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I. Cops not guilty of unreasonable force in mistaken killing of child hostage: Appeals Court

An internationally publicized case of a tragic shooting in which Force Science testimony was given has been decided by a California appellate court in favor of the involved officers.

Controversial from the beginning, the headline-grabbing case concerned a tense standoff between LAPD SWAT and a drug-deranged father who was holding his 19-month-old daughter in his arm as a hostage and human shield. In a desperate showdown, officers killed the offender in a fusillade of bullets--but also, inadvertently, killed the child.

The girl's mother filed suit, claiming the operators' reckless and unreasonable use of force and negligent disregard of proper police tactics caused her daughter's wrongful death. At trial, Dr. Bill Lewinski, executive director of the Force Science Institute, testified on the officers' behalf, describing in realistic terms the death scene's chaotic climax.

A Superior Court judge ruled that the plaintiff's arguments had no documented merit and tossed the case. Now the California Court of Appeal has upheld that decision, in an opinion written by Justice Madeleine Flier. [Click here](#) to read it in full.

THE THREAT. On a balmy Sunday in July, 2005, 34-year-old Jose Raul Pena, drunk,

coked up and meth-addled, depressed over financial problems, and "emotionally unstable," turned deadly. After threatening to kill himself and members of his family, he grabbed his baby daughter Suzie and stormed off to the garage/shop of a small used car lot he owned around the corner from his home in Watts, where a standoff with responding police officers shortly ensued. Pena claimed to have access to 2 handguns, a 12 ga. shotgun, and extra ammunition.

"Four times, Pena stood outside the auto shop and shot at officers [with a 9mm Beretta] as he held Suzie in his right arm as a shield," the appellate decision recounted. Raving that he was Tony Montana from the movie *Scarface*, he yelled "over 10 times" that he was going to "kill Suzie" and take her "to hell with me," a phrase from the film. According to an investigative report later, he "told the officers to go ahead and shoot him."

"I'm going to kill my baby before I leave my baby to my wife, that whore," the appellate decision quoted him as threatening. He said he'd been in the "Salvadoran military" and knew "how to kill." He also said he'd been in jail and "wasn't going back." Extensive attempts across nearly 3 hours that late afternoon to negotiate a surrender of the child, of Pena or of his weapons were unsuccessful because the hostage-taker "was not being rational and was making constant threats."

SHOTS FIRED. Five minutes after breaking off communication by disconnecting his phone, Pena again "exited the auto shop, holding Suzie in his right arm." A SWAT sniper tracked him via rifle scope from inside a Bear Cat parked outside.

"[H]e saw Pena move his hand as if he were about to remove his gun from his waistband," the appellate decision stated. "[H]e believed Pena was going to shoot Suzie." The sniper fired; Pena flinched "as if struck" and stumbled back inside.

Immediately, the SWAT team leader ordered 4 operators, specially trained in hostage rescue, to enter the building as a rapid-deployment Emergency Assault Element under his direction and bring the baby to safety.

"When they entered the auto shop, the officers expected Pena to be on the floor as a result of [the sniper's] shot," Justice Flier wrote. "[I]nstead he was positioned in an interior office," still alarmingly alive and alarmingly deadly. Quickly he fired "at least six shots through the drywall" in the officers' direction. One round hit one of the rescue team in the shoulder.

The operators said later they did not retreat because their "mission was to separate Suzie from Pena" and they considered her to be in "imminent peril." Retreating, their commander said, "would have been a dereliction" of their duty. Instead, the wounded operator tossed in a flashbang and the stack surged in.

Consider the pandemonium. The office was a tight 8 X 12 feet, filled with smoke and the echoing boom of the grenade. Pena, moving rapidly, continued shooting at officers while still holding his infant daughter as a shield. All 4 officers simultaneously fired back, defending their own lives and, they thought, saving Suzie.

At least 1 of the officers said he was "blinded by muzzle flashes from Pena's weapon" a few feet from his face, so he could not actually see the child. All concentrated their

fire on their assailant's left side, aware he had consistently held the baby on his right throughout the standoff. "Together the officers fired 50-55 shots inside the office within 3.5 to 6 seconds," the appellate decision said. In all that fateful Sunday, Pena had himself fired at least 39 rounds before his fatal takedown.

