

COMMITTEE AGAINST TORTURE

U.S. Civil Society One Year Follow Up Report

Submitted By: Family of Israel “Reefa” Hernandez-Llach, Dream Defenders, Community Justice Project, Inc.

I. INTRODUCTION

The family of Israel “Reefa” Hernandez-Llach, Community Justice Project, Inc., and Dream Defenders submit this follow up report as an assessment of actions undertaken by the United States one year after its review by the Committee Against Torture and respond to the United States Government’s one-year report (“USG Report”) describing its efforts to comply with the Committee’s recommendations in paragraph 26. The spirit of the Committee’s recommendations in paragraph 26 is that of accountability and redress. To the victims, the two cannot be extricated, as effective remedy and rehabilitation is tightly tied to a State’s assumption of responsibility for torture or ill-treatment and measures taken to hold accountable those individuals who take part in such acts. We therefore will comment on recommendations 26(a) and (b) in addition to 26(c), as requested by the Committee. Further, since Hernandez-Llach’s case specifically involved an electrical discharge weapon (Taser), this report will draw upon related Committee observation in paragraph 27, though the main thrust of the report remains one regarding a continuing failure to promote accountability and redress to victims of police brutality.

II. ACTIONS TAKEN BY THE STATE PARTY

The actions mentioned in the U.S. Government report (“USG Report”) represent but a drop in the bucket compared to the staggering number of cases of police misconduct occurring in the U.S. While we find important the investigations, interventions and charges brought in the instances mentioned in the USG report, their present tools for accountability and redress remain too blunt to encourage broad-scale culture shift in policing and adherence to best practices. The Israel “Reefa” Hernandez-Llach case and numerous other cases of police-involved deaths illustrate this accountability crisis. That said, the family of Hernandez-Llach and the community would welcome, and indeed beseech, the Department of Justice to conduct an investigation into Hernandez-Llach’s killing and the Miami Beach Police Department in light of the facts presented in this report.

a. Hernandez-Llach Killing found “legally justified” by State Attorney

Despite sustained community pressure, including the December 2014 shutdown of a major highway in protest of Israel “Reefa” Hernandez-Llach’s killing¹, and ample evidence throwing into question the primary police officer responsible, the Miami-Dade State Attorney Katherine Fernandez-Rundle ruled the killing “legally justified” and went on to say it would be “unethical”

¹ *Miami Protestors Shut Down Traffic on I-95*, Miami Herald, December 5, 2014, <http://www.miamiherald.com/news/local/community/miami-dade/article4301592.html>

for them to do otherwise.² With that, Fernandez-Rundle continued a over twenty-five year streak of failing to hold any officer accountable for a killing or shooting of a civilian.³ Officer Jorge Mercado, who fired the device, remains employed and active on the Miami Beach Police Force. The impact of this continued pattern of failure to hold police officers involved in killings like that of Herandez-Llach is felt most deeply by the families and friends of the victims.

The State Attorney's refusal to bring charges against police officers does not inspire confidence in how the state conducts its investigations. The family and community is deeply disappointed by the decision to not bring charges against Officer Mercado, and largely considers the State Attorney's investigation to be faulty and partial to the police department involved. In light of witness statements and prior misconduct by Officer Mercado, the failure to bring charges stings doubly as it continues a permissive culture regarding excessive use of force by police and signals complicity between the organ tasked with oversight (prosecutor's office) and the entity to be held accountable (police department and police officer involved in killing). The failure of local oversight bodies (like prosecutors) to respond to community concerns regarding police brutality is what places an ever-growing burden on the Department of Justice to investigate cases and police departments for civil rights wrongdoing. This case is no different: having lost trust in State Attorney Rundle, the family and broader community is now looking to the the Department of Justice to carry out an investigation into the case.

b. Changes reported to Taser policy, but policy on file does not reflect changes and recent case indicates policy is not being followed

In September 2015, the Miami Herald reported that the Miami Beach Police Department announced that it would be using a different electroshock device, the Taser X2 Smart weapon, and were issuing modest tweaks to its guidelines on Taser usage. These included guidance that officers cannot aim a Taser at a suspect's chest, cannot fire if there is no immediate threat or if an individual is in handcuffed, cannot use Tasers to intimidate a crowd and cannot discharge them more than three times.⁴ While these are welcome, if modest, changes, there is reason to doubt that the changes have actually been registered in the Department's Use of Force Standard Operating Procedure (SOP) currently being used. Though the Department announced the changes in September 2015, a request for the most recent SOP in force indicates that it was last revised in 2010. This SOP neither reflects the changes indicated by the Police Chief nor certain best practices such as calling electroshock devices ("Electronic Control Devices" or Tasers) less lethal force instead of non-lethal force. It is possible that the changes have not yet been crystallized in the form of a new SOP, but in such a case the police department should not make representations to the public that its policies are being improved.

