

Investigating Police-Involved Fatalities: *The Boston Model*

BY DANIEL F. CONLEY

THE TURMOIL THAT GRIPPED Ferguson, Missouri, and so many other cities last year after the fatal shooting of an African-American teenager by a white police officer, and again after a grand jury declined to return indictments in the case, brought unprecedented national attention to police-involved fatalities and the prosecutor's role in investigating them. In the weeks and months that followed, events in other cities across the country that might once have been considered isolated incidents instead became sequential flashpoints in an ongoing examination of racial disparities in the criminal justice system.

For big-city prosecutors, these cases do not reflect a new phenomenon. More than ever, though, the question is being raised as to whether we can investigate them fairly and impartially when we work closely with the police departments in question. Of course there exists a close working relationship between many police departments and prosecuting offices. Police and prosecutors both occupy one end of the criminal justice system, while judges, defense attorneys, and others occupy their own places on the spectrum. But our roles are nonetheless distinct, and many prosecutors are rightly offended at the notion that they lack independence, knowing all too well the ongoing and underlying tensions that exist between prosecutors and police, with each zealously guarding their own prerogatives and authority. Rather than simply dismiss questions of prosecutorial independence, however, it's up to the leaders of our profession to answer them openly and to demonstrate to the communities we serve that there is one system of justice for all of us, sworn or civilian, and that we approach every case openly, honestly, and impartially. In Boston, we've

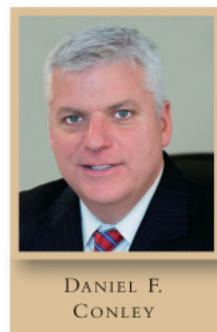
striven to accomplish this by creating a true culture of transparency.

THE BOSTON MODEL

Under Massachusetts law, the district attorney directs and controls all death investigations. The law makes no distinction between deaths that arise from the police use of force and those that don't. Because instances of police use of force invite so much attention and can have a major impact on the relationship between law enforcement agencies and the communities they serve, the manner in which we undertake these investigations is designed to stress the impartial and independent nature of our investigation. First and foremost, at the very outset I assign them to one of only a handful of the most proven, experienced, homicide-qualified prosecutors in my office. These prosecutors answer directly to me and act as my personal representatives with the investigators on the ground.

Because most of Massachusetts' cities and towns are small to mid-sized, in most instances the state's DAs will designate teams of state police detectives to work with senior-level prosecutors to conduct death investigations. Only three cities have police departments large and sophisticated enough that the DA can also designate their detectives for homicide investigations. The largest of these cities is Boston, home to more than 85 percent of Suffolk County's residents and the great majority of my office's prosecutions.

The Boston Police Department is the largest municipal



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police department in New England, has the only ASCLD-LAB accredited crime laboratory in Massachusetts outside of the state police, and has an outstanding team of homicide detectives who can work closely and effectively with prosecutors who demand the best. They also have a group of investigators drawn from the command staff, homicide unit, and other specialized units called the Firearms Discharge Investigation Team (FDIT), which is specifically trained and experienced in investigating officer-involved shootings. When a Boston police officer uses lethal force, I designate the FDIT to work with a senior prosecutor to process the scene, gather evidence, interview witnesses, and document every step they take or don't take.

This leads to two common questions: First, can the Boston Police FDIT detectives properly investigate a Boston police officer? And second, can I make an impartial charging decision when my office works so closely with the Boston Police Department in other cases? These are fair questions that deserve thoughtful answers.

Statistically, most police shootings in Boston involve officers on patrol out of district stations or the department's anti-gang unit. Given that the Boston Police Department employs about 2,000 sworn officers, it's extremely unlikely that these street-level officers will have any relationship with the high-ranking members of the homicide unit and command staff who comprise FDIT. There's no personal incentive to cut corners for a friend as there might be in a much smaller department. More to the point, there's simply no way to do so: the methodology we employ in these cases calls for strict documentation of every investigative step. Most importantly, because of policies and practices we adopted more than a decade ago, investigators also know that their work will be reviewed not only by me and my senior staff but will also be made available for review by civil attorneys, the public, and the media. In this respect, transparency isn't just a core value of our office, it's a critically important and powerfully effective management tool that forces everyone involved to operate at the very highest level.

As the chief law enforcement officer in a large, diverse, sophisticated urban area, I know full well the attention that each police-involved fatality generates, and I know the scrutiny that every charging decision will receive. So when someone questions my ability to charge a police officer, I point to my record — I've prosecuted some two dozen officers for various forms of criminal conduct over the past decade alone. I also point to the fact that no outside agency or independent commission has ever found that criminal charges were warranted in a police-involved shooting that I declined to charge. There is indeed a close working relationship between my office and the Boston Police

Department, but that's never overshadowed my obligation to find the facts and apply the law, no matter what the case may be.

