

**DECLINATION OF CHARGES REPORT
INTO THE DEATH OF BANKO BROWN
ON APRIL 27, 2023**



**Brooke Jenkins
District Attorney**

May 15, 2023

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Privacy Statement

This report does not include names and other identifying information of witnesses. The public interest in such information is limited because it is not necessary to gain an understanding of the incident. Thus, the interest in nondisclosure outweighs the public interest in disclosure.

For privacy reasons, as well as readability of this report, the witnesses are listed as follows:

- Witness 1
- Witness 2

Privileges and Exemptions

Under Government Code section 7923.600, records contained within our District Attorney investigative case files are exempt from public disclosure under the California Public Records Act (CPRA). This exemption continues despite the termination or conclusion of an investigation. (*Williams v. Superior Court (Freedom Newspapers, Inc.)* (1993) 5 Cal.4th 337, 354, 361-362.) This limited waiver here does not constitute a general waiver of the investigative exemption for any other case or any other time.

“[A]bsolute protection is afforded to writings that reflect ‘an attorney’s impressions, conclusions, opinions, or legal research or theories.’” (Code of Civ. Proc., § 2018.030.) Like other privileges, the work product privilege may be waived, and that waiver may be limited. (*People v. Superior Court (Jones)* 12 Cal.5th 348, 361-362, 366.) To provide the public with a robust analysis of the District Attorney’s decision in this case, this report also includes impressions, conclusions, or legal opinions. But these disclosures are limited to this case and the opinions and conclusions listed below; they do not serve as a waiver of the work product privilege for any other case or any other time.

Normally, these privileges and exemptions would not be waived as long as the statute of limitations for prosecution had not passed due to the possibility, however slim, of new evidence changing the analysis of whether a case is prosecutable. In this case, there has been extraordinary public interest and statements calculated to sow distrust in the criminal justice system. The District Attorney’s Office views one of its mandates as preserving public trust in a system designed to ensure fair and ethical prosecutions by protecting the rights of the accused as well as advocating for victims and public safety. Given the maelstrom surrounding this case, the District Attorney will waive the investigative exemption and work product privileges in this case. This waiver is limited to this case only, not for any other matters at any other time, and is only being done after concluding that disclosure of these facts and this legal analysis would not negatively impact any chance of future prosecution in this case should new facts or circumstances impact the legal analysis.

Introduction

The evening of April 27, 2023, a shooting occurred at the Walgreens on 901 Market Street in San Francisco. Banko Brown (Brown) attempted to leave a Walgreens without paying for items taken. A lawfully armed Walgreen's security guard, Michael Earl-Wayne Anthony (Anthony), attempted to stop the theft and Brown became physically combative, escalating the theft to a robbery.¹ During the struggle, Anthony reports that Brown repeatedly threatened to stab him. Anthony had Brown pinned down and released Brown after telling Brown repeatedly that he would let Brown go if Brown calmed down. Anthony released Brown, stepped back, and drew his firearm because of the stabbing threats, but pointed the firearm at the ground. Brown grabbed the bag of goods off the floor, made for the exit, then turned and lunged in Anthony's direction, after which the shot was fired. Anthony said he shot because he was in fear for his safety.

The San Francisco Police Department (SFPD) responded to the scene to investigate the incident. This report is the San Francisco District Attorney's review of the evidence in this case. The scope of this report is limited to determining whether sufficient evidence supports criminal charges being brought against Anthony.

Based on the criminal investigation, review of evidence, and evaluation of the case, we have determined that there is insufficient evidence to support the filing of criminal charges against Anthony.

CAUTION: The images and information contained in this report may be graphic and disturbing. Therefore, viewer discretion is advised, especially for young children and sensitive individuals.

¹ San Francisco City Charter section 3603C governs the possession of firearms and the applicable exclusions. Section 3603C, subdivision (e) specifically permits "a uniformed security guard or uniformed alarm agent" to possess a firearm in public spaces.

Summary of Incident

On April 27, 2023, at about 6:36 p.m., SFPD responded to the Walgreens at 901 Market Street after a shooting occurred there. A Walgreens surveillance camera captured the entire incident.

Surveillance Video

Video shows Brown walking into Walgreens, collecting items from two different shelves and then walking towards the rear of the store. While walking down an aisle, Brown grabs a bag from a shelf, placing it into the bag that Brown carried with him when he entered the store. Anthony and Brown do not have any contact with one another until Brown moves to exit the store without having paid for any items.

