

REPORT ON THE OFFICER-INVOLVED SHOOTING DEATH OF  
NICHOLAS MCWHERTER ON OCTOBER 14, 2016



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## **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 McWherter near Stern Grove in San Francisco, California on the evening of October 14, 2016. 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.

The investigation revealed that SFPD officers initially responded to Lakeshore Plaza after receiving multiple 911 calls regarding McWherter's erratic and violent behavior. When officers responded and tried to stop McWherter as he ran from the Lakeshore Plaza parking lot, he pulled out a .22 caliber revolver and shot Officer Kevin Downs in the head from a distance of approximately 12 feet. A manhunt for McWherter ensued, and about an hour later, McWherter fired multiple shots at Officer Paul Dominguez near Stern Grove. Officer Dominguez and Officer Nathan Chew returned fire, injuring McWherter. Despite being ordered to drop his weapon, McWherter refused to do so. A tactical team using bulletproof shields eventually arrested McWherter without firing additional shots and recovered McWherter's gun, which was still in his possession. Ballistics analysis confirmed that McWherter used the same gun at both shooting incidents. McWherter was taken to San Francisco General Hospital, where he died two days later.

The investigation also revealed that McWherter had a reported history of mental health issues that appeared to be worsening leading up to this incident. Indeed, on September 15, 2016, just two weeks before this incident, the Pacifica Police Department issued a written warning to its patrol officers about McWherter's potential for violence and his reported mental health issues. The following day, on September 16, McWherter legally purchased the firearm used in this incident.

As discussed in further detail below, all available evidence supports the conclusion that Officers Dominguez and Chew acted in self-defense and in defense of others when they fired their weapons at McWherter. Under California law, the officers were justified in using deadly force because they faced an imminent danger to themselves and to others. Accordingly, the District Attorney declines to file any criminal charges in this matter.

## **II. SUMMARY OF INVESTIGATION**

This summary is based on eyewitness interviews and other evidence obtained and analyzed from the investigation. This incident unfolded across three main locations: 1) at Lakeshore Plaza, a shopping center located on Sloat Boulevard; 2) on Everglade Drive where McWherter shot Officer Downs; and 3) on 28<sup>th</sup> Avenue near Stern Grove where McWherter was fatally injured.



*Figure 1: Overview of Key Locations and Times*

## **A. LAKESHORE PLAZA**

The first reported interactions involving McWherter on October 14, 2016, occurred at Lakeshore Plaza located on Sloat Boulevard.<sup>1</sup> At approximately 7:30 p.m., Zion S., a contract security guard, was working at Lucky's Supermarket when a store employee requested assistance with a "guy acting strange." Zion S. spoke with customers Brandon D., his wife, and their minor child, each of whom reported that McWherter had poked Brandon D. with his finger and told him "tag you're it" before quickly leaving the store.

After speaking with the family, Zion S. exited the store and saw McWherter doing "karate" moves with his arms. After seeing McWherter "flinch" at an unidentified customer, Zion S. decided to call the police. At 8:06 p.m., SFPD received a 911 call reporting a "mentally disturbed" man threatening customers at Lakeshore Plaza. The man was described as a white male, approximately 5 feet 6 inches tall, wearing a white jacket and blue jeans and carrying a black backpack.

Eric Q., another security guard working at Lakeshore Plaza, later saw McWherter standing by the stairs near the Petco store fidgeting with his hands and throwing punches in the air. Shortly thereafter, Eric Q. received a call from Jeff L., the Big 5 store manager, telling him that McWherter was causing a disturbance inside the store because Jeff L. refused to sell him a knife due to his erratic behavior. Eric Q. approached McWherter as he was standing by the Big 5 counter and asked him to leave. In response, McWherter took a fighting stance and tried to kick Eric Q. While this was occurring, Jeff L. called 911.

McWherter left the Big 5 store with Eric Q. following him. Once outside, McWherter turned around and told Eric Q., "Police are going to take a while to come here...I'm going to fuck you up," and proceeded to charge at him. McWherter was approximately one to two feet away when Eric Q. sprayed McWherter with pepper spray. McWherter immediately jumped back and started swearing and rubbing his eyes. At that moment, Eric Q. saw two police vehicles driving into the parking lot from Ocean Avenue as McWherter fled on foot.

