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Investigating Officer Involved Shootings: Don't Ignore the Evidence

Michael S. Maloney

It's good to see everyone today, I'm grateful for the opportunity to speak with you. Probably an interesting background compared to most of the speakers that you have here. It's interesting for me as well – I generally don't make a presentation with this many attorneys in the room without a vigorous cross-examination. So I'm looking forward to just being able to limit the number of your questions. Here we go. We are set to go.

I've had the opportunity to be involved in probably about ten or so officer involved shootings scenarios, both as the government representative, as one of the supervisors at the federal crime lab, and also as a private consultant. I've had the opportunity to work with both the defense side in an officer involved shooting and the prosecution side. What I will share with you today is some of the things that we got from that.

Please watch the video carefully, I think you'll find this interesting. This is an FBI agent. He is celebrating. They just bought their house at his first posting after graduating Quantico, and they are in a downtown bar in Denver. And he is going to bust some dance moves. There it is, there is his gun and there is the shot and I call this the 'no harm, no foul, I'm from the federal government, I'm here to help'. Why are we watching it again? Because we can. There we go. And he did shoot another patron in the leg.

So, officer involved shooting? [video] He's clearly off duty. He's outside of the regulations of this organization. He's at an establishment where he's drinking, and he's armed. Initially when I arrived, my role in this one is I was the supervisor in the Crime Scene Investigation Unit for the Denver Crime Lab. And the original call was not officer involved shooting. The protocol for an officer involved shooting evidentiary wise, what we see is, very different than a non-officer involved shooting. I convinced them that this needed to be at least treated from the crime scene perspective, as an officer involved shooting and it was going to be a lead story on CNN and every other news feed the next day. So we were able to document this as if it were an in-the-line-of-duty officer involved shooting.

Two Denver police officers are pulling up to a 7-Eleven. They are bike patrol officers which is why you'll see they're wearing shorts. They're not on their bikes at this time. They're in a car and they have an armed robbery in progress. [video] I was a uniformed police officer way back when and I assure you that I don't recall where we had our partner put a tourniquet around my leg, that's for sure. This is now [video] ... What's of interest to us is the second floor of that building. The reason that's of interest is a man standing at the second-floor bar of the pizzeria is shot in the back. [video] So the interest for us in our crime scene perspective in working this particular case was, not the shooting of the suspect down the street that came out to be certainly is an officer involved shooting, but from our perspective, it's very straightforward while collecting the evidence. Our challenge was the man that was up on the second-floor bar over there and got shot in the neck. It was a nonfatal shot. Shot came through the window of the bar, it all went through the soft tissue of his neck then it embedded in a large screen TV.

We were able to use lasers to extrapolate the trajectory back, based from the TV and the shop window, and the shot came back to this area. Well, it's certainly-- it's almost in the suspect's area, but it's actually down the road farther than that. We did testing on the lamp post and some other areas. We found a very clean bullet deflection point. So it was actually a ricochet that struck him in the back. We were able to see and that also from the bullet and some DNA evidence on it. But in this case, what we were going after was determining: was there liability on the part of the officer to, failure to control his muscle during a high stress incident, or were his shots as well aimed as they just they should have been—and it was the unfortunate result of a deflection or ricochet – in this case, it was a ricochet.

[video] OK, I'll probably unless you're on a self-imposed media blackout for the last several years, you'll have learned that this was an off-duty police officer from Dallas, Amber Guyger.¹ She parked on the fourth floor rather than the third floor where she lives. She approached the wrong apartment, and she entered that apartment and shot the man who was within that apartment.² I was working for the prosecution in this particular case. My job was to do a reconstruction and give that-- give them points in her statement and her testimony which were forensically not possible. Also, I will be called as a rebuttal witness against the expert for the defense in this particular case. It's important to realize that the decision on whether it's an officer involved shooting or not is made very early in the investigation. And it's not made by anyone way up the food chain that has greater knowledge of policy or anything else.

