

REPORT ON THE OFFICER-INVOLVED SHOOTING DEATH OF  
NICHOLAS FLUSCHE ON MAY 3, 2017



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## **TABLE OF CONTENTS**

I. INTRODUCTION .....	2
II. FACTUAL SUMMARY .....	3
III. LEGAL STANDARD .....	9
IV. LEGAL ANALYSIS .....	9
V. CONCLUSION .....	10

## **I. INTRODUCTION**

The San Francisco District Attorney's Office (SFDA) has completed its review of the officer-involved shooting that resulted in the death of Nicholas Flusche on May 3, 2017. The SFDA's review was conducted by the office's Independent Investigations Bureau (IIB) and focused exclusively on determining whether criminal charges relating to the officers' conduct are warranted. IIB's review did not examine issues such as officers' compliance with internal SFPD policies and procedures, their training or tactics, or any issues related to civil liability. This report should not be interpreted as expressing any opinions on such non-criminal matters.

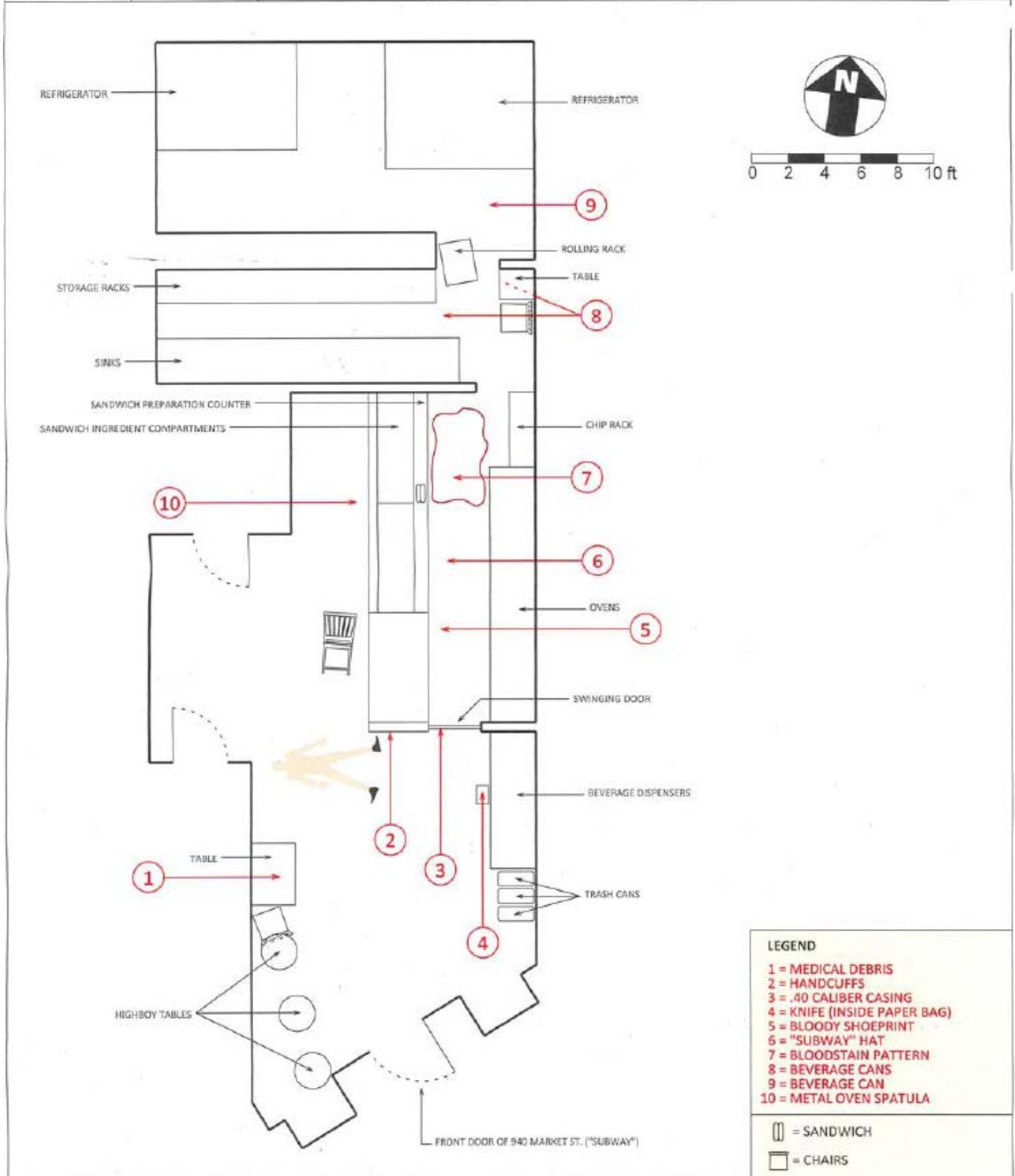
In brief, on May 3, 2017, San Francisco Police Department (SFPD) Officers Jordan Cagonot (Star No. 2023) and Kenneth Cha (Star No. 1206) responded to a Subway restaurant where Flusche was attacking an employee, including stabbing him with a knife multiple times. The officers immediately ordered Flusche to "get on the ground" several times. Flusche did not comply. Instead, Flusche, wielding a knife, chased the bloody and visibly wounded employee who had managed to briefly escape Flusche. As Flusche neared the employee, Officer Cha fired one shot. Flusche died on scene from his gunshot wound. As detailed below, all available evidence supports the conclusion that Officer Cha's actions were taken in defense of another individual. The District Attorney, therefore, declines to pursue criminal charges in this matter.