## **B. EVERGLADE DRIVE**

At approximately 8:13 p.m., two marked SFPD police cars, one with Officers Kevin Downs (Star No. 2026) and James Sayasane (Star No. 312) and Cadet Hunter Padilla (Star No. 719), and another with Officers Kevin Brady (Star No. 4258) and Mathew Nazar (Star No. 2093), drove into the Lakeshore Plaza parking lot along Havenside Drive. All SFPD personnel were in uniform. Eric Q. pointed to McWherter, who was running from the parking lot, and told Officers Downs and Brady, the drivers of the police vehicles, "That's the guy." The responding officers and the cadet observed McWherter, with a black messenger bag and wearing a gray hooded sweatshirt, jogging away from the parking lot. The two police cars turned around and accelerated east on Ocean Avenue toward McWherter with their emergency lights on.

McWherter was running on the sidewalk down Everglade Drive towards Sloat Boulevard. Officer Downs decided to drive past him in an attempt to cut him off with his patrol car. When

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<sup>1</sup> The Big 5 Sporting Goods and the Lucky's Supermarket where the initial civilian contacts with McWherter occurred are located in the Lakeshore Plaza.

Officer Downs stopped the car and exited, he was standing next to a silver 2005 Honda Accord occupied by Peter Y.

McWherter approached Officer Downs and was approximately 12 feet away. Officer Downs stated that he took one or two steps from his vehicle before he heard three shots and saw a muzzle flash. He felt a gunshot hit the top of his head, which he said felt “like someone hit me over the head with a baseball bat,” and immediately fell to the ground. Officer Downs attempted to get up and unholster his weapon but could not because he experienced paralysis on the right side of his body. Officer Downs felt blood running down his face and head but remained conscious as he watched McWherter run away. He could not see McWherter’s gun in his hand because it was dark outside and the street was poorly lit.

Officer Sayasane heard the gunshots in close proximity and saw McWherter running when he heard Officer Downs yell, “I’ve been shot. I’ve been hit.” Officer Sayasane ran to Officer Downs, who was behind the Honda bleeding from the top of his head, and attempted to help him.

Officers Brady and Nazar saw McWherter running as he fired but they did not see the gun because it was dark. They chased after McWherter as he crossed Sloat Boulevard and jumped over a residential fence but stopped after hearing Officer Downs say he had been shot. Officer Nazar immediately ran to his police vehicle to retrieve his personal medical kit and returned with gauze, which he used to wipe blood off of Officer Downs’ face. The initial radio calls reporting shots fired occurred approximately 90 seconds after the officers’ initial arrival to Lakeshore Plaza.

Cadet Padilla,<sup>2</sup> who was unarmed, immediately ducked for cover once he heard shots and did not know an officer was hit until he heard the radio call. Peter Y., the occupant of a Honda Accord parked nearby, heard a single gunshot and saw one of the two officers run back to the police vehicle. He did not see a muzzle flash and did not know what the officers did in response to the shot.

No SFPD officer fired during this part of the incident. Officer Downs was transported to San Francisco General Hospital (SFGH) by San Francisco Fire Department (SFFD) Medic No. 57, where he received medical attention for his gunshot wound.

Numerous officers responded to the scene and established a perimeter around Stern Grove by 8:32 p.m. Officers from SFPD’s Crime Scene Investigations Unit (CSI) analyzed the scene and identified blood stains on the pavement between Peter Y.’s parked Honda and Officer Downs’ police vehicle and on the Honda’s right rear bumper. CSI Officer Gordon Shyy (Star No. 2416) discovered a bullet hole on the Honda’s left rear panel and impounded the car as evidence.

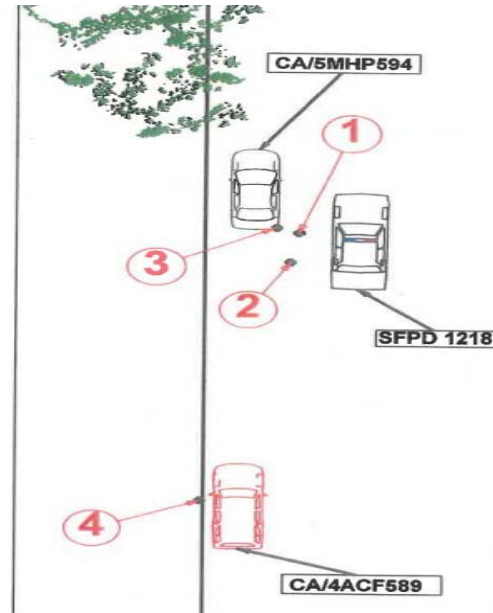
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<sup>2</sup> SFPD Cadets are unsworn and unarmed. The cadet program exists in part to “expose men and women to the various aspects of police work in order to prepare them for a career in law enforcement.” See <http://sanfranciscopolice.org/san-francisco-police-cadet-program>