As Brown approaches the exit, Anthony appears to reach his hand out, with his palm facing upward, as if to ask for something. Anthony keeps his arm outstretched with his hand open as Brown continues to walk directly toward Anthony.

The photographs in Figures 1 and 2 are still frame shots from the Walgreens surveillance camera showing Anthony with his arm outstretched.

Figure 1



Figure 2



Anthony stands by the exit of Walgreens with his outstretched hand until Brown initiates physical contact with Anthony by continuing forward and shoving Anthony.

The photograph in Figure 3 is a still frame shot from the Walgreens surveillance camera showing Brown shoving Anthony.

Figure 3



Brown and Anthony then appear to push each other before Anthony swings his arm multiple times in the direction of Brown, which he stops as soon as he manages to grab hold of Brown; Brown continues to resist and fight.

The photographs in Figures 4 and 5 are still frame shots from the Walgreens surveillance camera showing Anthony swinging his arm and struggling with Brown.

Figure 4



Figure 5



Anthony then gets behind Brown and appears to be holding Brown while Brown appears to continue to fight back. This lasts for about 15 to 20 seconds.

The photograph in Figure 6 is a still frame shot from the Walgreens surveillance camera showing Anthony holding Brown from behind.

Figure 6



After about 15 to 20 seconds of Anthony holding Brown from behind while Brown resists, Anthony and Brown fall to the ground. Anthony can be seen lying on top of Brown, who is on his stomach. Anthony appears to be holding Brown on the ground for about 15 to 20 seconds. During this time, it appears as though Brown continues to resist.

The photograph in Figure 7 is a still frame shot from the Walgreens surveillance camera showing Anthony lying on top of Brown as he continues to resist.

Figure 7



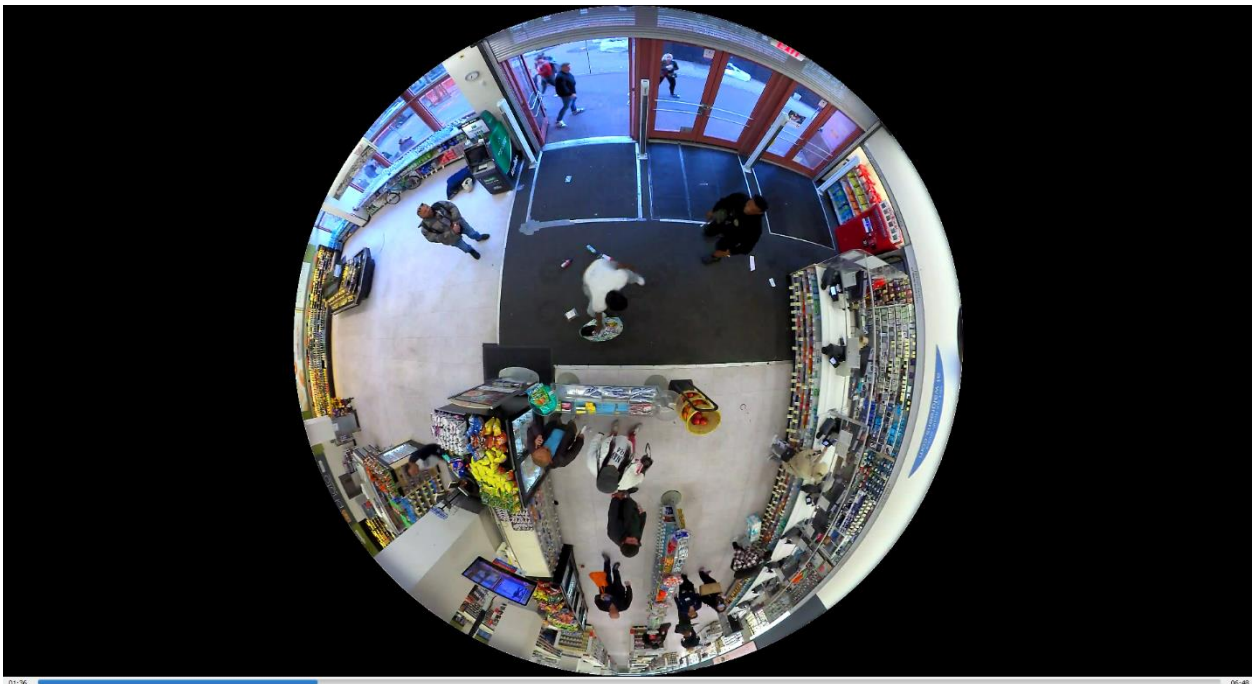
After holding Brown on the ground, Anthony slowly gets up while keeping a hand on Brown, until he can step away and create distance from Brown. Brown begins to get up, while Anthony can be seen taking out his firearm, but holding it down, pointed directly in front of his own feet. Brown picks up his bag and walks towards the exit.