## **II. FACTUAL SUMMARY**

### **A. The May 3, 2017 Incident**

The primary sources of evidence in this matter are the restaurant surveillance video (which did not capture audio), witness accounts, officer statements, and dispatch recordings. The incident occurred at approximately 11:20 a.m. at a Subway restaurant located at 940 Market Street. At this location, customers walk to the back of the store where they custom-order their sandwiches. An employee, who assists customers from behind the counter, takes the order and assembles the sandwich. *See* Figs. 1a and 1b. The area behind the counter is employee-only and is accessible by a swinging half-door.

CASE 170-362-512	INCIDENT OIS	DATE 5/3/2017	LOCATION 940 MARKET ST. ("SUBWAY")	DRAWN BY SGT. SHANAHAN #1818
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**Fig. 1a:** Crime scene sketch of the Subway restaurant at 940 Market Street. (Source: SFPD Crime Scene Investigations (CSI)).



**Fig.1b:** Interior of the restaurant from the entrance. The counter is in the center, with the customer-side on the left and the employee-side on the right. The red circle denotes a swinging half-door that leads to the employee area. (Source: SFPD CSI).

The surveillance video system shows Flusche entered the restaurant at around 11:10 a.m. to order a sandwich. Once it was made, Flusche said he had no money and demanded the sandwich for free. The employee refused and placed the sandwich on the back counter. Flusche continued to linger in the restaurant for approximately ten minutes, during which time other customers filtered in and out. Flusche attempted to unlock the swinging door that led to the employee area behind the counter, but the employee pushed him away and told him he was trespassing. The employee then closed and latched the door.

While the employee was attending to another customer, Flusche attempted again - this time successfully - to enter the space behind the counter. Flusche headed directly towards the employee, pushing him to the back wall away from the swinging door. The surveillance video shows the employee crouched down on the ground, with his arms covering his face, as Flusche kicked and punched him. At some point during the attack, the employee reported that Flusche grabbed a Subway knife and began stabbing him with it. See Fig. 2.



**Fig. 2:** *The knife recovered at the scene by SFPD. (Source: SFPD CSI).*

Several civilians attempted to intervene and stop Flusche's attack of the employee. Three women were present in the restaurant when it began, and all of them attempted to aid the employee in some manner. One woman, who said she feared Flusche was going to kill the employee, entered the back area almost immediately, where she hit and kicked Flusche. She later grabbed a Subway oven paddle and repeatedly hit Flusche with it. None of her actions appeared to affect Flusche. The other two women, who worked with each other, reported that they yelled at Flusche to stop. One of them said she dialed 9-1-1 but her call was directed to a recording. The two coworkers left the restaurant to look for help. The surveillance video shows that an African-American man and a young African-American man with a backpack enter the restaurant mid-assault, and both of them threw objects at Flusche. Flusche appeared to ignore them, too, and continued to strike the employee.

Surveillance video shows that almost two minutes after Flusche began assaulting the employee, Kevin Ramsey entered the restaurant.<sup>1</sup> Ramsey said he heard one of the female coworkers screaming for help outside the Subway restaurant. When Ramsey saw Flusche stabbing the employee with a knife, he rushed behind the counter and grabbed Flusche's right hand in an attempt to disarm him.

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<sup>1</sup> IIB does not typically identify civilian witnesses by their full names unless that witness has been identified by reputable media outlets and/or has otherwise self-identified in connection with the incident under investigation. In such instances, that person's full name will be used to minimize confusion and to allow meaningful comparison of publicly available accounts with SFDA's investigative findings. Here, Kevin Ramsey is identified by his full name because he provided a statement to the media regarding this incident.