## Lakeshore Plaza

Item #1 Blood stain on roadway  
Item #2 Plastic bottle with chewed tobacco  
Item #3 Blood stain on vehicle  
Item #4 Giants hat



**Figure 2:** Excerpt of CSI Diagram from Lakeshore Plaza/Everglade Drive. SFPD 1218 is the vehicle driven by Officer Downs; the vehicle next to it is Peter Y.'s Honda Accord. Both vehicles are located on Everglade Drive. (Source: CSI)



**Figure 3:** Photo of Officer Downs' Patrol Vehicle and Peter Y.'s Honda Accord (Source: CSI)

While officers searched for McWherter, a surveillance camera from 1712 Wawona Street captured a person matching the shooter's description running past a home near Stern Grove at approximately 9:13 p.m. This person was wearing a light colored hooded sweatshirt with the hood up and a messenger bag slung across the left shoulder.<sup>3</sup>

### **C. 28TH AVENUE NEAR STERN GROVE**

Officers Paul Dominguez (Star No. 2212), Nathan Chew (Star No. 2088), and Jim Trail (Star No. 921) were at the Ingleside police station preparing to end their shift when they heard an emergency call announcing "officer down." The three officers rushed out of the station and responded to the scene searching for a suspect described as a white male, 20 to 30 years old, wearing a gray hoodie and blue jeans.<sup>4</sup>

They arrived at the intersection of Sloat Boulevard and Sunset Avenue and relocated to Stern Grove Park near 28<sup>th</sup> Avenue and Vicente Street. While Officers Dominguez and Chew were walking through the park, Officer Trail contacted the occupants at the nearby San Francisco Child Protective Center.

Officers Dominguez and Chew heard an officer announce over the radio that a person was running away from them on Wawona Street. Officer Dominguez checked his phone for the location and discovered it was nearby, so he and Officer Chew moved toward what they believed would be the person's path.



***Figure 4: Photo of Location Where Officers Arrested McWherter. Source: CSI.***

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<sup>3</sup> Investigators obtained this video after the shooting occurred.

<sup>4</sup> Officers Dominguez and Chew did not have body-worn cameras during the incident because they had already turned in their cameras as their shift was ending when the emergency call was broadcast. Given the emergency, they rushed out of the station without checking out cameras.



As Officers Dominguez and Chew moved to the end of the paved roadway on 28<sup>th</sup> Avenue, they heard branches breaking. Moments later, McWherter appeared from behind the bushes and proceeded to walk north along the fence line. As Officer Dominguez illuminated him with his flashlight, McWherter raised his right arm and fired three to five rounds toward Officer Dominguez from approximately 15 to 20 feet away. Officer Dominguez saw a muzzle flash and returned fire, shooting anywhere between five to more than 10 rounds. He saw McWherter fall to the ground but was unsure if he had hit him with any shots. Officer Dominguez dropped to one knee and reloaded his weapon. Once he stood back up, Officer Dominguez saw McWherter, “kind of like sit up and kind of threw his body over the right side of himself and now he’s-he’s facing me so his legs-his legs facing towards me this direction.”

Officer Chew, who was standing approximately 15 to 20 feet to Officer Dominguez’s left, did not see muzzle flashes but heard shots close by. He immediately ducked and circled to a large bush to take cover. Officer Chew saw Officer Dominguez, who was standing to Officer Chew’s left, exchange his gun magazine. Officer Dominguez yelled to Officer Chew, “He’s got a gun in his hand...he won’t drop it.” Both officers shouted verbal commands to drop the gun and radioed that shots had been fired. According to the radio dispatch report, that call occurred at 9:16 p.m.