The photographs in Figures 8 and 9 are still-frame shots from the Walgreens surveillance camera showing Anthony allowing Brown to stand up while Brown picks up the bag with the stolen merchandise.

Figure 8



Figure 9



As Brown approached the exit, Brown turned back towards Anthony. While Anthony and Brown are facing each other, Anthony is seen holding a firearm in his right hand still pointed towards the ground. As Brown was walking out of the store, Brown suddenly turns toward Anthony and moves as if to lunge at him.

The photographs in Figures 10 to 14 are still frame shots from the Walgreens surveillance camera

showing Brown turning back and making a lunging motion in Anthony's direction.

Figure 10



Figure 11



Figure 12



01:39

06:40

Figure 13



01:38

06:40

Figure 14



Within about one second of Brown turning back and making this lunging motion, Anthony raises his firearm and shoots Brown one time in the chest. The space between the two is visibly decreased from the prior frame as Brown has moved closer to Anthony.

The photograph in Figure 15 is a still frame image from the Walgreens surveillance camera depicting Anthony pointing and shooting his firearm.

Figure 15



Immediately after the incident, Anthony can be seen kneeling next to Brown attempting to render aid and summon help.

The photograph in Figure 16 is a still frame shot from the Walgreens surveillance camera showing Anthony on one knee next to Brown.

Figure 16



Upon arrival, SFPD saw Brown outside of the entrance of Walgreens unconscious but breathing. While assessing Brown and providing medical aid, San Francisco Fire Department (SFFD) medical personnel arrived on scene and took over medical care. Brown was taken to San Francisco General Hospital, and pronounced dead at 8:50 p.m.

Body Worn Camera Footage

SFPD detained Anthony, an employee of Kingdom Group Protection Services that contracts security services at Walgreens. SFPD seized and secured all of Anthony's weapons and other equipment. An SFPD officer waited with Anthony with Body Worn Camera (BWC) activated until Anthony was formally interviewed. At this time, SFPD did not ask any questions of Anthony about the incident. But as the BWC footage shows, Anthony described how he's been homeless and primarily on his own since he was a young teenager living in Oakland. Anthony describes drug use by his stepfather and feeling like his grandparents were the only individuals in his life to ever support him. Anthony describes how his younger brother was shot multiple times while sitting in a car in East Oakland. Anthony also describes the incident and what led up to the shooting several times, and discussed what he was thinking throughout the incident. Anthony stated he thought he was in a potentially life-and-death situation because Brown had been aggressive; Anthony did not know what Brown was going to do next. Anthony states that he did not draw his weapon over stolen items; Anthony drew his weapon because he was concerned for his safety after Brown repeatedly threatened him and indicated he was going to stab him. Anthony states that he wanted to let Brown go, and once he did, he kept thinking, "Please don't

do nothing stupid." Then, Brown advanced back towards him and he felt "it was me or [him]" after Brown repeatedly threatened to stab him. Anthony said he did not know what to expect from someone who had fought and threatened to stab him.

On scene, SFPD interviewed Witness 1 with BWC activated. Witness 1 stated she was standing in line at the Walgreen's Pharmacy getting ready to check out when she heard a "commotion" behind her. Witness 1 turned around and saw various fruits flying in the air and a security officer, Anthony, in a physical altercation with an unknown subject, later identified as Brown. Witness 1 stated she saw Anthony holding onto Brown. Witness 1 stated that Brown was "cussing out" Anthony and stated, "let me go and I'll fight you one on one." Witness 1 stated Anthony said, "I'll let go of you if you calm the fuck down." Witness 1 stated that Brown appeared to calm down after Anthony stated this, and Anthony subsequently let go of Brown. Witness 1 stated once Anthony let go of Brown, Brown proceeded to "get more agitated." Witness 1 stated she saw Brown spit at Anthony and "squared up" on Anthony, assumed a fighting stance, and looked like Brown was about to "get at the guard" (Anthony). Witness 1 stated it looked like Brown "wanted to fight more." Witness 1 stated she saw Anthony draw a gun from a holster on his person. Witness 1 heard Anthony state, "Don't do it, step back." Witness 1 then heard a gunshot. Witness 1 then saw Anthony re-holster the gun and state, "Dammit" and "Someone call the police, someone call 911." Witness 1 stated that after the gunshot, Brown stated, "Sorry man, that shouldn't have happened. I was stupid." Witness 1 stated she heard Anthony say, "Just breathe man," in response to Brown. Witness 1 stated that Anthony shot his firearm approximately 30 seconds after he first pulled it out. Witness 1 stated she was about 25 feet away from where the incident occurred and had an unobstructed view of the incident.