Surveillance video shows that less than ten seconds later, Officers Cha and Cagonot entered the restaurant. They were in full uniform with their SFPD patches, badges, and duty belts visible. The officers reported that they were parking their marked police vehicle to respond to a vandalism call at a nearby business when the two female coworkers flagged them down and told them to go to Subway. Officer Cha told investigators that when he looked through the front door and saw the “bloody” employee, he immediately radioed, “Code 33.” (This code indicates that the radio channel should be held open with only emergency calls broadcasted over it.). He then entered and stood by the swinging door with his firearm raised and pointed. Officer Cagonot stood by the Subway entrance to Officer Cha’s left, his firearm also raised and pointed.

Officer Cha ordered everyone to “get on the ground” but Flusche did not comply and continued to assault the employee. Officer Cha said he repeated his command to get on the ground, which, as discussed later, is confirmed by radio recordings. The three men – the employee, Ramsey, and Flusche - then left the employee area behind the counter, exiting through the swinging door by Officer Cha. Surveillance video shows that Ramsey physically held back Flusche so that the employee could escape. Ramsey then exited, followed by Flusche.

Upon leaving the back counter area, the employee went around the corner of the counter and stood by the front counter register, blood streaming down his face, while Ramsey dove to the ground. Flusche, however, followed the employee, with the knife in his right hand. *See Fig. 3.*



**Fig. 3:** *Flusche chasing the employee, moments before Officer Cha fired his gun. The employee is partially visible on the far left, while Flusche is in the center and Officer Cha is on the right. (Source: Officer Cagonot’s body-worn camera).*



Officer Cha reported that when he saw Flusche go “right after” the employee, he warned Flusche at least twice to “drop the weapon or I’ll shoot.” When Flusche was within arm’s reach of the employee and facing the employee, Officer Cha—who was directly behind Flusche—shot him once in the back. *See* Fig. 4. Flusche fell to the ground, grabbed a chair, and tried to throw it in the employee’s direction.



**Fig. 4:** *Flusche with a knife in his right hand, moments after Officer Cha fired his weapon. (Source: Subway surveillance video).*

Officer Cagonot said he did not fire his weapon because he did not have a clear shot. Both officers described giving multiple commands to Flusche before Officer Cha fired his weapon. Dispatch recordings confirm this. According to the dispatch recordings, the officers called in the scene at Subway at 11:21 a.m. Less than ten seconds later, Officer Cha yelled, “On the ground! Or I’ll shoot! Get on the ground or I’ll shoot! Get on the ground!” After a brief pause, Officer Cha repeated, “Get on the ground! Get on the ground!” and then announced, “Shots fired! Shots fired!” Overall, less than a minute elapsed from when the officers arrived on scene to when Officer Cha had announced “shots fired.”

Both officers said they believed the employee’s life was in danger – a belief the employee shared. The employee said that when he saw Flusche advancing towards him, Officer Cha was his “only hope.” The civilian witnesses who saw Flusche’s assault also echoed the viewpoint that the employee’s life was in danger. The two female coworkers, who did not re-



enter the restaurant after the officers arrived, said they feared Flusche was going to kill the employee. Similarly, an African-American man—who entered the restaurant during the attack and was present for the use of lethal force—opined that the officers gave Flusche “more than fair warning” and they “did what they had to do under the circumstances.” He reported that the officers “did not do anything wrong in this scenario.”

### **B. Body-Worn Camera**

SFPD officers are equipped with body-worn cameras. The body-worn camera does not continuously record; each officer must activate it to begin recording. Once activated, the camera retains the 30 seconds of video (but not audio) footage prior to activation and records until the officer turns it off.

Officer Cha’s camera was not activated in time to capture any of the shooting. Officer Cagonot’s camera captured the shooting but it did not record audio until after the shooting had occurred. Because Officer Cagonot’s camera is not a bird’s eye view like the Subway surveillance video, it captures: (1) how close Officer Cha was to the employee and Flusche as they left the area behind the counter; and (2) how close Flusche was to the employee when Officer Cha shot. *See Fig. 3.*

### **C. Autopsy Report**

The autopsy report indicates the cause of death was a single gunshot wound to the back. The toxicology report specifies that Flusche had cannabinoids in his blood, at a level of 35 ng/mL. Dr. Luke Rodda, director and chief forensic toxicologist for the City and County of San Francisco, explained that Flusche was not considered to have been under the influence, meaning the cannabinoids in his system would not have impaired his judgement or behavior.

### **D. Flusche’s Background**

The investigation revealed additional, pertinent information about Flusche’s background. Flusche moved to San Francisco from San Antonio, Texas, and was homeless at the time of the incident. Flusche had worked at a restaurant for approximately one month in the fall of 2016, and his supervisor reported that although Flusche initially appeared to be intelligent and nice, he subsequently appeared to be “unstable.” She recalled an incident where Flusche appeared to hallucinate as he commented “all answers are in math.”