In this particular case, I had an opportunity to talk to some of the responding officers, that were on the secondary wave arriving as investigators. They asked the sergeant on scene, is this an officer involved shooting? The sergeant on scene said yes it was. At that time, the union-based protocol took over and there was a whole different set of procedures that will work for her. The camera was turned off in the patrol car she was placed in. She was allowed to leave the patrol car and talk to her union representative, the union attorney. There were a variety of things under the union contract because this was about a identified as an officer involved shooting that we would not have typically seen. Was it an officer involved shooting? That's not my area of expertise. She was clearly off duty. She was not in her full gear. She was carrying a great deal of it over her arm, and she is not going to have an obligation to respond. The problem we have with a lot of departments, it's their policy and what they drill in their people, is that you are on duty 24 hours a day. So unlike in the military--which obviously through my NCIS background I work with a great deal--in the military, we had it in the line of duty and not in the line of duty. So, this would be very similar to, yes, she's a police officer, but she's not acting within the scope of duties. Once again that decision made very early and it affects the remainder of the investigation.

What are our evidentiary challenges in a case like this? First of all, evidence is missed. Why is evidence missed? It's missed because there is a bias that comes in. The only story the responding investigators hear is the story from that police officer. And I'll tell you, I served as a police officer

¹ *Guyger v. State*, No. 05-19-01236-CR, 2021 Tex. App. LEXIS 9341 (Tex. App.—Dallas Nov. 17, 2021).

² Elliott C. McLaughlin, 'I thought it was my apartment,' Dallas officer says 19 times in tearful 911 call after shooting Botham Jean, CNN, April 30, 2019, <https://www.cnn.com/2019/04/30/us/dallas-botham-jean-911-police-officer-amber-guyger/index.html>.

for many, many years. I served in law enforcement. I was actually a uniformed deputy sheriff in Tom Creek County, Texas. Who knows where that is? San Angelo, who knows where that is? Mohair capital of the Southwest. There we go. And I know from that perspective, if I ever pull the trigger or put someone down, my answer was already very rehearsed because I've been told what to say since the academy. So there is a challenge in the bias coming into this, where the investigators are basically supporting the story that they have, even with a third party coming in and doing the investigation. There still tends to be that bias that's there on the officer's story is the only story and other law enforcement tend to believe that. I know that surprises you. I hate to think that I gave you that revelation today, but I did.

Importance is not noted on evidence. There's no context, so they ignore it and they never collect it. The evidence is collected and then never analyzed, or the evidence just isn't collected. I worked another law enforcement involved shooting. It was at a hoarder house and we went back some days later and re-worked the scene and we recovered the fatal bullet that had significant evidence on it to show what it passed through before it passed through the victim. That was left at the scene, it was never collected. But sufficient evidence was collected to support the officer's version of events that night. I hate to say my own profession, but that's how it works. But that's how it works. So you've heard what the participants and witnesses say. I think one of the critical things we need to ask ourselves is what does the evidence say?

In reconstruction, we want to be able to tell you who was where, doing what, and when they were doing it. And once we know who was where, doing what, and when they were doing it, we can take the statements of the witness, the participant, of the suspect, the victim if the victim's alive. And we can bullet that out in chronological order and we can look for forensic inflections, where what they stated happened could not have happened from the physical evidence that we're seeing. And that gives you a great benefit, both from need to interview people, preparing for your direct examination, your cross-examination, and whether or not you're conferring charges on a case. So let's put that together for the Amber Guyger case.

And that's what we're going to take the rest of my time here with. We're going to spend a few minutes talking about Amber Guyger. Real quickly, just bulleted synopsis of what she says. She came home after an extended shift. Her front door was not secured. Her key fob did not open it, it was already unlocked. She stepped inside the threshold— remembering her foot was on the threshold – there was a man moving back and forth directly in front of her near the patio door. He began coming towards her, she shouted the verbal command, “Show me your hands, show me your hands, show your hands.” His response was, “Hey, hey, hey” and continued to move forward, she read that as noncompliant, she said.³ Actually, she said she drew her weapon. She did not. Her weapon was already drawn when she opened the door. She later corrects that testimony, but she says she fired two shots in rapid sequence, and that's our evidence.