On scene, SFPD interviewed Witness 2. Witness 2 stated he entered Walgreens and started to shop. Witness 2 gathered a few items, proceeded to stand in line, and then left the line to get a beverage. As Witness 2 was getting back into the line, he saw Anthony block Brown from exiting the store. Witness 2 stated it appeared that Anthony and Brown may have known each other from previous encounters but could not elaborate. Witness 2 only saw the last few seconds of the incident prior to the shooting. Witness 2 stated Brown lunged towards Anthony as if he was going to strike Anthony. Witness 2 said, "I think he (Brown) was trying to hit him (Anthony) or trying to go after him." Witness 2 said Brown then spit in Anthony's face. Anthony then pulled out his pistol and fired one round at Brown. Witness 2 indicated that the spit, flinch, and shot all seemed to happen at the same time.

Search of Brown

SFPD searched and seized the shopping bag last seen in the possession of Brown. Inside, SFPD located products belonging to Walgreens and various personal items belonging to Brown. SFPD did not recover a knife.

Cell Phone Video Footage and Media Interview

SFPD transported Anthony to the Homicide Office located at 850 Bryant Street to conduct a formal custodial interrogation. SFPD received cell phone video footage from a bystander. That video footage begins only after the shot was fired. The individual who provided the footage also gave an interview to the news.

News reports detailing the statement of a Donald Washington² were also reviewed. The news article reported that according to Washington, Anthony threw Brown out of the store and headed back inside. Washington was quoted, "As I'm ready to leave the store, the guard like, gives me a nudge. I'm like, hey, bro, say excuse me, something that, right? So, he says, I'm sorry, bro. You know, then I hear him say, he say, damn, shit. I'm tired of this, man. Not today." "He walks outside, reach for the gun, bam, bam, it was quick, it was fast. It was like a movie. There wasn't no time. You know, it was already in his mind. You know, I mean, to do what he did." The video footage produced by Washington only documents the moments after the gunfire and does not corroborate Washington's statement.

Homicide Inspector Interview of Anthony

Anthony was transported to the Homicide Interview facility located at 850 Bryant and placed inside an interrogation room. He remained handcuffed in that room for about 90 minutes before two SFPD Homicide Inspectors conducted their interview. Before the actual interrogation, Anthony was fully Mirandized. Although Anthony initially indicated the desire to consult with an attorney, he indicated that he wanted to cooperate with the inspectors and answer their questions.

During this interrogation, which took place between 12:15 a.m. and 3:00 a.m. on Friday, April 28, Anthony answered questions about the incident and the reasons he fired his weapon at Brown. Anthony explained that while he is a security guard employed by Kingdom Group Protective Services (KGPS), his actual title is "Robbery Suppression Officer." As of April 28, Anthony worked for the company for over a year, and one day per week at the Walgreens store at 825 Market Street. Anthony is part of a three-person security team that, dependent on the time of day, could be reduced to only one guard inside the store. At the time of the incident, Anthony was by himself because the other guard on duty was on break.

Anthony told inspectors that his shift on April 27 started at 1:30 p.m. that day. Anthony described his professional attire as consisting of black Battle Dress Uniform (BDU) pants, a black hoodie for the cold, worn under his jacket which is emblazoned with "Security" on it and a patch for the security company on a black polo type shirt. Anthony described the clothing as having in more than one location the words "Security" prominently displayed.

Anthony informed inspectors that he has an armed guard license and permitted to carry a firearm among other non-lethal weapons. He told inspectors that he has records for these permissions and that he also carried the weapon with the full knowledge of KGPS, who also trains their employees in security measures.

