

San Francisco Pier Shooting and Murder Prosecutions in California

There has been a lot of political debate surrounding the tragic shooting death of Kate Steinle. While walking on a pier in the Embarcadero with her father, she was killed by a bullet in the back, fired by a Mexican national with a long criminal record and without documentation to be in the United States. A number of articles are available detailing the political controversy over San Francisco's status as a sanctuary city, but there has been little analysis of the law of murder cases as it applies to the facts.

This prosecution was an uphill battle for the DA. Some DAs would not have filed murder charges. The prosecutor argued that Jose Garcia Zarate was guilty of first degree murder because he had intentionally engaged in some form of Russian Roulette. A conviction of first degree murder in this case would have required proof beyond a reasonable doubt that Garcia Zarate intended to kill Kate *and that the killing was premeditated*; that he weighed the consequences of his actions and made the decision to kill. Garcia Zarate had no motive to kill this young stranger, and the one shot that he fired bounced off the concrete pier 12 feet in front of him and traveled 78 feet to strike her. He could not have replicated that fatal ricochet if he had fired a hundred rounds instead of one.

The defense was accident. The public defender argued that Garcia Zarate found the stolen firearm wrapped in a cloth under a seat on a pier just seconds before it discharged. The jury was shown a video of a group of people gathered at that seat before Garcia Zarate arrived, and it was plausible that one of them may have left the firearm there. The gun had been stolen four days previously.

A firearms expert testified for the defense that this .40-caliber SIG Sauer P239 automatic handgun has a history of accidental discharges, even among well-trained shooters. There was no evidence Garcia Zarate had ever handled that firearm - or any other firearm - before. In the single action mode the gun has a hair trigger. It has no safety lever, making it perpetually ready for firing.

The jury heard a four-hour tape recording of the police interview with Garcia Zarate (translated from Spanish). Garcia Zarate has a second grade education, is a drug addict, and has a history of being homeless when not in jail. In his interview, he gave contradictory explanations of how the gun had fired. He was not a credible witness, but his rambling and inconsistent statement did not give the prosecution much to work with to support a first degree murder charge.

A conviction of second degree murder with the personal use of a firearm would have brought a sentence of 40 years to life - 15 for the murder plus 25 for the firearm use. This would have required proof that Garcia Zarate intentionally fired the pistol, either with the intent to kill, (without the premeditation element of first degree), *or* with the subjective determination that his actions had a high probability of resulting in death, and he was acting with a wanton disregard for human life. The jury deliberated for several days, and it is likely they were discussing second degree murder and involuntary manslaughter, the two forms of unintentional illegal homicide, as well as accident. There may have been some votes for involuntary manslaughter or even second degree murder, perhaps someday we will find that out.

By: Dana Grimes, CASD President



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If the jury had convicted Garcia Zarate of any of the forms of unlawful homicide on which they were instructed, the most likely verdict would have been involuntary manslaughter, Penal Code §192(b). This is an unintentional killing which occurs during the commission of a crime that is not an inherently dangerous felony, or committing a lawful act which might produce death, without due care. The penalty for involuntary manslaughter is 16 months, two years, or four years.

Garcia Zarate was convicted of being a felon in possession of a firearm under state law, which has a sentence range of 16 months, two years, or three years. Since this conviction, he has been indicted in federal court for being an illegal alien in possession of a firearm, and the federal statute prohibiting possession of a firearm by a felon. The maximum sentence for each of these offenses is 10 years, although the calculations of the federal sentencing guidelines will indicate a

recommended sentence of less than the maximum. When he finishes his sentence in California he will not be released in the United States, he will be held for federal authorities. When he has finished his proceedings in federal court, and has served any sentence in that case, he will be deported, for the sixth time, to Mexico.

Immediately after this shooting, various forms of federal legislation were introduced to deter illegal immigration with mandatory minimum sentences, including one which its proponents called Kate's law. However, we already have 8 U.S.C. §1326, illegal reentry after deportation. Every year, in federal courts, (especially in border districts), thousands of defendants are sentenced to prison for reentering the United States illegally after being previously deported. They need not commit a new crime; the crime is reentering or being found in the country after being deported. The United States Sentencing Guidelines

ranges in these cases are complicated and depend upon a number of factors, particularly the number and type of prior convictions. The statute dictates sentencing through a series of sentencing provisions based on defendant's prior criminal history, as follows:

A 2-year maximum if there are no prior felony convictions or less than 3 misdemeanor crimes of violence or drug trafficking convictions. 8 U.S.C. §1326(a).

A 10-year maximum if there is a felony conviction or 3 or more misdemeanor crimes of violence or drug trafficking convictions. 8 U.S.C. §1326(b)(1).

A 20-year maximum if there is any "aggravated felony" as defined in 8 U.S.C. §1101(a)(43). 8 U.S.C. §1326(b)(2).

The last time that Garcia Zarate was convicted of this in federal court, he was sentenced to almost four years in prison.

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ICE does not try to arrest and deport all law abiding undocumented immigrants, and most people, (at least in California), do not think they should. On the other hand, most people think that undocumented immigrants who are convicted of certain crimes should be deported.

The question of amnesty cities or amnesty states is a different matter. The amnesty issue is complex. The term is used to refer to a wide range of benefits, many involving the providing of public services to undocumented immigrants.

The form of amnesty that got San Francisco in trouble was its refusal to hold all inmates subject to deportation orders. Before the shooting death of Kate Steinle, Garcia Zarate was in jail in San Francisco on drug charges. He had numerous previous convictions for drug and theft related offenses, and had been deported five times. In March 2015, he finished his most recent sentence in jail in San Francisco, and he was released, in spite of a standing federal deportation order. In other words, San Francisco ignored a request from ICE to notify them before the release of Garcia Zarate. San Francisco declared itself to be a Sanctuary City

in 1989, and strengthened that stance with an ordinance in 2013. This San Francisco law declares that local authorities can not detain immigrants for federal immigration officials if the immigrant has no violent felonies on their record. Federal law calls for deportation for undocumented persons (and some other non citizens who are not undocumented) upon conviction of a number of nonviolent felonies, including offenses involving illegal drugs.

CONCLUSION

This case has been used to support unfair attacks on the criminal justice system, citing it as an example of jury nullification, which is simply a misunderstanding of that term or the facts of the case. Television pundits on both sides of the aisle have presented versions of the shooting that have been incomplete and misleading. Many prosecutors will agree upon consideration of the facts of this case, that a jury reasonably concluded that the People did not meet their burden of proving - beyond a reasonable doubt - that one ricochet shot was not fired by accident.

The tragic shooting of Kate Steinle has also been used by people who want to eliminate all aspects of amnesty cities, want to deport all undocumented immigrants, or want to build a wall. A careful analysis of the facts shows that this unusual case is perhaps not the best anecdotal support for those concepts, since federal laws already exist which would have held then imprisoned Garcia Zarate for years, had those laws been followed. When San Francisco city council members decided to revise the list of deportable federal felonies with a city ordinance, they created a risk that at least one of the people who would be released by that action would cause some sort of trouble, thereby greatly imperiling less controversial amnesty city goals, such as providing education and other public services to undocumented noncriminal immigrants. **TBN**

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