



Should Bailey shooting be subject to third-party review?

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The body-worn camera footage is gruesome.

Two young black men are cooperating with police one moment, standing still with hands raised and answering questions. Springs Police Officers had told the men they matched the description of armed robbers, that they were concerned they were armed, and to keep their hands up and not reach for their waistbands.

Then, as a Colorado Springs Police officer approaches to search for the weapon reportedly held by one of the men, 19-year-old De'Von Bailey spins to his right and takes off at a sprint.

A pair of white officers, identified by the department as Sgt. Alan Van't Land and Officer Blake Evenson, pursue, yelling three times for Bailey to raise his hands before shots are fired.

Bailey tumbles to the ground. It was just minutes before 7 p.m. on Aug. 3.

At 7:20 p.m., Bailey was pronounced dead at a nearby hospital.

Bailey was shot four times — three times in the lower left side of his back and once in the right elbow — according to an El Paso County Coroner's report. The report ruled the cause of death a homicide, defined in Colorado statute as "the killing of one person by another."

An attorney for Bailey's family calls it murder. Colorado Springs Police have said Bailey was reaching for a pistol he had hidden in his shorts.

The video footage shows Bailey was armed, and his hands did, at points, appear to be at or near his waistband. It also shows he was running away when he was shot in the back. Beyond that, it's hard to determine what happened.

Either way, the officers involved were put on routine administrative leave and the investigation of the shooting — which took place on Preuss Road near Adams Elementary School and adjacent Adams Park — was turned over to the El Paso County Sheriff's Office. The office concluded its investigation and handed over its findings to the 4th Judicial District Attorney's Office Aug. 15.

On Aug. 13, members of Bailey's family, their attorneys and leaders in the black and progressive communities gathered outside the Colorado Springs Police Operations Center to call for an independent, third-party investigation. Specifically, Darold Killmer, the attorney for members of the Bailey family and named partner of Denver civil rights and employment firm Killmer, Lane & Newman LLP, asked for the Colorado attorney general's office to step in.

"It is an unusual move, admittedly," he tells a standing-room-only crowd of reporters, supporters and advocates calling for police reform. "But this is an unusual case."

Lawrence Pacheco, director of communications for the attorney general's office, says his office is not involved in the matter, adding, "These investigations are done by local law enforcement [in accordance with] Colorado law."

It's important to understand that when an officer uses deadly force in the line of duty, there are certain protocols that his or her department must follow in the aftermath.

State law requires an officer-involved shooting resulting in injury or death to be investigated by a pre-established multi-agency team, "which shall include at least one other police department or sheriff's office, or the Colorado Bureau of Investigation." The team is tasked with investigating, evaluating and reviewing the shooting, and the agencies in question don't have to be from the same judicial district.

That being said, each agency must either post its review protocols on its website or, if it doesn't have a website, make those available upon request.

In El Paso County, an officer-involved shooting resulting in injury or death deploys the Deadly Force Investigations Team. This cadre of investigators includes members of the Colorado Springs Police Department, the El Paso County Sheriff's Office and the DA's office, as well as a liaison from the involved agency.

A similar model is followed in Pueblo, where the 10th Judicial Critical Incident Team is composed of the Pueblo Police Department, Pueblo County Sheriff's Office, district attorney's office and the Colorado State Patrol. In the city and county of Denver, the investigations team includes the Aurora Police Department, an independent monitor and DA personnel.

Jacqueline Kirby, El Paso County Sheriff's spokesperson, says her department has investigated 23 officer-involved shootings since the passage of the 2015 legislation, and the Bailey case is the sixth this year. She says this case followed the same protocols as every other such incident since the relationship was codified.

"You interview witnesses, you process the scene, you analyze the data, you test evidence," she says. "All of that has to be done, and once that is done it is given to the DA's office and they make a ruling."

"This is the first time that our competence or impartiality has been called into question in the 23 that we have done in the last 4½ years," she continues.

However, the Feb. 5, 2018, firefight that killed Sheriff's Deputy Micah Flick and theft suspect Manuel Zetina and that injured three other officers and paralyzed an innocent bystander, raised red flags about operational practices, including among some rank-and-file officers.

The sheriff's office, Kirby stresses, does not have the authority to rule on culpability or determine whether charges should be filed. Rather, that falls to the district attorney.

On Aug. 15, the DA's office released a statement: "Our office takes officer-involved shooting investigations very seriously, and we are committed to a thorough, fair and neutral review, which may include follow-up interviews, additional testing and further analysis and examination of the evidence."

According to the statement, an officer-involved shooting investigation typically takes the office 90 to 120 days to complete, although it may be longer. Once their work is completed, the DA will release its findings — the shooting is ruled justified, charges will be filed or the case will be sent to a grand jury.

The DA completed its initial interviews prior to the release of the body-worn camera footage, the statement notes.

Despite the assurances of neutrality, some leaders in the community warn that the close relationship between the El Paso County Sheriff's Office and Colorado Springs Police Department could sway the results. It's no secret that Undersheriff Pete Carey retired from his position as chief of the Colorado Springs Police earlier this year.

"The family is seeking justice, rather than a huge political statement," attorney Killmer says.

No stranger to representing families in officer-involved shootings, he taps an analogy of secrecy he says is endemic during these investigations.

"The shades are pulled over the windows while the investigation is" taking place, he says. "The shade is lifted [when] the investigation is done.

"I'm not saying that's what Colorado Springs is going to do but that's what we've seen again and again and again."

David Kopel disagrees.

He's an adjunct professor of constitutional law at the University of Denver's Sturm College of Law, research director at the Denver-based libertarian think tank the Independence Institute and an associate policy analyst with Washington, D.C.'s libertarian Cato Institute. He's penned 17 books on constitutional law, criminal justice, civil rights and firearms policy, among other topics, according to his biography.

He also represented 55 of Colorado's sheriffs — including the El Paso County Sheriff's department — in a federal civil rights lawsuit challenging the state's controversial 2013 gun-

control legislation. In preparing for that case, Kopel reviewed every officer-involved shooting that took place at the sheriff's level over the course of 10 years, for all 55 of his clients.

Kopel says he is familiar with the Bailey shooting, has watched the videos and concludes that calling for a third-party investigation is unwarranted. Especially when it comes to the AG request.

"I've never heard of that happening in Colorado," he says. "The circumstances of this case don't call, in my view, for anything else.

"The attorney general does lots of stuff, and it is imaginable that might have happened at some point in Colorado history, but I can't think of [a situation when the office may have taken over this type of review]. I don't see anything about the circumstances about this one that make it so different from all the other [officer-involved shootings] I've seen."

So is there the potential for a conflict of interest, given Carey's close connection to both departments?

"I'm not sure I'd call it a conflict of interest in the precise sense of that term," Kopel says. "Obviously, law enforcement agencies tend to respect each other.

"It's common that law-enforcement officers, over the course of their careers, might move across a variety of different agencies, including moving from a sheriff's office to a police department in the county and vice versa."

(It's worth noting that El Paso County's Kirby says the undersheriff had no involvement with the "very skilled individuals" in charge of the review, outside of the chain of command.)

In the meantime, while the community waits, family and friends mourn Bailey. (It's also worth noting that in April Bailey was wanted on charges of sexual assault on a child by a person in a position of trust.)

"De'Von was a great kid," his father Greg Bailey told the crowd gathered Aug. 15 in little more than a whisper. "All we want is justice, as long as it is done for my son. He has opened a lot of eyes in the community."