On the date of the incident, KGPS, who would change its policies concerning the role of security guards sometimes daily by direct news feed to their employees, had recently changed the policy concerning what their guard-employees were to do in the way of active recovery of property from persons seen stealing merchandise from the Walgreens. On April 27, 2023, the instructions to guard personnel was to engage in "hands-on" recovery of merchandise. The guards were also allowed to request receipts for merchandise, but in any event they were to actively work to retrieve or recover any stolen items once it was clear that the individual who concealed the items intended to leave the store without paying.

² This witnesses name is being published because they have voluntarily submitted to news interviews and it allows for clarity about external statements in the media.

Anthony told the inspectors that during the year he had worked at the Walgreens at 825 Market Street he had incurred many threats from persons including threats that he would be shot, the store would be "shot up," and that he should "watch his back." Anthony also told inspectors that he had been spit on numerous times. In each of these instances, Anthony stated he had never engaged in any use of force or used any weapon against the individuals who issued the threat or spat on him.

Anthony told inspectors that he believed Brown to be male and only thought that Brown might be a female when aid was provided to Brown and Brown's chest was exposed. (At the time of the interview, it was not known that Brown was a transgender male. The interview therefore uses female pronouns. This report memorializes what was in that interview. The use of the female pronoun is not meant to offend, it is simply the pronoun used in the absence of other information.)

Anthony repeatedly told the inspectors that during the events with Brown, his intentions were always directed at recovering the items he saw Brown take and conceal inside a bag Brown was carrying. Anthony stated he intended to recover the items in compliance with his duties, because if he failed to do so, he would lose his job. Anthony saw that Brown had taken items and would likely try to exit the store, but he waited to confront Brown so as to make sure that Brown intended to steal. Anthony stood at the front of the store and as Brown approached, he said he told Brown "Hey, you know...just put the items back," and that he did not want any issues with Brown.

But Brown refused to do as Anthony instructed and instead became "aggressive" as Brown made movements consistent with an intent to retain the stolen items. Anthony then reached for the items, and told inspectors that as he did, Brown "[fought him] to keep the items." Anthony became concerned at that point about a possible struggle because of a prior accident which dislocated his shoulder. Anthony told inspectors that he had limited options when it appeared that Brown was trying to "swing on" him, and that he could only think to grab Brown and "hold Brown" to prevent Brown from striking him. Anthony hoped at this point that he could control Brown, remain safe, and wait for his partner to return from break to help him. It was then that Brown began to struggle more with Anthony, the momentum of which caused them both to fall to the ground, where Brown continued to aggressively struggle.

It was at this point that Brown began to threaten Anthony. Anthony told inspectors that Brown was telling him as they "wrestled" that Brown said repeatedly: "I'm going to stab you! I'm going to stab your ass!" Anthony told inspectors that while he did not see anything in Brown's hand, he was not certain that Brown did not have the ability to make good on the threat. And that because of the physical resistance, aggression, and perception that Brown intended to "fight" him, Anthony feared that if he released Brown from the hold he had Brown in, that Brown would then stab him.

Anthony told inspectors he repeatedly told Brown that he "would let [Brown] go," but that he wanted Brown to "calm down." Anthony believed that if he convinced Brown to calm down, he could release Brown and escape any harm that Brown intended to inflict on him. Anthony told inspectors because there was no chance to pat Brown down to determine if Brown had a weapon, he was in fear that once he released Brown, Brown would again "try to attack" him, but this time with a weapon. Anthony told inspectors that while he did not see a weapon, the threats compounded with physical aggression frightened him.

Anthony told inspectors the following:

HI-1: Okay. And you said that she was, when you were ...we'll call it... interacting with her...you were trying to get her to drop the property... and you said that she was kind of retaining the property?

MA: Um, when I asked her for the items back, and she gave me the impression that she wasn't going to give them back. And I was like okay. Um, it was really like right there next to me so I went and reached for it and then that's when the aggressiveness pursued ...um, I was thinking about my shoulder that at the time like okay. I'm gonna get in a tussle. I don't want my shoulder pop out...I'll be screwed... so first thing I did was grab hold of her and held her down and try to get like try to see if my partner was around. But he was on break or whatever. That's when I was on the ground with her and I was saying: "Hey, you know I'll let you go. But just calm down, you know... just go."

HI-1: And what was she saying in response to that?

MA: She was gonna stab me.

HI-1: When she was saying that she was going to stab you, do you remember exactly what she said?

MA: "I'm gonna stab you. I'm gonna stab your ass!"