When the smoke cleared, the officers discovered that the baby had been killed, along with her father. Just who fired the fatal round to her head was never determined, although the court said the shooter was 1 of 3 members of the entry team. All carried Colt M4 carbines, according to an investigative report.

"NONSUIT." The sole basis for the mother's inevitable lawsuit claiming "negligence and wrongful death" was her allegation that "the officers used unreasonable force" in confronting Pena's deadly threats, the appellate decision noted. Her only expert witness--a retired LAPD commander who admitted to having no experience, training, or familiarity in SWAT tactics and protocol--opined that retreat and more negotiation would have been preferable to lethal assault.

During the initial 2-week trial in the Superior Court of Judge Rolf Treu in 2009, Bill Lewinski was asked to explain, among other things, how multiple rounds could have missed the suspect in such tight quarters, including the one that struck and killed the child. (An autopsy revealed that Pena had been hit just 6 times.)

That was not a matter of recklessness, Lewinski told the jury, but instead a common dynamic of sudden, life-threatening confrontations of high stress, rapid dynamic movement, and short duration.

Drawing on studies by the Force Science Institute and other research groups, for instance, he documented the typical time required for officers in a shooting to perceive a given threat, interpret its meaning, decide on a response, and perform a reaction. That all can occur within mere micro-seconds, he explained. Yet within that brief timeframe, the scenario they're confronting can change radically because of split-second movements by the targeted suspect. Officers might not be able to detect the change in enough time to alter the rapid-fire action they've initiated.

Unexpected movement by Pena, who was highly agitated and animated, would account for the failure of the highly trained sniper to deliver an effective head shot outside the shop and of the operators who stormed the inner office to put all rounds on their target, despite the close distances. Pena shifting the little girl from one arm to the other could have brought her into the line of fire unexpectedly and unavoidably.

"These were elite officers," Lewinski told *Force Science News*. "If LAPD had a Delta team, it would be these guys. Yet they still couldn't shoot with total accuracy in that difficult situation, not because they were recklessly out of control but because of immutable human limitations.

"Force Science has measured what an 'instant' is in a high-stress encounter and what people can and can't do in that time. My job was to help clarify for the jury how our research on human behavior related to what happened in the confrontations with Pena."

After attorneys for both sides had rested their case and minutes before closing arguments were to start, Judge Treu abruptly called a halt to the trial. In response to a defense motion, he found that "reasonable jurors here could only draw one conclusion from the evidence presented, and that was that the officers' use of force was reasonable." In short, the matter was a "nonsuit," and he issued a directed verdict aborting the case.

It was this ruling, challenged by the plaintiff, that the appellate court upheld.

APPELLATE REASONING. In the appeal, the plaintiff's attorneys argued that Treu's nonsuit ruling was improper because no probable cause had existed either for the sniper's initial use of deadly force against Pena or for the rescue team's use of lethal force during its final assault.

The appellate decision characterized this claim as a "nonsensical interpretation of the evidence."

The evidence was "overwhelming," Justice Flier wrote, "that Pena posed a danger to Suzie," even though he did not point his gun directly at her. He had made numerous verbal threats to kill her, and the sniper was "not required to wait" until Pena pointed his gun at her and actually "pulled the trigger to conclude that [the] threats were real and exposed Suzie to great risk."

As for the final shootout, the appellate panel agreed with the trial court that the operators "had probable cause and rights within their discretion to go in after Pena, particularly since there were shots fired from inside the room out and the officers could reasonably have believed [these] may involve Suzie."

Addressing the multitude of rounds fired, the officers' "concurrent shooting multiple times at Pena cannot constitute excessive force under an objective standard," the appellate decision stated. Case law has established that the "number of shots by itself cannot be determinative as to whether the force used was reasonable. That multiple shots were fired does not suggest the officers shot mindlessly as much as it indicates that they sought to ensure the elimination of a deadly threat."