² *Miami Beach Cop won't be Charged over Taser Death of Graffiti Artist*, Miami New Times, July 23, 2015, <http://www.miaminewtimes.com/news/miami-beach-cop-wont-be-charged-over-taser-death-of-graffiti-artist-reefa-7773371>

³ *Miami's last cop shooting conviction, 25 years ago, left legal legacy*, Miami Herald, December 6, 2014 <http://www.miamiherald.com/news/local/community/miami-dade/article4317878.html>

⁴ <http://www.miamiherald.com/news/local/crime/article36462477.html#storylink=cpy>

Still, a focus on policy belies the fact that, in the absence of a strong accountability structure, it is doubtful that any guidance would actually be followed. In fact, the recent killing of David Winesett in December 2015 by the Miami Beach police indicates that police officers were *not* following proper Taser protocol and that violation led to killing.⁵ Other cases discussed below illustrate a similar disturbing dynamic.

III. CURRENT SITUATION / UPDATE OF THE ISSUE

a. Israel “Reefa” Hernandez-Llach Case: New evidence suggests existing pattern of abuse and ill-treatment by police department

Officer Jorge Mercado certainly did not have a clean record at the Miami Beach Police Department prior to his involvement in Hernandez-Llach’s death, and was reported to have a “very long and troubling Internal Affairs file.”⁶ But evidence brought forth by one witness indicates that this is not just a case of one “bad apple.” Though Officer Mercado did have a reputation for being harsh, the testimony of this witness suggests a culture of brutal policing that goes beyond Officer Mercado.

In the early morning hours of August 6, 2013, while Hernandez-Llach was being pursued by Miami Beach law enforcement, another individual (identified here as “John Doe”), was being held at a satellite police station (the “Satellite Station”), located just blocks from the site where the police encountered Hernandez-Llach. John Doe was being held at the Satellite Station in connection with a separate incident of graffiti writing that night. While at the Satellite Station, John Doe heard the two-way radio communication relating to the call-in, pursuit and ultimate seizure of Hernandez-Llach as it progressed. John Doe also witnessed how other members of the Miami Beach Police Department responded to the Hernandez-Llach call.

When the Hernandez-Llach call first came in, the officer who was holding John Doe in custody placed the radio in front of him and turned up the volume to make him listen closely to the events involving Hernandez-Llach. John Doe recalls that the radio dispatcher referenced a “28 in progress” – which is the police code for vandalism. He also recalls that the suspect was first identified as a “six foot one mulatto wearing a cream colored shirt.”⁷ The officer told John Doe that he was permitting him to listen in on the incident over the radio to teach John Doe a lesson and show him what “happens to people who do what you do [write graffiti].” He went on to detail that the officer who was pursuing Hernandez-Llach would show no mercy “in situations like this” and would beat the suspect beyond recognition. John Doe listened as the officers reported on the chase, and then made a request for an “Ambulance Code 3.” When John Doe asked the officer what that meant, the officer bragged that it meant that the other officers at the scene had probably beat Hernandez-Llach so badly that he was likely bleeding profusely on the ground. The radio communication indicated that the ambulance took longer than expected,

⁵ <http://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article48720630.html>

⁶ http://www.huffingtonpost.com/2013/08/16/jorge-mercado-israel-hernandez_n_3767285.html

⁷ <http://nbclatino.com/2013/08/15/police-audio-released-in-israel-hernandez-taser-death-case/>

as an officer commented that the ambulance drivers got lost. The officer with John Doe appeared taken aback by the events as they occurred. However, prior to the unfolding of the incident with Hernandez-Llach, he had seemed to gloat at the fact that the other officers would teach Hernandez-Llach a lesson and used communications about the arrest in progress as a way to threaten John Doe, who had been arrested earlier for the same charge.