Approximately six months before the incident, SFPD Officer Michael Amoroso (Star No. 606) and another officer were dispatched to a San Francisco fire station on a report of a “mentally disturbed person.” Upon arrival, Flusche fought with the officers and firefighters. Noting that Flusche was “unnaturally strong,” Officer Amoroso reported that it took the “assistance of five firefighters” to restrain Flusche, who twisted Officer Amoroso’s left thumb, causing pain.

### **III. LEGAL STANDARD**

The question presented is whether Officer Cha committed a criminal act in shooting and killing Flusche. Possible criminal charges against an officer involved in a fatal shooting include murder and voluntary manslaughter. In order to charge an officer with any of these crimes, the prosecutor must be satisfied that the evidence will show beyond a reasonable doubt that no legal justifications existed for the officer's actions. When an act is legally justified, a person is not criminally liable even though the act would otherwise constitute a crime. Here, the relevant legal justification offered by Officer Cha is that he was acting in self-defense and/or in defense of others.

California law permits any individual to use deadly force “[w]hen resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.” Cal. Pen. Code, § 197; *see also Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333. Specifically, self-defense or defense of others serves as a complete defense to murder and to voluntary manslaughter so long as the officer (1) subjectively believed in the need to resort to force in order to avert a threat of imminent and great bodily injury, and (2) his perceptions and actions were objectively reasonable under the circumstances. *See People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Viramontes* (2001) 93 Cal. App. 4<sup>th</sup> 1256, 1262.

The subjective prong of the self-defense standard examines the person's belief in the need to use force. The objective component of self-defense asks what a reasonable person would have done in the officer's position. The reasonable person is an abstract individual of ordinary mental and physical capacity who is as prudent and careful as any situation would require him to be. *People v. Humphrey* (1996) 13 Cal.4th at 1083. In making the determination as to whether an officer's conduct was objectively reasonable, one must consider all the “facts and circumstances . . . in determining whether the defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety.” *Id.* This includes any prior assaults on known threats. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1188-89. Self-defense law “grants a reasonable margin within which one may err on the side of his own safety, and so long as he is found to have done so reasonably, no abuse of the right of self-defense should be found to have occurred.” *People v. Ross* (2007) 155 Cal.App.4th 1033, 1057.

### **IV. LEGAL ANALYSIS**

Here, the subjective prong is met. Officer Cha articulated his opinion that the employee was in imminent danger of great bodily harm. The question turns on whether his belief was objectively reasonable. For the reasons explained below, we cannot prove beyond a reasonable doubt that it was not.

Moments before Officer Cha used lethal force, Flusche, wielding a knife, persisted in pursuing the bloody, injured employee whom he had just brutally attacked for almost two minutes. All prior less-than-lethal attempts to disarm Flusche failed. Specifically, several civilians verbally yelled at Flusche to stop attacking the employee; one civilian woman kicked and hit him with an oven paddle several times; at least three civilians threw objects at Flusche in an attempt to stop him; and Ramsey physically inserted himself between Flusche and the employee. Despite all these attempts, when the officers arrived and gave verbal commands—

including pointing guns at Flusche and warning him twice that he would be shot if he did get down—Flusche continued to chase the employee with a knife. When Flusche was within several feet of the visibly wounded and bleeding employee, Officer Cha shot Flusche once.

Importantly, not a single civilian witness disputed the necessity of the police actions. Rather, many of them echoed the officers' belief that Flusche was going to kill the employee. The employee himself opined that he thought Flusche was going to kill him, and described Officer Cha as his "only hope." Similarly, another civilian (the African-American man who was present for the shooting) believed that the officers did everything they could and they had no choice but to use lethal force.

That Officer Cha's belief was not unreasonable is perhaps best captured by Flusche's actions *after* being shot – namely, even after he fell to the ground and was bleeding from a fatal gunshot wound, Flusche still picked up a chair and tried to throw it at the employee. Because Flusche was singularly focused on attacking the employee, because he had already inflicted significant bodily harm on the employee, and because no less-than-lethal measures deterred him, we cannot prove beyond a reasonable doubt that it was objectively unreasonable for Officer Cha to believe that the employee was in imminent danger of great bodily harm.

## V. CONCLUSION

For the reasons discussed above, we conclude that evidence supports the conclusion that Officer Cha acted in defense of another individual when he discharged his weapon on May 3, 2017. Therefore, the District Attorney declines to file any criminal charges in this matter