Officer Dominguez continued yelling, “Put your hands up, put your hands up.” McWherter instead raised his gun in Officer Dominguez’s direction. In response, and in fear for his life, Officer Dominguez shot two or three rounds. Officer Chew, fearing for both his and Officer Dominguez’s life, fired three to four rounds. Enrique S., a civilian who was inside the business located at 2819 28<sup>th</sup> Avenue, reported that he saw an unidentified uniformed police officer pointing his handgun in the direction of where McWherter was eventually apprehended. Enrique S. heard at least one command of “Put your hands up,” followed by at least three gunshots.

Officer Dominguez continued to order McWherter to put his hands up, but McWherter continued to hold his gun while turning his head from side to side. Moments later, Officer Chew grabbed Officer Dominguez by the collar and moved him to an area behind where officers with rifles had positioned. There, Officer Dominguez told Officer Chew he believed he had been shot; however, he quickly realized that he had escaped without being shot.

Multiple officers and police cars surrounded McWherter, who was on his back with a gun on his chest. McWherter was moving his arms around and rubbing his face but was ignoring the officers’ commands to drop the gun. At 9:28 and 9:31 p.m., officers used flashbang devices in an attempt to get McWherter, who was still holding the gun and moving, to comply. At approximately 9:39 p.m., SFPD officers approached McWherter with bulletproof shields and arrested him.

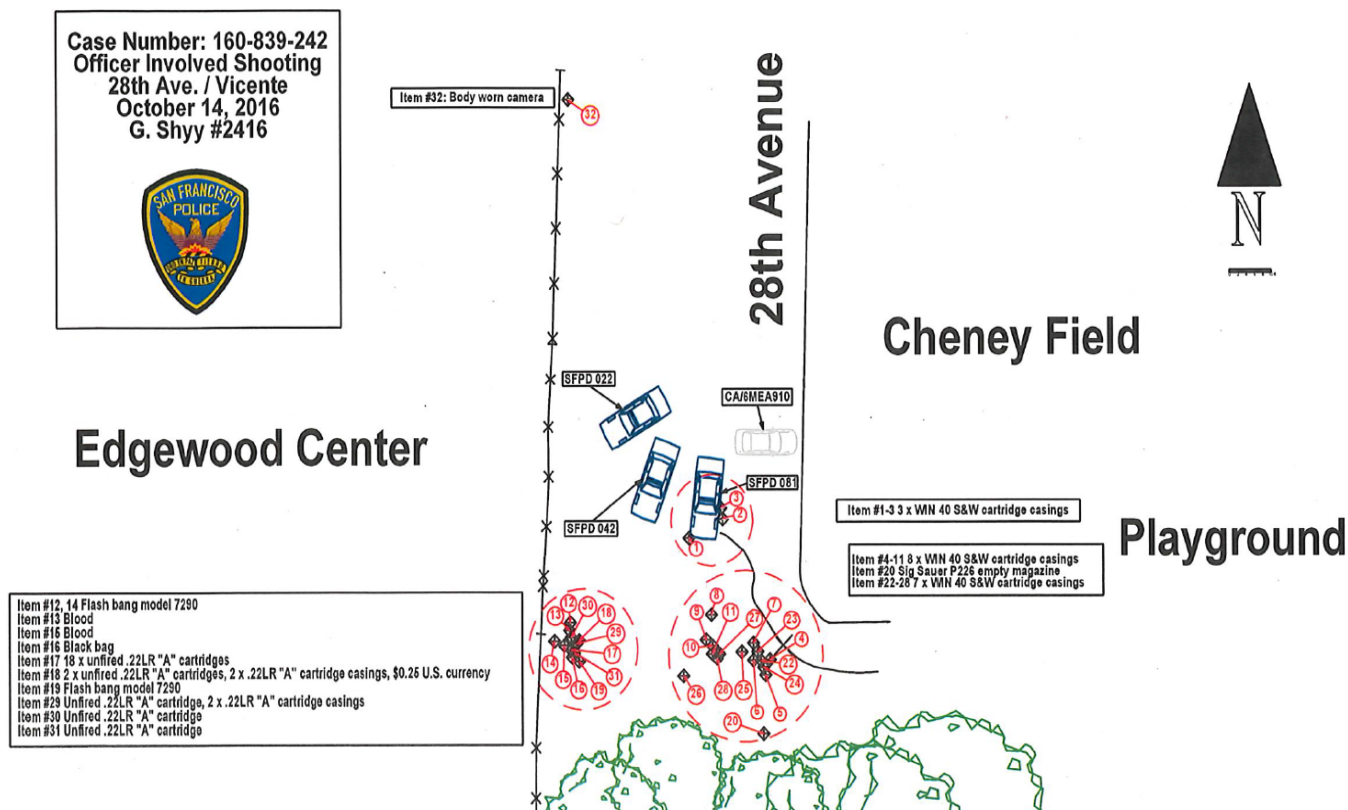
A loaded .22 caliber revolver, later determined to be registered to McWherter, was recovered next to him and secured into evidence. SFPD Officer Brian Cranna (Star No. 177) examined McWherter’s Ruger .22 caliber handgun and found the six-round cylinder open with two spent casings and one live round inside. The rounds were not in sequential order in the cylinder and one of the spent casings was sticking out.