Any belief by the plaintiff "that the officers should have stopped after each shot and assessed its effect" when Pena was shooting directly at them was unrealistic from "the perspective of [a] reasonable officer at the scene," the court declared.

Tragic as the unintended death of the child was, the decision concluded, "retreating when Suzie remained in danger would have been a dereliction of duty.... [C]onsidering the exigency of the circumstances," the officers acted properly in pursuing the father who threatened her life and "used reasonable care in employing deadly force."

II. Scan patterns, OIS investigations & the Lizard Brain...

Two new publications and a creative YouTube video of interest to law enforcement trainers and other Force Science aficionados:

- First, a full report on the groundbreaking Force Science study of scan patterns in

potential threat situations is now in print in the professional journal *Human Movement Science*.

This study, conducted by Dr. Joan Vickers of the University of Calgary and Dr. Bill Lewinski of the Force Science Institute, used sophisticated technology to track the respective gazes of elite SWAT team members and rookie officers as they watched a role-playing scenario gradually evolve into a deadly force encounter. Because of their distinctive scanning patterns, the highly experienced subjects proved much faster and more accurate in anticipating and responding to threats than those new to the street.

Ultimately, this information is expected to prove valuable in recruit and in-service firearms training, hopefully hastening the speed with which officers can develop optimum scanning habits.

Force Science News reported on these findings in Transmission #104, sent 8/22/08. For complete details, the *Human Movement* report is available at: [by clicking here](#). The journal requires a fee for access beyond the article's brief abstract.

Vickers also presents findings from this study and her other eye-movement research during a presentation at the certification course for Force Science Analysis.

- Certified Force Science analyst Kris Pitcher writes in *Law and Order* magazine on "Maintaining Investigative Credibility" in critical use-of-force cases. Pitcher draws on his first-hand experience as commanding officer of the LAPD's Force Investigation Division to offer practical tips to agencies on assuring public confidence as they search for the truth in controversial force events. You can access the article free of charge [by clicking here](#)

Pitcher, incidentally, was involved in the investigation of the Pena shooting described above. He is also scheduled as a faculty member for the Lethal and Less-lethal Force seminar, presented Oct. 10-12 in Las Vegas by Americans for Effective Law Enforcement, along with other certified Force Science Analysts Dr. Alexis Artwohl and Greg Meyer. More details on that seminar are at www.aele.org/menu-lethal.html.

- Finally, check out this clever video on YouTube at: www.youtube.com/watch?v=ImMBiqM62jk

Using a cartoon format, it's an easy-to-follow description of the human amygdala (the so-called "Lizard Brain"), which "regulates emotions and activates the body's earliest warning system for danger so survival actions can follow."

In particular, the narration explains how hypervigilance fostered by the impact of police training and working conditions on the amygdala can affect officer interactions on the street both positively and negatively.

"Our hope is that this video will help the public and officers alike better understand some of the police behavior they may see on TV or encounter first-hand," says Jack Colwell who, with his long-time training partner Charles "Chip" Huth, was the creative force behind the production. Huth is a certified Force Science Analyst and together they've also written the book *Unleashing the Power of Unconditional Respect*:

Transforming Law Enforcement and Police Training.

At the moment, the video is available only on YouTube but can be downloaded for roll call training, Colwell says. Eventually he and Huth hope to have a system in place that will allow them to search Twitter and other social media for people who are expressing concerns about law enforcement experiences.

"About every 30 seconds somewhere in the U.S. someone is Tweeting about frustrations or criticism involving the police," Colwell says. "Our goal is to be able to 'capture' these individuals online and refer them to the video as a means of broadening their understanding and hopefully easing or eliminating anti-cop sentiments."

Force Science board member Dr. Alexis Artwohl, internationally recognized for her research into the psychological effects of police shootings, was a key consultant on the video project. Dr. Kevin Gilmartin, also an FSI board member, is quoted in the narration. More productions in a similar format are planned, Colwell says.

For more information on the Lizard Brain production and Colwell's and Huth's other projects, contact them at: unleashingrespect@gmail.com

NOTE: If you'd like to forward this message to a friend, [please click here](#)