At the end of the day, perception matters — but quality matters more. Under this set of practices, I have a highly trusted, highly experienced, personal representative of my independent office at the scene almost immediately after a police shooting. I can have dozens of uniformed officers performing a line search for evidence or a canvass for video and witnesses anywhere in the city of Boston within half an hour. I also have some of the best homicide detectives, criminalists, and ballisticians in the country working seamlessly with some of the most experienced homicide prosecutors to gather the evidence I need to make a fair and just charging decision. While I'm always open to new and better practices, no one has yet presented an alternate protocol that would maintain the rapid response, independence and total professionalism that are currently in place in Boston.

THE GRAND JURY

The grand jury is a powerful investigative tool. It can compel testimony from reluctant witnesses, order the production of documents, and allow us to sort through multiple conflicting accounts of an event. And a grand jury indictment is necessary to proceed to trial on any homicide charge. Under Massachusetts law, however, grand jury proceedings are secret. Although there are mechanisms for lifting that requirement, they would delay our ability to explain the evidence in the case — allowing rumor, speculation, and innuendo to fill the vacuum left by the absence of timely facts. Rumor, speculation, and innuendo are precisely what I try to avoid when dealing with an issue as important and sensitive as police use of deadly force.

Moreover, in most police-involved shootings, the facts are not even in dispute. Throughout my tenure, Boston officers have given voluntary interviews even though they have the right not to under *Garrity v. New Jersey*. They are Mirandized and tape-recorded, just as a civilian would be under the same circumstances. Police administrators make their dispatch and transmission records available without a subpoena. The key issue often centers not so much on what happened or who is responsible, but whether the officer's actions were justified as a matter of law. Unless there is an indication that the officer's conduct may lead to charges, presenting the case to a grand jury offers no investigative benefit — and can actually interfere with my ability to inform the public as fully and completely as possible about the facts and law behind my decision.

The investigative file compiled by Boston Police FDIT and my lead prosecutor generally runs to more than 1,000

pages of reports and interview transcripts, hours of audio and video recordings, and dozens of charts, maps, and diagrams. These are as valuable to me as any set of grand jury minutes, and they carry no legal requirement that I withhold them from public view. So again, transparency only helps us as we make our charging decision public.

THE CHARGING DECISION AND ANNOUNCEMENT

Over the course of the past decade, I've overseen investigations into 10 fatal shootings by Boston police officers. Three investigations are still ongoing, but the evidence in the remainder established that the officers were confronted by armed gunmen who pointed firearms at them. In five of those cases, the gunman fired at them, and in three of those cases the gunman actually shot and wounded an officer during the encounter. The lone exception involved a man armed with a realistic replica handgun who refused to drop it, stole a police cruiser, crashed it, and then aimed it at police as they approached him. As a result, I found each of these cases to be a lawful exercise of self-defense or defense of others, and I declined to charge any of them.

Some critics have reduced this series of case-by-case decisions to a meaningless statistic, suggesting that the absence of any charges against the officers represents a bias in favor of police. This is nonsense.

First, these decisions follow quite clearly the Massachusetts laws on self-defense and decades of Supreme Court decisions on the use of force. As *Graham v. Connor* spells out, "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." And just last year, the high court affirmed that standard with *Plumhoff, et al., v. Rickard, et al.*, writing that "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended."

Second, I don't believe that any percentage of fact patterns should be charged against the weight of the evidence simply to meet a quota. After all, as the American Bar Association's prosecution standards state, "A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." Against this same backdrop, consider that over the past decade I've also declined to charge five civilians who used lethal force in self-defense. But whether the case involves a police officer or a civilian, I make the decision based on the specific facts, evidence, and law — nothing more and nothing less.

In the event that I determined that an officer's actions

were criminal, I would put the case to the grand jury, seek an indictment, and charge it as I would any other. But because public confidence in our work requires as much an understanding of why we don't charge certain cases as why we do charge certain others, I take several steps toward community outreach when I decline a case for prosecution.

First and foremost, I meet personally with the family of the deceased, usually accompanied by their civil counsel. With my point prosecutor, we walk them through the facts, the evidence, our findings, and our legal analysis. We answer every question put to us, bar none, during a meeting that often lasts hours. When it's complete, we provide them with a copy of our entire investigative file for their personal review.

That meeting is followed by one I host for a panel of community leaders that includes members of Boston's clergy; civil rights organizations like the ACLU, NAACP, and the Urban League; community leaders such as youth and street workers; and other stakeholders, again laying out the case and taking any questions they may have. While we have excellent working relationships with many of these individuals and organizations, everyone in the room is nonetheless highly independent of each other and of my office. Because this is not a collection of "yes" people, they often have credibility in the community that we in law enforcement can't match, and they're in a key position to knock down bad information, street by street and block by block.