We have one bullet hole in the wall. What in the world could we do with that? Lots! Otherwise, this presentation would be a complete waste of your time. So, what are our goals in the reconstruction? And I need to clarify this real quick. We have position and location. Your location

³ *Guyger v. State*, No. 05-19-01236-CR, 2021 Tex. App. LEXIS 9341, 23-24 (Tex. App.—Dallas Nov. 17, 2021).

is where you are in this room right now. Your position is, most of you are sitting and our videographer is standing. So when I talk about location: where are they at the scene? Position, are they standing, sitting, kneeling, etc., OK? Methodology, we start with the knowns. Well, I really have more than a shot in the wall, I also have a shot in the victim. I have spent bullet casings within the room and I have gunshot residue on the wall. So there is some evidence to work with.

One of the first things we're going to do is we're going to model that scene. And the reason we're going to model that scene is that we look at --this is all the rage now, the lidar scans⁴, there's a couple other brand names, but it's basically a three dimensional lidar scan of the room. You showing that to a jury and it's like You know, it's sexy. It costs a whole lot of money. Departments love using them, but I don't want to walk someone through what happened on that. So what we do is we build it out in three dimensions with a CAD program. We build it out with the CAD program, and to show that we've done that accurately we then overlay the two, and transparency you can see the furniture is basically in the same place. As you can see, the diagram that we're going to show you where, is a lot cleaner and neater than that lidar drawing, right?

Where we ran into ... interesting on this, I never got called as a rebuttal witness because the defense's expert was so limited on his testimony there was no damage. The reason he was so limited on his testimony was because he used the dimensions reported by Ranger Adcock. And he also used the Texas Rangers lidar scan. When asked why, he said because it was a better scan. It absolutely was, they took multiple scans and they didn't have as many blind spots. The problem is they took it three days later and the furniture had been moved. So, he based his reconstruction off of the three-dimensional scan of the room where the furniture had been moved. He placed the victim right where this ironing board is. The problem is he didn't have the ironing board there. You only know it's there if you watch all of the bodycam from the police officers and you watch them move that ironing board off to the side. So the judge felt the fact that he had the body right where a three dimensional piece of furniture was, and he used the wrong scan, that she could sufficiently limit his testimony, so I ended up not having to testify on this one.

OK, so what do we do? We build the tool in three dimensions. There's not a scowl to her face as she broke into the apartment with the intent of killing who was in there. We don't show emotion. We don't try to show intent. We don't try to show emotion. I don't have her in tactical gear or anything else that's just meant to be a three-dimensional place holder in the reconstruction to show where she is. I've shown him with his shirt off. He had a shirt on at the time. The reason will become clear because we want to show where the bullet defect is. Let's start with the wall shot. You can see the single shot in the wall way up here, just interesting. Their trajectory is wrong, it's off by probably almost ten degrees. They don't have spacing cone in here so the laser has dropped the rod in that hole, which is going to give lower feedback is that critical, yea it can be.

So what we're showing here is just the basic trajectory for that shot in the wall. Now what we do is we show where could someone have been along that trajectory to fire a shot into the wall. Yes, I realize she was not charged with the felonious shooting of a wall. But, the wall we know it's

⁴ See, U.S. Dept. of Justice, N.I.J. 254907, Terrestrial LiDAR Scanning (TLS) Working Group for Criminal Justice Applications, First Meeting Report (July 2020).

static, it's there, and we're going to use that as our base for this reconstruction. The gray areas she can easily be standing in; the yellow area her body position would have to be around furniture or leaning over a counter. The red area there's not physical space for her to inhabit and also have the gun, so we've limited where she can be in the room for that shot.

What we then do is establish her shooting card. In this particular case, she states she's standing up when she shoots. We know she's either got a hip draw to an eye hold, because police officers are trained sufficiently that we don't have to go with the gangster hold or anything like that. So that's going to be her shooting position. We then superimpose that order in the room. We bring our trajectory, and this begins to further limit us because obviously the gun has to be within the trajectory. So we can see where she couldn't have shot from, where she could have shot from. Now we have this yellow zone and we have this green zone in the back. We do the same thing from overhead, and now we're going to look at the fatal shot.

We have three witnesses, and they all state the same thing. These were rapid fire shots. She states she double tapped, which is the lingo for rapid fire shots. One after the other, it's part of her training. It's how she shot. So what we're going to do is we're going to determine what's the likelihood she's significantly changed locations between the two shots. And there's not much because the shots are happening very rapidly.

