

**Officer Involved Shooting of Steven Pena
South Gate Police Department**

Sergeant Heriberto Gutierrez, #10090

J.S.I.D. File #15-0371



JACKIE LACEY

District Attorney

Justice System Integrity Division

June 7, 2016

MEMORANDUM

TO: CHIEF RANDALL DAVIS
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FROM: JUSTICE SYSTEM INTEGRITY DIVISION
Los Angeles County District Attorney's Office

SUBJECT: Officer Involved Shooting of Steven Pena
J.S.I.D. File No. 15-0371
L.A.S.D. File No. 015-00049-3199-055

DATE: June 7, 2016

The Justice System Integrity Division of the Los Angeles County District Attorney's Office has completed its review of the July 26, 2015, non-fatal shooting of Steven Pena by South Gate Police Department (SGPD) Sergeant Heriberto Gutierrez. It is our conclusion that Sergeant Gutierrez acted in lawful self-defense.

The District Attorney's Command Center was notified of the shooting on July 27, 2015, at approximately 2:34 a.m. The District Attorney Response Team (DART) responded and was given a briefing and a walk-through of the scene.

The following analysis is based on various reports prepared by Detectives Teri Bernstein and Angus Ferguson from the Los Angeles County Sheriff's Department's (LASD) Homicide Bureau.

PROLOGUE

On July 26, 2015, at approximately 11:00 p.m., Joel Muniz Jr. was in the living room of his home at [REDACTED] Katella Road in the City of South Gate when he noticed that a motion sensor light on his next door neighbor's property had turned on.¹ Through the window, Muniz noticed several Hispanic males, one of whom was later identified as Steven Pena, walking down his next door neighbor's driveway. Muniz became suspicious and went outside to look for the men. When Muniz looked down his neighbor's driveway, he saw that his neighbor's automatic gate had not been opened and noticed that an outside free standing shower fixture located in the

¹ To prevent confusion with his father Joel Muniz Sr., Joel Muniz Jr. is referred to as Muniz whereas his father is referred to as Joel Muniz Sr. or Muniz Sr..

backyard pool area of his home (Muniz's) was vibrating back and forth rapidly as if it had just been touched.² Muniz concluded that Pena and the other men had jumped over the cinder block wall and into his backyard pool area.

Muniz ran back into his residence, grabbed his gun, and walked into the kitchen where he told his mother Judith and father Joel Muniz Sr. that someone was in their backyard.³ He exited the kitchen to the backyard pool area and made a sound as if he was racking a firearm in order to scare Pena and the other males.

Muniz heard the side pedestrian entrance door of the garage slam shut.⁴ Muniz pounded on the door and yelled, "Who's in there, who's in there?" From inside the garage, he heard someone say, "Homie, go inside your house, so we can leave!" Muniz remained outside, yelled for his parents to call the police and told the men to come out of the garage. The men told Muniz to "get the fuck out of here, go inside" but Muniz refused. Muniz rolled up the garage door and saw Pena and two other men pointing guns at him as his mother, father, wife and three sisters stood behind him. Muniz warned his family members that Pena and his companions had guns and told them to call the police. Lilibeth, Muniz's sister, called 9-1-1.

In order to protect his family members, Muniz tried to hold back Pena and his two companions as they came out of the garage. However, Pena's two companions broke away and escaped over the cinder block wall. Pena, who remained behind, grabbed Muniz by the neck and pointed a gun at his head while telling him "You're gonna fuckin die right now, you gonna fuckin die."

Muniz's mother, Judith, suddenly grabbed the barrel of Pena's gun as Violeta, Muniz's wife, also attempted to disarm Pena. Joel Muniz, Sr., seeing the struggle, struck Pena in the head with a log of firewood to no effect. Muniz pushed Pena into the pool, jumped in and fought for control of Pena's gun. Violeta, who had fallen into the pool with Pena, wrestled the gun out of Pena's hand and threw it as Muniz struggled to restrain him.

As Muniz held Pena in a chokehold and pushed him into the water, Pena pulled a second gun out of his waistband and attempted to aim at Muniz as they wrestled. Violeta saw the second gun and pried it out of Pena's hand before he could shoot. Violeta threw the gun outside of the pool towards the cinder block wall which Pena and his companions had leapt over to trespass onto the property.⁵ Muniz, who is much taller in stature than Pena and heavier, continued to struggle with Pena whom he noticed was extremely strong and seemed to be under the influence of narcotics.

² Muniz's neighbor's driveway runs parallel to the west exterior wall of Muniz's home and a cinder block wall which separates Muniz's backyard pool area from his neighbor's property. The wall is low enough that the shower fixture in Muniz's backyard is visible from his neighbor's property.