It is well-established under international law that use of force by state officials should strictly adhere to the principles of necessity and proportionality. This scenario indicates however that the reality is quite different; that force can be applied by law enforcement extrajudicially to “teach a lesson,” regardless of whether it is necessary or proportionate based on any threat of physical harm. The conduct of the officer with the radio towards John Doe makes clear that without a strong apparatus to stave off misuses of force, police departments can encourage a culture of impunity and permissiveness of misconduct. This emboldens law enforcement with complete license to contravene policies and abuse the concept of legitimate force without fear of negative consequences.

b. Current Picture of Police Accountability in Florida and Lack of Redress

Just a few weeks ago, another South Florida family experienced an unspeakable loss at the hands of police. After a “rubber stamped” investigation, a police shooting of Sebastian Gregory that left the sixteen year old near paralyzed and severely physically impaired from four shots in his back was ruled justified,⁸ Sebastian tragically took his own life earlier this year. This was after the family had tried several avenues to get justice, testifying in numerous forums and town halls, yet never receiving the redress they sought.

In another recent case, State Attorney Rundle again declined to bring charges against a Miami Gardens police officer involved in the shooting killing of Lavall Hall. Hall was an unarmed young Black man diagnosed with a mental illness, whose mother had called the police to help subdue her son. Despite community pressure for transparency and information relating to the killing, including weeks of activism by the Dream Defenders and other community activists demanding the release of video footage of the killing in February 2015, the State Attorney did not choose to open a process for holding the officers accountable, something the family’s attorneys called a “travesty of justice.”⁹ The ranks of families suffering through these tragedies at the hands of police continue to grow, yet their chances of attaining justice remain slim.

Police killings overall have continued to plague Florida¹⁰, as well. Between 2013-Feb. 15, 2016, 286 people have been killed by police in Florida.¹¹ In 2015 alone, 71 people were killed. Despite

⁸ Family Questions Police Shooting of Teen, NBC 6, Sept. 3, 2014. <http://www.nbcmiami.com/news/local/Family-Questions-Police-Shooting-of-Teen-267435081.html>

⁹ <http://www.miamiherald.com/news/local/community/miami-dade/miami-gardens/article59213023.html>

¹⁰ *Cops from six agencies shoot, kill 14 in Miami-Dade last year*, Miami Herald, January 22, 2016, <http://www.miamiherald.com/news/local/crime/article55951775.html>

¹¹ Data from wetheprotestors.com and *The Counted*, analysis on file with the authors.

being of comparable population to New York, Florida police kill almost three times as many people. 45% of those killed were Black. Florida police killed more Black people in 2015 than any other state except for California. Still, only one officer has been charged for a police-involved killing and no officers have been punished for a killing in 25 years in Florida. While it is possible that some victims receive civil settlements for money damages, the failure of the criminal justice apparatus to hold officers responsible for misconduct in the criminal context registers as a resounding affront to victims' families who also want to see that those responsible face consequences and further such killings do not result.

c. Deaths from Electroshock Devices (Tasers) and Taser use policies

In 2015, deaths stemming from the use of electroshock devices persisted in Florida and across the United States.¹² Florida ranked fourth in the nation with four Taser related deaths. In total, fifty people were killed by police employing these devices across the country that year. Forty-six of these deaths involved unarmed victims, and another two involved incidents where witnesses and family members dispute authorities assertions that the victims were armed with tools or scissors.¹³ 58% were victims of color, 19 of whom were Black.¹⁴

These numbers do not include the serious injuries that result from use of electroshock devices by police, such as a near fatal incident in nearby Hallandale Beach in April 2015. There, police used a Taser device after beating an unarmed 39 year-old man accused of stealing just \$75.¹⁵

Another egregious case is the case of Calvin Reid from Coconut Creek in Broward County, north of Miami-Dade, who died from multiple Taser shots to the chest issued despite his cries of "I can't breathe, I can't breathe."¹⁶ Prosecutors last summer again declined to bring charges against the three police officers involved, even though it was later found that the Coconut Creek police department was in violation of state policy on Tasers to train and issue re-certification on Taser use annually.¹⁷ This is yet another case that exposes the grave disconnect between police practice and culture and the policies on the books.