HI-1: Okay.

MA: And then she got up; "... I'm like calm down; let you up. Just ...calm down." And when I got up, I quickly backed off and put my weapon down. And 'cause [sic] I don't know if she was gonna grab a knife or whatever... if even she had a knife.... I'm just going based off of what she said.

Anthony told inspectors that his next intention centered on the goal "to create distance" between Brown and himself. Anthony, although concerned about his safety, felt that if he could quickly release Brown and simultaneously gain distance from Brown, he could prevent Brown from making good on the threat to stab him. It was at this moment that Anthony also decided to unholster his firearm from his right leg holster. Anthony told inspectors that as things escalated with Brown, he drew his firearm but "pointed it downward" because he never intended to fire the gun.

Anthony stated:

MA: I'm thinking about my safety the whole time. it's not about none of the items getting back putting back it's just straight about my safety. I was thinking about my dislocated shoulder um popping out again in the scuffle... whatever... possibly my gun getting taken away. ...I don't know what to expect. I heard she's gonna stab me that's when I took out my gun 'cause I never had drawn my weapon initially until she says something about stabbing me. I kept some distance between me and her. Had held the barrel down...downward and um, that's when she was....looked like she was going to walk out... but then she turned around and advanced towards me while I'm already drawn down...

Anthony elaborated that this event with Brown, up to the physical aggression by Brown, was fairly typical because many people steal from Walgreens. Anthony stated that in prior times when he has confronted persons stealing, that they have complied with his request to return concealed items. But Brown did not and then seemed intent on fighting with Anthony for control of the items. And once Brown threatened Anthony with great bodily injury (to stab him), Anthony told inspectors "[T]hat's what really put the fear in my heart."

Anthony told inspectors:

MA: And then she got up; "... I'm like calm down; let you up. Just ...calm down." And when I got up, I quickly backed off and put my weapon down. And 'cause [sic] I don't know if she was gonna grab a knife or whatever... if even she had a knife.... I'm just going based off of what she said.

HI-1: Okay.

MA: And...um... That's when um...she walked towards the door, but then she turned around and advanced back turned towards me. That's when I already had my weapon drawn and when she moved towards me, that's when I fired one shot. I didn't want to do that. I didn't...

HI-1: Kay. Why did you do that?

MA: I felt like I was in danger. I felt like I was going to be stabbed...and I didn't know what to expect after the hostility...um...

Anthony told inspectors that it was only after Brown advanced towards him, and he had fired out of fear of Brown's intentions, that he felt the spit hit his face projected by Brown. Anthony did not realize that Brown advanced towards him to spit on him. And as Brown advanced to spit, Anthony perceived the forward motion by Brown towards where Anthony was standing as an intention to do him harm, to which Anthony responded by protecting himself.

Applicable Legal Standards

Homicide is the killing of one human being by another. (*People v. Beltran* (2013) 56 Cal.4th 935, 941.) Homicide may be lawful and not murder or manslaughter if the killing occurs during the exercise of a lawful right of self-defense. Homicide only is criminally chargeable as murder when the killing occurs without legal justification or excuse. There are two types of criminal homicide: murder and manslaughter.

Murder

Murder is the unlawful killing of a human being with malice aforethought. (Pen. Code, § 187, subd. (a).) Murder is divided into first and second degrees. A willful, deliberate, and premeditated killing is murder of the first degree. (Pen. Code, § 189; *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.)

Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements of willfulness, premeditation, and deliberation that would support a conviction of first-degree murder. (*People v. Knoller* (2007) 41 Cal.4th 139, 151.) The malice required for second degree murder may either be express or implied. (Pen. Code, § 188; *Hernandez, supra*, 183 Cal.App.4th at p. 1332.) Malice is express when there is an "intent to kill." (Pen. Code, § 188; *People v. Delgado* (2017) 2 Cal.5th 544, 571.) Malice is implied "when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his [or her] conduct endangers the life of another and who acts with conscious disregard for life." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1215.)

Voluntary Manslaughter

Manslaughter is an unlawful killing without malice. (Pen. Code, § 192; *People v. Thomas* (2012) 53 Cal.4th 771, 813.) Several factors may preclude the formation of malice and reduce a killing that would otherwise be murder to voluntary manslaughter including: (1) heat of passion; and (2) imperfect self-

defense. (*People v. Moya* (2009) 47 Cal.4th 537, 549.)

Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury and that the use of deadly force is necessary to defend against that danger. Such a killing is deemed to be without malice and thus cannot be murder. (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) The doctrine of imperfect self-defense cannot be invoked, however, by a person whose own wrongful conduct (for example, a physical assault or commission of a felony) created the circumstances in which the adversary's attack is legally justified. (*People v. Booker* (2011) 51 Cal.4th 141, 182.)

Self-Defense

A homicide is not unlawful if it is justified and committed in self-defense. Self-defense is a complete defense to a homicide offense, and, if found true, the killing is not criminal. (*People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 744.) When a person is charged with a homicide-related crime and claims self-defense, the prosecution must prove beyond a reasonable doubt that the homicide was not committed in self-defense. (*People v. Winkler* (2020) 56 Cal.App.5th 1102, 1167.)

California Penal Code section 197 et. seq. sets forth the law of self-defense in homicide cases. Penal Code section 197 lists circumstances where a homicide committed by "any person" is justifiable, which includes self-defense or the defense of others.

Under the law, a person is not guilty of murder or manslaughter if the person killed someone else in self-defense. A person acts in self-defense when: (1) the person reasonably believes that he was in imminent danger of being killed or suffering great bodily injury; (2) the person reasonable believed that the immediate use of deadly force was necessary to defense against that danger; and (3) the person used no more force than was reasonably necessary to defend against that danger.

A person's belief must have been reasonable and that person must have acted only because of that belief. A person is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation.

When deciding whether one's belief was reasonable, a trier of fact considers all the circumstances as they were known to and appeared to the individual and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the belief was reasonable, the danger does not need to have actually existed. Self-defense also has a subjective component. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) The subjective element of self-defense requires that a person actually believes in the need to defend against imminent peril or great bodily injury. (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262.)

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 157 [addressing duty to instruct on voluntary manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos* (1974) 12 Cal.3d 470, 479.) The

following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) If the defendant is asserting that he or she was resisting the commission of one of these felonies or another specific felony, the court should include the bracketed language at the end of element 1 and select "raped," "maimed," or "robbed," or insert another appropriate forcible and atrocious crime.

CALCRIM 505 is the jury instruction that explains the law about self-defense: if a person was justified in killing someone in self-defense, that person is not guilty of murder or manslaughter. A person acts in lawful self-defense if: (1) the person reasonably believed that they were in imminent danger of being killed or suffering great bodily injury; (2) the person believed that the immediate use of deadly force was necessary to defend against that danger; and (3) the person used no more force than was reasonably necessary. Under the law of self-defense, a person is not required to retreat, but can defend themselves. And if it is reasonably necessary, the person can pursue an assailant until the danger has passed—even if safety could have been found by retreating. Ultimately, the People must prove beyond a reasonable doubt that the person did not act in reasonable self-defense. If the People cannot meet that burden, the person is not guilty of murder or manslaughter. That instruction states in relevant part:

The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if:

1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being (raped/maimed/robbed) under circumstances in which he reasonably believed that he would suffer great bodily injury or death;
2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;
AND
3. The defendant used no more force than was reasonably necessary to defend against that danger.

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/great bodily injury/ <insert forcible and atrocious crime>) has passed. This is so even if safety could have been achieved by retreating.]

The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter.

Robbery

California Penal Code section 211 sets forth the law of robbery. A robbery is the felonious taking of property in the possession of another, from his person or immediate presence, and against his will, carried out by means of force or fear. It is not necessary that the victim of the robbery also be the owner of the goods taken. Robbery is an offense against the person who has either actual or constructive possession over the goods. (*People v. Gordan* (1982) 136 Cal.App.3d 519, 528-529.) Thus, a store employee may be a victim of robbery even though he does not own the property taken and is not in charge or in immediate control of the property at the time of the crime. (See *People v. Miller* (1977) 18 Cal.3d 873, 880; *People v. Johnson* (1974) 38 Cal.App.3d 1, 9.)

CALCRIM 3261 is the jury instruction that explains how long a robbery lasts. A robbery continues until

the perpetrator reaches a place of temporary safety. At a minimum, a person reaches a place of temporary safety if that person: (1) successfully escaped from the scene; and (2) is no longer being chased.

[The crime of robbery [or attempted robbery] continues until the perpetrator[s] (has/have) actually reached a place of temporary safety.