McWherter was taken to San Francisco General Hospital, where he was pronounced dead two days later on October 16, 2016, at approximately 3:16 p.m.

#### D. CRIME SCENE INVESTIGATION

After McWherter was arrested and transported to the hospital, CSI Officer Dennis Rodelas (Star No. 729) documented the crime scene in the below diagram. Three unoccupied marked SFPD police vehicles (Nos. 081, 042, and 022) were parked at the end of the paved roadway with their headlights and spotlights illuminating the wooded area. Next to vehicle 081, Officer Rodelas noted one .40 caliber casing next to the right front wheel and two more next to the opened driver's door. Fifteen expended .40 caliber casings (Items 4-11 and 22-28) and an empty Sig Sauer P226 magazine (Item 20) were found near vehicle 081. Officers Dominguez and Chew both fired .40 caliber handguns during the incident.

Officer Rodelas also found 22 unfired .22 caliber rounds, five .22 caliber cartridge casings, two blood pooling areas located near each other, and three expended flashbangs in the area where McWherter was arrested. SFPD also recovered a black backpack. CSI Officer Glenn Juco (Star No. 4121) later collected a lead fragment and a copper jacket fragment from the trunk of Peter Y.'s Honda. The SFPD's Forensics Unit analyzed the fragments and determined that they were fired from McWherter's revolver.



**Figure 5:** Diagram of shootout scene near 28<sup>th</sup> Avenue. The larger red circle indicates where McWherter was arrested and where numerous .22 caliber cartridges and casings were recovered. (Source: CSI).

CSI also responded to San Francisco General Hospital and collected gunshot residue from both of McWherter's hands.

**E. MEDICAL EXAMINER'S FINDINGS AND SFPD FORENSIC INVESTIGATION**

On October 17, 2016, Assistant Medical Examiner Dr. Harminder Narula conducted an autopsy and determined that McWherter's cause of death was a gunshot wound to his head. McWherter also had gunshot wounds to the right knee and left buttock and a grazing wound to the left knee. No soot or gunpowder stippling was found, indicating that the gunshots were not fired from very close range.

The toxicology test revealed no substance, other than caffeine, in McWherter's system.

The Medical Examiner recovered gunshot and bullet jacket fragments during the autopsy that were provided to the SFPD Forensic Services Division, which conducted a forensic analysis of the fragments and jackets. This analysis determined that the shots to McWherter's head and right knee were fired from Officer Dominguez's gun and the shot to his left buttock was fired from Officer Chew's gun.

In addition, the Forensic Services Division tested the shooting officers' and McWherter's weapons and found that they functioned properly. Accounting for the magazine's 12 round capacity and the bullet in the chamber, the available evidence indicates that Officer Dominguez fired 18 total rounds and Officer Chew fired three total rounds.

**F. MCWHERTER'S BACKGROUND**

McWherter had no reported criminal convictions. California Department of Justice databases indicate that he owned seven firearms, including the one he used in this incident.

McWherter also had reported mental health issues. On September 15, 2016, a mental health advocacy organization contacted the Pacifica Police Department about McWherter. According to the police report, McWherter's family reported that their son suffered from paranoid schizophrenia but McWherter refused to believe he had a problem. Because he had gotten into physical altercations and become more aggressive, his family took his weapons and refused to return them. In response to these reports, the Pacifica Police Department issued a memo that same day to its patrol officers advising them about the potential safety concerns McWherter posed.

On September 26, 2016, McWherter contacted the Pacifica Police Department and made allegations against his family. During the course of the interview, McWherter told the interviewing officer that he had just been released after being held for evaluation for a mental health disorder pursuant to Welfare and Institutions Code section 5150. McWherter also showed the officer a prescription for Olanzapine, a medication for people suffering from schizophrenia and bipolar disorders.

