand, had to be passed from shift to shift.



According to his bail pleading Mehserle had been certified to use Tasers for only a month and carried the weapon no more than a dozen times. Given his agitated state it’s not difficult to see how he might have become confused. It’s an instance where the muscle memory that enables officers to swiftly draw their issue handguns can have an unintended consequence. Reacting in the way that he was conditioned, Mehserle robotically reached for the far more familiar holster. In his rattled state of mind he failed to detect, in the instant before squeezing the trigger, that the weapon at hand was not the one he had meant to deploy.

It’s happened before, and thanks to an inherent design flaw that makes Tasers so gun-like will likely happen again. There’s really no technical reason why Tasers can’t be shaped differently and activated, say, by pressing a button. But that would be a different blog post.

None of what we've said is new to the Alameda D.A. So why do they persist in charging Mehserle with murder? (Mehserle's lawyer asked Judge Clay to reduce the charge to involuntary manslaughter. He refused.) Considering the public outcry, the charges of police racism, the marches and demonstrations, prosecutors probably figured that jumping on the choo-choo train was probably the safest choice, politically and otherwise. Still, there must be *something* to justify a charge of murder. While we're not privy to the evidence in the case, the [bail filing](#) did mention that after the shooting Mehserle told another officer, "Tony, I thought he was going for a gun."

According to Judge Clay, that statement and the video were enough to convince him that Mehserle purposely shot Grant. But to believe that requires one dismiss compelling evidence that points in a far more innocent direction. Regrettably, the reasoned voices have been strangely silent, leaving the public unprepared for what we're convinced will be a big (and to many, unwelcome) surprise. Knowing of the shooting's near-explosive aftermath, and with demonstrations already occurring in L.A., what will happen when, as we fully expect, prosecutors are unable to meet their burden?