So let's take a look at him. This is an actual photograph showing the bullet defect just above and slightly outward of his left nipple. We have placed that on our three dimensional model. We've then placed within his interior the final resting place of the bullet. This is then confirmed by the medical examiner during the autopsy. I served a year fellowship in Forensic Medicine, I've done a lot of the autopsy and other things. But as I'm sure you would know, this is something the medical examiner doing that autopsy is going to confirm for us. Yes, those bullets, the bullet defects, are placed correctly.

That's the trajectory. And contrary to what you may have heard, bullets travel in straight lines, they don't go and turn left and hit you on the top of the head. They follow the laws of physics until there's a reason not to. So if you don't have reflection against the bone or something like that, it travels in a straight line. And I've got probably three thousand shots — through classes I've taught on shooting reconstruction — into pig carcasses. I want to get out there, the pigs died the night before and we've taken from the slaughterhouse because they couldn't be sold — and the trajectories are straight. And it always amazes the students that there are all these things bullets can do in the body.

So how can he be in the room? Well, he could be standing, sitting or lying. He can be moving from lying to sitting or sitting to standing, or by her statement, he could be walking, running or lunging towards her. So let's put him in those positions. I think you can say that that trajectory is not likely. So let's eliminate trajectories that just don't work. I think you would agree with me standing, lunging, walking, and running is not what's happening here, unless he's in a really contrived body position, much like Keanu Reeves in the Matrix. These positions can be logically eliminated. So what I testified to is, my opinion based upon the evidence I am examining, is this is the best explanation and he is not in any of those positions when he received the fatal shot. He wasn't in

that position when he received the single shot, and he wasn't in that position when he received the fatal shot. She would have to have closed in on him and basically leaning over and shooting. We have her position somewhat established by her own statement against self-interest, by the presence of the two bullet cases within the kitchen. Yes, I know they could be moved but the movement of them is generally minimal, and doesn't move from one room to another.

So we're able to place her within that picture. So what's included? Sitting to standing works really well. You may have heard that he was standing up after eating a bowl of ice cream when he was shot, actually. So yes, there was a half bowl of partially melted ice cream in front of him on that ottoman. And that's the most logical position for when he received the shot. So, if he is sitting to standing, it has to be an object you can sit or stand on. That's the only one in the room. There's clothing, chairs, etc. If he's charging, he's in this. OK, he is where the red arrows are. If she's coming through the door and she demonstrated this in court that 'he's directly in front of me moving back and forth and charging towards me when he's shot.' Clearly, since his body is recovered here and clearly that's not the case. So that's something of cross examination etc. that can certainly be gone after. In the initial investigation, that's something that should definitely be focused on. But in this particular case, I believe in the city of Houston, I'm constantly in Houston, in Dallas. Under their contract, they can't be interviewed for 24 hours and they have a union rep and lawyer present while they are interviewed. So you're not going to get a lot of interrogation out of that interview. That's going to have to wait until you're cross with the stand.

So that's the most logical shooting position and receiving the shot position. How do you confirm this? OK. We go back to that trajectory into the wall. We know the shots are fired in rapid succession, double tap. We then see where along this trajectory she would be to be able to fire those two shots without a major change in location or position. We overlap them. You can see we have a green area that's overlapped. We don't place her back as far as the door because the spent bullet cases are within the kitchen at large. They didn't bounce over towards the other wall. We have some other indicators because the farther back she goes the lower the gun has to be. We have our overlapping green area and we have a pivot section in that green area. There's indication she fired one handed. Generally, an officer firing two handed has no trouble controlling the recoil and placing the second shot on target. What we see here was the one shot on target and one shot higher is a classic inability to control the recoil, which shows a weakened shooting position which is most likely single handed. And she did testify she fired single handed with her right hand. I think, you know what my conclusions are, so we will move passed that.

So, what is my summary? Officer involved shootings are inherently difficult to investigate. Typically, the officer's version of events drives the investigation. Too often, this bias that results in the scene being documented to support the version of facts that they believe they already have. A thorough analysis can be placed within the framework of a reconstruction. And then you can look at those statements and determine this cannot be true. In other words, these points in the statement are forensically incongruent and these are forensic discord. They could not have happened. And that's a valuable tool for you as you prepare for trial on either side, which you happen to be on. Thank you. And I am certain I'm out of time, but I'll be around, thank very much.