The investigating officer contacted McWherter's family, who reported that McWherter had recently brandished a gun and sent threatening text messages to friends and family. His parents provided the officer with a letter that they had provided to McWherter's doctor listing a number of incidents involving their son, including one in 2014 when McWherter disappeared for approximately six months. That letter indicates that when McWherter reappeared he claimed that he had been poisoned by federal agents and was asked to join their team. He stated that it took him months to relearn to speak after being poisoned.

In another example, in July 2016, McWherter was working in Alaska when he accused his coworkers of conspiring against him. His employer took him to the hospital after he tried "to escape the island with survival gear and a large knife." His father and older brother flew to Alaska to escort him home.

McWherter also believed he was being poisoned by friends, family, and strangers and was obsessed with firearms. His family noted that McWherter suffered from religious paranoia and aggressive tendencies.

Pacifica Police found no evidence to support McWherter's allegations against his family.

On September 30, 2016, four days after McWherter's complaint, McWherter's brother Christopher went to the Pacifica Police Department and surrendered five of McWherter's firearms and ammunition.

On the morning of this incident, on October 4, 2017 at approximately 7:47 a.m., Christopher McWherter reported to the SFPD that his brother suffered from mental health problems and was missing. When the investigating officer asked Christopher if his brother had any weapons, Christopher stated that he did not know. Christopher was unaware that his brother had purchased the revolver used in this incident on September 16, 2016, from City Arms in Pacifica, California.

### **III. LEGAL STANDARD**

The question presented is whether the officers committed a criminal act in shooting and killing McWherter. 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 officers' actions. Here, the relevant legal inquiry is whether the officers were acting in self-defense or in defense of others, thereby justifying their conduct.

California law permits any individual to use of 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 each 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. 4th 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 or known threats by the victim to the defendant. *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**

As a threshold matter, the witness and officer identifications and the ballistics evidence establish that McWherter shot Officer Downs and fired at Officer Dominguez. The civilian witnesses at the Big 5 and the Lucky's Supermarket identified McWherter from photographs as the person who had threatened them. Eric Q, the security guard, pointed out McWherter to the police as he ran from the parking lot. The officers immediately pursued McWherter onto Everglade Drive before he shot Officer Downs. Crime scene investigators subsequently matched the bullet extracted from Peter Y.'s Honda Accord to McWherter's gun, establishing a clear physical link. CSI also recovered gunshot residue from McWherter's hands. Accordingly, there is no reasonable dispute that McWherter shot Officer Downs and shot at Officer Dominguez.

There is similarly little question, based on the available evidence, that the shooting was legally justified. With respect to the subjective prong of the self-defense analysis, both officers stated that they fired out of fear for their lives when Mr. McWherter pointed his gun in their general direction. The investigation revealed no evidence to undermine the officers' statements that they feared for their safety. Therefore, the subjective prong is satisfied.

The shooting was also objectively reasonable. McWherter posed an imminent risk of great bodily injury or death to the officers and to the public. McWherter had already shot Officer Downs in the head, demonstrating that he was willing to use deadly force unprovoked, and Officers Dominguez and Chew were aware of this when they responded to the emergency call. Shortly thereafter, McWherter opened fire on Officer Dominguez. In response to this imminent threat, Officers Dominguez and Chew shot at McWherter, who continued to hold onto his firearm despite repeated commands to drop it. The contemporaneous police radio traffic detailed how McWherter continued to move while holding the gun despite orders from the police to drop it.

Moreover, the evidence suggests that McWherter was likely attempting to reload his weapon even after he was shot. When McWherter's revolver was seized, the chamber was open and contained two empty casings and one live round partially inserted. These casings and the bullet were not in sequential order, which suggests that McWherter was actively reloading during the

time before an SFPD tactical team was able to arrest him. CSI also recovered 20 live rounds next to where McWherter was arrested.

Given McWherter's actions before the fatal gunshots and all of the other available evidence, Officers Dominguez's and Chew's use of deadly force was an objectively reasonable response to an imminent threat. Accordingly, the officers were legally justified in using deadly force in this incident.

## **V. CONCLUSION**

For the reasons discussed above, the District Attorney declines to file any criminal charges in this matter against Officers Dominguez and Chew.