³ Muniz had left the gun unloaded after a recent trip to the shooting range.

⁴ Muniz's garage has been converted into storage and bathroom quarters and is located next to the backyard pool and patio area.

⁵ Two loaded guns (a .380 caliber semi-automatic and a 9 mm Glock semi-automatic) were recovered by police investigators from the concrete perimeter of the pool. Investigators did not find a third gun (a silver revolver) which Muniz also saw in Pena's possession. DNA testing of the guns found around the perimeter of the pool was either inconclusive or did not match Pena.

SGPD Officer Albert Rodriguez arrived at Muniz's residence and entered the backyard where he saw Muniz restraining Pena in a chokehold in the pool.⁶ Rodriguez instructed Muniz to bring Pena to the edge of the pool where Muniz helped him bring Pena out of the water. Muniz assisted Rodriguez in holding Pena face down on the concrete as Rodriguez grasped Pena's right arm to handcuff him. Pena suddenly pulled his arm away and pushed himself up. Rodriguez and Muniz struck Pena as Rodriguez repeatedly ordered him to get down and both men struggled to restrain him. Pena momentarily went down to the ground but then pushed himself upright again, grabbed the handle of Rodriguez's gun and pulled it causing Rodriguez to almost lose his balance. Rodriguez punched Pena, kicked him in the stomach and pushed him away to prevent him from un-holstering the gun. Rodriguez was surprised by Pena's strength and believed he was under the influence of drugs or adrenaline.

Pena ran towards the backyard gate where several of Muniz's family members were gathered. Fearing that Pena would hurt them or get away, Rodriguez fired his Taser and hit Pena in the back.⁷ Pena froze momentarily but suddenly ran away from Rodriguez who lost control of the Taser as Pena pulled away from him.⁸

Rodriguez called for back-up assistance and recovered the Taser moments before Pena ran into the cinder block wall separating Muniz's backyard from his neighbor's property and broke through the top portion of the wall.⁹ Muniz grasped Pena's sweater but was unable to hold on as Pena pulled him over the partially collapsed wall and then broke away from him. Rodriguez and Muniz chased after Pena as he ran west down Katella Road.

Simultaneously, Sergeant Heriberto Gutierrez, who was responding to the 9-1-1 call made by Muniz's sister and to Rodriguez's call for back up, arrived in front of the Muniz residence where he noticed several of Muniz's family members outside screaming. Muniz ran westbound past Gutierrez's car and yelled "he's getting away, get him!" as he chased after Pena.¹⁰ Gutierrez took the lead in the chase as Rodriguez and Muniz followed him west on Katella Road after Pena.

Gutierrez momentarily lost sight of Pena as Pena ran behind several cars parked in the driveway of 5212 Katella Road, ██████████ west of the Muniz residence. At the end of the driveway, Pena scaled a wrought iron gate, jumped over, and waited by the gate. Moments later, as Gutierrez approached the gate, Pena aimed a handgun at him through the bars of the wrought iron fence. Fearing that he would be killed, Gutierrez fired his service weapon at Pena and shot him in the right bicep. Rodriguez, who was on the east side of the driveway and whose view was blocked by a parked vehicle, did not see the shooting but heard gunshots.

⁶ Rodriguez and Sergeant Gutierrez were notified by dispatch of a burglary at ██████████ Katella Road.

⁷ A Taser fires two electrode darts which are connected to the device with thin metal wires that are used as a conduit for electrical impulses designed to stun and immobilize a target when the Taser is triggered.

⁸ A sweatshirt worn by Pena was later recovered and investigators found two Taser darts attached to this item. Based on the evidence reviewed, it appears that the sweatshirt worn by Pena prevented the Taser darts from imbedding into his torso and rendered the device ineffective.

⁹ SGPD Officer Rodriguez observed Pena as he literally ran through the wall that partially collapsed on impact.

¹⁰ Sergeant Heriberto Gutierrez did not know the identity of the individuals outside the Muniz residence including Joel Muniz Jr. who was chasing Pena.

After being shot, Pena ran through the backyard at 5212 Katella where he knocked down a temporary wood fence separating the property from the backyard of the property at 5203 Brookdale Road.¹¹ Pena ran through the yard of 5203 Brookdale Road and jumped over a fence to the adjoining property at 5209 Brookdale Road. Gutierrez and Rodriguez followed the blood trail left by Pena and found him hiding under a vehicle parked in the driveway of 5209 Brookdale Road. Gutierrez and Rodriguez ordered Pena to come out but Pena did not comply. Other officers and paramedics responded to the location. Pena eventually crawled out and was taken into custody.

Pena was transported to a local hospital where he was treated for a gunshot injury to his right bicep. LASD Investigators and support personnel from the LASD were unable to locate the firearm Pena pointed at Gutierrez.

