

# Appeals court revives lawsuit over controversial 2015 SDPD shooting in Midway

<https://www.sandiegouniontribune.com/news/courts/story/2019-07-11/appeals-court-revices-lawsuit-over-controversial-2015-sdpd-shooting-in-midway>

The 9th U.S. Circuit Court of Appeals said the suit filed by family of Fridoon Nehad should not have been dismissed because of questions over whether the shooting was justified. The ruling also opens the way to explore how SDPD handles reviews of police shootings.

By **GREG MORAN**, JULY 11, 2019, 6:12 PM

A federal appeals court on Thursday revived a civil rights lawsuit filed by the family of a man killed by a San Diego police officer in a controversial 2015 shooting incident in the Midway District — a sweeping ruling that sets the stage for a trial and a potential examination of how the department has investigated police shootings over the years.

[The decision by a three-judge panel](#) of the 9th U.S. Circuit Court of Appeals came in the case of Fridoon Nehad, a 42-year-old man who was shot to death in an alley by veteran San Diego Police Officer Neal Browder [just after midnight April 30, 2015](#). Browder said he believed Nehad had a knife, but he turned out to be unarmed — carrying only a blue pen in his hand.

Both the San Diego County District Attorney and police eventually concluded the shooting was justified and within use-of-force policy.

Nehad's family sued, however, contending that Browder made several mistakes, including creating a tactically unsafe environment from the start, and arguing that Nehad posed no reasonable threat when he was shot. The investigation found that Nehad was about 17 feet away when the shooting occurred, which the family said was more than enough space for the officer to have used other, less-than-lethal device.

U.S. District Court Judge William Q. Hayes dismissed the entire suit in December 2017, concluding that because Browder believed Nehad was armed and posed an immediate threat to his life, the officer's actions were reasonable under the law.

But on Thursday the appeals court firmly rejected that finding in a 31-page ruling that detailed several areas where there is a factual dispute over Browder's actions.

Following the legal standard of examining the evidence at this stage of a suit in a way that is most beneficial to the plaintiff, Judge Dean Pregerson said a “rational trier of fact could find that Browder’s use of force was objectively unreasonable.”

In addition to questioning Browder’s actions the court reinstated a broader claim made by Nehad’s family: that San Diego police have a history of lax investigations of shootings by officers, not disciplining officers and “whitewashing” police shooting incidents.

That claim widens the potential scope of the suit, from focusing just on Browder to implicating the city and its practices — potentially escalating any monetary award and possibly spurring changes to how the city handles such instances internally in the future.

A spokeswoman for the City Attorney’s Office said lawyers were reviewing the ruling and will determine later with city officials on how to proceed.

**Daniel Miller, the lawyer for the Nehad family, welcomed the ruling. “We are pleased with the Ninth Circuit’s thoughtful opinion and we very much look forward to trial so that Fridoon’s family can finally get justice,” he said in a statement.**

The appeals court said there were questions about Browder’s credibility and his accounts of the event, whether Nehad actually posed a threat, and if Browder had given any commands or could have used a variety of less-lethal options. In each of those instances the court said a jury could decide what Browder did was not reasonable.

The encounter between Nehad, a 42-year-old with a history of mental illness, lasted all of 33 seconds. While Browder failed to turn on his body camera, the incident was captured by a security camera for a nearby business.

Browder was responding to a call from an adult bookstore worker who reported a man threatening people with a knife. Browder pulled into a nearby alley, using his patrol car spotlight but not turning on his police lights. He later said he saw a couple of civilians and another man who turned out to be Nehad. He confirmed Nehad’s description with dispatchers, and then got out of the car.

The video shows that Nehad slowly walked toward the officer and the car. Browder already had his gun pulled. The officer said he didn’t remember shouting any commands at Nehad though two witnesses reported that he did.

Within five seconds of getting out of his patrol car, Browder fired on Nehad hitting him in the chest. Video shows him immediately sprinting down the alley to Nehad, who was prone on the ground.

The appeals court noted that three hours after the shooting Browder told investigators he did not see any weapons. But when he was formally interviewed — five days after the shooting and after reviewing the video with his attorney multiple times — he told police investigators he thought Nehad had a knife and was “aggressing” him, and he felt he would be stabbed.

“These possible inconsistencies, along with video, eyewitness, and expert evidence that belies Browder’s claim that Nehad was ‘aggressing,’ are sufficient to give rise to genuine doubts about Browder’s credibility,” Pregerson wrote.

The court said it was also a question for a jury to decide if Browder mistook a pen in Nehad’s hand for a knife. A police practices expert hired by Nehad’s family said officers are trained to make such a distinction.

The court also rejected city arguments that Browder had to make a split-second decision, saying that said Browder could be seen as making the situation worse. Pregerson said Browder never identified himself as a police officer and didn’t give any commands or warnings to Nehad. That, the judge wrote, could lead a jury to conclude “any sense of urgency was of Browder’s own making.”

The Nehad family got [access to internal police records of 20 shootings](#) both fatal and non-fatal between 2013 and 2015 and hired a police practices expert to review them. The expert, Roger Clark, concluded that 75 percent of the shootings were avoidable and an unnecessary use of force. Clark said that the investigations into those shootings by both homicide detectives and Internal Affairs were inadequate, with “an evident bias in favor of the shooting officer.”

While the district court judge in San Diego rejected that claim, the appeals court saw it differently. The higher court determined that the analysis by Clark, the fact that Browder was not disciplined and other evidence developed by the family raises enough questions about whether the department “looks the other way when officers use lethal force”. That is enough to keep the allegation alive for a jury to decide, the court said.

**Miller said that finding was crucial. “This opinion also calls into question the SDPD’s history of looking the other way when officers use unnecessary lethal force,” he said. “It leads to a dangerous culture that allows officers to shoot**

**people with impunity.”**

The city could ask for a larger panel of the court to review the decision. If not, the case will be sent back to San Diego for a possible trial.

The key issue at the trial would focus on Browder’s decision to fire. A new state law authored by San Diego Assemblywoman Shirley Weber expected to be signed by Gov. Gavin Newsom would change the standard under state law for when police can use deadly force.

Previously the law said officers can use deadly force when it is “objectively reasonable” to protect public safety, but Weber’s bill says lethal force can be used only when “necessary.” That change will not impact the Nehad suit, however, because it is in federal court and will be decided under federal law.