While the US Department of Justice and the Police Executive Research Forum acknowledged the lethal nature of these devices and updated their guidelines to police in 2011¹⁸, a recent investigation of police departments responsible for a death by Taser showed a startling lack of

¹² *The Counted: People Killed by Police in the US*, The Guardian, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>

¹³ *The Counted*, see Mario Ocasio and Sinthanouxay Khottavongsa.

¹⁴ *The Counted*

¹⁵ *Robbery suspect stunned by police Taser remains critical, faces charges*, Sun Sentinel, April 2015. <http://www.sun-sentinel.com/local/broward/fl-hallandale-laundromat-taser-charges-20150409-story.html>

¹⁶ *Bolts from the Blue*, The Guardian, November 5, 2015. <http://www.theguardian.com/us-news/2015/nov/05/police-tasers-deaths-the-counted>

¹⁷ <http://miami.cbslocal.com/2015/03/11/coconut-creek-police-violate-state-taser-law/>

¹⁸ 2011 Electronic Control Weapon Guidelines, <https://assets.documentcloud.org/documents/2504551/electronic-control-weapon-guidelines-2011.pdf>

adherence to these basic principles.¹⁹ The City of Miami Police Department was one of only two departments to fail on every metric evaluated. Not a single one of the Florida departments surveyed included the recommended prohibition that Tasers should not be used if the sole justification is a suspect fleeing, and only one advised against multiple shocks (over three).

Despite these staggering figures, accountability remains elusive and profiteering off these deaths continues. As police killings have risen in the national spotlight, TASER Corporation has capitalized on the tragedies and erroneously positioned its devices as a non-lethal alternative. In the Hallandale Beach incident discussed earlier, the City's contracted "use of force consultants" had financial ties to TASER Corporation.²⁰ Such reports are concerning and indicate a conflict of interest that can muddy municipalities' determinations about sound use of force policies and whether electroshock devices are appropriate for use.

Impact of the Action of the State party

As mentioned above, there is an overwhelming lack of confidence communities have in their prosecutors' ability to conduct impartial and thorough investigations, largely due to the miniscule number of officers who are charged for involvement in a killing, to say nothing of convictions or even indictments. This presents a dynamic where the redress and rehabilitation offered by the state in only a limited number of cases falls well short of expectations. The federal government, for its part, has employed a set of rather resource-intensive and time-consuming remedies, including separate investigations and consent decree negotiations, but broader reaching reforms are imperative in order to shift the culture of policing and counter the long-standing impunity police have enjoyed.

This is particularly clear as we see that policy changes, such as those announced to the public by the Miami Beach Police Department, are not being implemented or followed by police officers, and there is no strong mechanism to indicate that officers are being held accountable for misconduct. Those involved in killings and other instances of brutality, like Officer Mercado, remain on the force despite having a documented history of violence. The U.S. government must employ better tactics to address these major faults in the system. We simply cannot consider the few investigations cited by the government as sufficient to cure a problem of police impunity and racism that is widespread and deep in law enforcement departments across the country. Finally, money damages are not a substitute for finding justice; if officers and police departments do not see the consequences of their misconduct then there will never be an incentive to shift behavior.

Recommendations

With respect to Hernandez-Llach's case, the state should ensure:

¹⁹ *Bolts from the Blue*

²⁰ Brian M. Stewart, *Social Justice Delayed is Social Justice Denied*, @LawBlarg, Dec. 2, 2015, <http://blarg.legalmechanics.us/social-justice-delayed-denied>

- An impartial, independent investigation by the Department of Justice into the killing of Hernandez-Llach and the Miami Beach Police Department
- Full review of Officer Jorge Mercado's Internal Affairs record and recommendation for dismissal
- Transparency with the family and community about the progress of the investigations.

To address the problem of police impunity, the state should take measures for:

- Thorough review into the impartiality and soundness of investigations conducted by State Attorney Katherine Fernandez-Rundle.
- Divestment from an inflated police apparatus and investment in social services programs that deal with root causes, such as those that deal with mental illness and homelessness.
- Revision of the federal civil rights crime standard from a specific intent standard to a recklessness standard.
- Establishing a link between federal funding and compliance with best practices (in line with human rights law) regarding use of force, data collection and accountability mechanisms within police departments. If departments are found to be in grave contravention of established norms, they should have their funding docked.
- Strict decoupling of corporate interests and intermingling in policy decisions (such as use of force policy revisions).