LASD Scientific Services Bureau (SSB) personnel processed the two firearms used by Pena recovered from next to the Muniz family's pool but were unable to develop or lift any latent fingerprints. DNA analysis of samples taken from Pena and the two firearms was inconclusive.¹²

In case VA139721, Pena was charged with making criminal threats in violation of Penal Code section 422, assault with a semi-automatic firearm in violation of Penal Code section 245(b), false imprisonment by violence in violation of Penal Code section 236, burglary in violation of Penal Code section 459, possession of a firearm by a felon in violation of Penal Code section 29800(a)(1), illegal possession of ammunition in violation of Penal Code section 30305(a)(1), resisting an executive officer in violation of Penal Code section 69 and attempted removal of a firearm from a peace officer in violation of Penal Code section 148. Several firearms enhancements and enhancements pertaining to Pena's prior criminal convictions were appended to these charges. Pretrial in this matter is currently set for June 8, 2016.

CONCLUSION

The use of deadly force in self-defense is justifiable if the person claiming the right actually and reasonably believed the following: (1) that he was in imminent danger of being killed or suffering great bodily injury; (2) that the immediate use of force was necessary to defend against that danger; and (3) that he used no more force than was reasonably necessary to defend against that danger. See, *CALCRIM No. 505*.

The test for whether an officer's actions were objectively reasonable is "highly deferential to the police officer's need to protect himself and others." *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1102. Reasonableness of force used by an officer depends on the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham v. Connor* (1989) 490 U.S. 386, 396. "The reasonableness of the particular force used must be judged from the

¹¹ Extensive construction was in progress in the backyard at 5203 Brookdale Road.

¹² Swabs taken of several parts of these two guns either contained no DNA or contained DNA mixtures from several contributors that were too complex to reliably analyze or contained DNA in such small quantities from unidentified possible contributors that could not be reliably analyzed.

perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* “The calculus of reasonableness must embody allowance for the fact that police are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Id.* at 396-97.

In California, the evaluation of the reasonableness of a police officer’s use of deadly force employs a reasonable person acting as a police officer standard. *People v. Mehserle*, (2012) 206 Cal. App. 4th 1125, 1146 (holding that California law “follows the objective ‘reasonable person’ standard—the trier of fact is required to evaluate the conduct of a reasonable person in the defendant’s position [citations omitted] . . . the jury should consider all relevant circumstances surrounding the defendant’s conduct. This enables the jury to evaluate the conduct of a reasonable person functioning as a police officer in a stressful situation—but this is not the same as following a special ‘reasonable police officer’ standard.”

Actual danger is not necessary to justify the use of deadly force in self-defense. If one is confronted by the appearance of danger which one believes, and a reasonable person in the same position would believe, would result in death or great bodily injury, one may act upon those circumstances. The right of self-defense is the same whether the danger is real or apparent. *People v. Toledo* (1948) 85 Cal.App.2d 577; *See also People v. Minifie* (1996) 13 Cal.4th 1055, 1068; *People v. Clark* (1982) 130 Cal.App.3d 371, 377; *People v. Collins* (1961) 189 Cal.App.2d 575, 588.

The evidence presented in this case demonstrates that Sergeant Gutierrez reasonably believed that Pena posed a significant threat of death or serious physical injury when he pointed a firearm at him.

Prior to Gutierrez’s arrival at the Muniz residence, Pena had engaged in a series of violent acts which posed a significant threat of death or serious physical injury to Muniz and his family members. Muniz pointed a loaded firearm at Muniz, Muniz’s father, mother and siblings. When Muniz attempted to protect his family, Pena held a gun to his head and threatened to kill him. Pena was unfazed by being struck in the head with a log by Muniz’s father. Pena continued his assaultive behavior against Muniz and his family members. During the struggle to subdue him in the pool, Pena produced not one but two separate loaded handguns which Violeta Muniz fortunately was able to force out of his hand.

Pena’s assaultive and dangerous conduct did not stop after Muniz was finally able to restrain him by holding him in a chokehold. When Officer Rodriguez attempted to take Pena into custody with Muniz’s assistance, Pena fought both men and attempted to take Rodriguez’s handgun. When hit by a Taser, Pena was only momentarily stunned before he ran away and crashed through and over a cinder block wall.

When Sergeant Gutierrez finally caught up with Pena at 5212 Katella Road, Pena, without hesitation, pointed a firearm directly at him, as he had in the case of Joel Muniz Jr. and his family members. In fear for his life, Gutierrez shot Pena.

Given the totality of the evidence presented, we find that Sergeant Gutierrez acted in lawful self-defense when he used deadly force against Steven Pena. We are therefore closing our file and will take no further action in this matter.