In a step modeled after the practice of former Denver DA Bill Ritter, I draft a detailed report that memorializes my findings and legal analysis that is distributed with a summary press release to all of Boston's news media. This report is posted to my office's website so that anyone can read, often in painstaking detail, the evidence and the law undergirding my decision.

We then take the final step of opening up the entire investigative file to any media interested in reviewing it for themselves: we scan the entire file and affirmatively provide them with a digital copy on a flash drive. I began the practice of opening the file to media review over a decade ago, just a few years after taking office, and it is one of the best decisions I ever made. It demonstrates a level of confidence in the thoroughness, professionalism, and independence of the investigation and the investigators that is unsurpassed.

MOVING THE BALL FORWARD

When I first took office in 2002, the decision not to charge a police officer for a fatal shooting was announced in a two-sentence letter from the office's chief homicide prosecutor to his counterpart at the Boston Police Department. We've come a long way since then, but there's always room for improvement.

Earlier this year, at the conclusion of one of these investigations, I met with the family of a man who was fatally shot by Boston police after he pulled a gun during a street interaction and began firing, injuring one of the officers. The incident was captured by a nearby surveillance camera, and the family viewed the clip during our meeting. Aside from their grief and anger over losing a loved one, they explained to me that they were also frustrated that they had to wait until the investigation was over to view this footage.

As it happened, surveillance video captured another police-involved shooting just a few months later. In that case, the evidence suggests, officers pulled over a car in the course of an investigation and the driver fired point-blank at the officer who approached his door. The officer was struck in the face and miraculously survived; the gunman was killed when he pointed his weapon at the other officers during his attempted escape on foot. Although the video footage showed the deadly threat faced by officers at the scene, rumor and misinformation immediately began to spread, and officers preserving and processing the scene were subjected to vicious and unwarranted verbal attacks by individuals who suggested the gunman had been executed without any justification.

Knowing that the perception of a cover-up had played a large role in unrest over police-involved shootings in other jurisdictions, and bearing in mind the input from that earlier family meeting, I approved the release of the video evidence even though the investigation was still very active.

We undertook this release in stages with the specific intention of offering the family of the deceased to view it first. They weren't immediately available, so the video was screened for members of Boston's clergy and civil rights leaders the very next morning. Their public comments afterward very effectively refuted the conspiracy theories and other distortions that had been percolating for hours on the street. Despite our efforts to schedule a meeting with the family of the deceased, they opted not to join us and the video was released to the media within a few days.

Also out of respect for the family, we made a conscious effort not to comment on the man's criminal history. Some of his prior convictions had previously been covered in the media, and we acknowledged that those reports related to the same individual, but we referred reporters to court filings or other public records for details rather than release them ourselves. In this way, we reaffirmed our commitment not to prejudge the case or decide it on anything but the facts and evidence.

This sequence of events repeated itself several weeks later after another fatal shooting. As with the first one, inaccurate rumors spread within minutes of its occurrence, and as with the first one, video evidence refuted those rumors. Another screening was scheduled for the following day with reli-

gious and civil rights leaders. Once again, the voices of informed but independent leaders drowned out the inflammatory statements. We withheld the video from public release until after the man's burial, respected his family's wishes to view it before the public at large, and then provided it to the media for broadcast and analysis afterward.

"As expected, the video seemed to serve to quell, rather than inflame, controversy," wrote one Boston Globe columnist. And the New York Times noted that "There have been no demonstrations of violence in response to the shooting, as there were in other cities after recent police shootings, partly because the police contacted clergy and civic leaders immediately and showed them the video. Most of the leaders, even some who were skeptical of the police account, assured the community that [the deceased] had not been shot in the back."

TOWARD BEST PRACTICES

As prosecutors, the burden is always on us — to prove our case beyond a reasonable doubt, and to prove we're exercising sound, impartial judgment. At a time of extraordinary public interest in our work, we have the opportunity to set the bar high and build confidence in what we do and how we do it.

District attorneys make tough choices about police investigations each day — if the evidence doesn't support charges, we reduce or dismiss them. We bring that same independence and impartiality to our investigations of police-involved shootings. If additional questions need to be asked or additional steps need to be taken, we have to insist that they are. Likewise, if there are improvements to be made to the status quo, let's make them. If there are alternative strategies that might work better, we owe it to our constituents to consider them. And if there's a new way to help the public understand how we do this important work, let's try it.

By applying our ethical and investigative principles to these cases, we can ensure that they're fully, fairly, and properly examined. And by applying the values of openness, transparency, and accountability, we can ensure that our findings are credible and trustworthy. A first-rate investigation and ironclad legal analysis will defuse almost any criticism — but only if the public can see it for themselves. After all, the facts may change from case to case, but our mission never does: We find the facts, apply the law, and serve the interests of justice.