The perpetrator[s] (has/have) reached a place of temporary safety if:

- (He/She/They) (has/have) successfully escaped from the scene; [and]
- (He/She/They) (is/are) not or (is/are) no longer being chased(; [and]/.)
- [(He/She/They) (has/have) unchallenged possession of the property(; [and]/.)]
- [(He/She/They) (is/are) no longer in continuous physical control of the person who is the target of the robbery.]]

Character Evidence

Evidence Code section 1103 allows a person charged with a crime to introduce character evidence of the alleged victim of that criminal charge. “In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted” may be offered by the defendant to “prove conduct of the victim in conformity with the character or trait of character.” This includes evidence of the alleged victim’s character for violence.

Burden of Proof

A prosecutor bears the burden of proving a criminal defendant’s guilt beyond a reasonable doubt. (Pen. Code, § 1096.) Where an investigation is complete and all of the evidence is available for review, prosecutors should file charges only if they believe there is sufficient admissible evidence to prove the charges beyond a reasonable doubt at trial. (See, e.g., Nat. Dist. Attys. Assn., National Prosecution Standards (3d ed. 2009) Part IV, § 2 pp. 52-53; United States Department of Justice Manual § 9-27.220; Melilli, Prosecutorial Discretion in an Adversary System (1992) B.Y.U. L.Rev. 669, 684-685 [surveying ethical standards used in the exercise of charging discretion by prosecutors]; accord, *People v. Catlin* (2001) 26 Cal.4th 81, 109 [“A prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt,” quotation and internal quotation marks omitted]; *People v. Spicer* (2015) 235 Cal.App.4th 1359, 1374 [explaining that a prosecutor may have probable cause to charge a crime but reasonably decline to do so if they believe there is a lack of sufficient evidence to prove the charge beyond a reasonable doubt at trial]; cf. Rules Prof. Conduct, Rule 3.8(a) [prosecutor should not initiate or continue prosecution of a charge that is not supported by probable cause].)

Further, the prosecution has the burden of proving beyond a reasonable doubt that a killing is not justified. It is not a criminal defendant’s burden to prove that the force was necessary or reasonable. (*People v. Banks* (1976) 67 Cal.App.3d 379, 383-384.) Thus, the prosecution must prove beyond a reasonable doubt that the person charged did not have an actual or reasonable belief in the need for self-defense or the defense of others.

Procedural History

The incident occurred on the evening of April 27, 2023. By law, a suspect that is in custody must be charged or released within 72 hours. On May 1, 2023, the San Francisco District Attorney's Office reviewed the evidence and concluded that at that point in the investigation the case could not be proven due to the evidence of self-defense. The case was discharged for further investigation (Discharge Code 27), and the SFPD was asked to conduct further investigation. The analysis and requested follow-up investigation was memorialized in the Record of Investigation.

Legal Analysis

The San Francisco District Attorney's Office bases this analysis on all of the evidence reviewed, including: video recordings; witness interviews; law enforcement reports; physical evidence; and photographs.

The San Francisco District Attorney's Office reviewed the evidence to determine whether there is evidence sufficient to support charges against Anthony for homicide of Brown, which in turn is dependent on whether Anthony acted in lawful self-defense against Brown. We conclude that the evidence is insufficient to support criminal charges.

First, the evidence shows that Brown transformed a simple theft into a robbery when he used physical force to take property without paying. As seen in the surveillance video, Anthony is standing at the exit of Walgreens with his arm clearly outstretched, consistent with asking for items back. Brown then continues to walk directly at Anthony and shoves Anthony.

Anthony responds, to what had by law escalated to a robbery, by taking multiple swings at Brown, wrestling Brown onto the ground. The entire physical interaction between Brown and Anthony lasts about 56 seconds.

While on the ground, Brown threatened to stab Anthony, which caused Anthony to be in fear. No evidence disproves the threats or the fear reported by Anthony. A witness heard Brown "cussing out" Anthony and Anthony telling Brown to calm down. Anthony keeps a hand on Brown until able to step away and create distance. Anthony pulled out his weapon but kept it pointed down, continuously watching Brown.

Brown grabs the bag that had fallen to the floor and moves toward the exit again. Legally, the robbery is still in progress. Anthony does not point the gun at Brown, but also does not stop watching Brown – consistent with a safety concern.

The robbery is still in progress when Brown moves toward the exit and even when he steps outside because Brown has not reached a place of safety that would terminate the robbery. It is in the context of a legal robbery when Brown turns back toward Anthony in what a witness described as a lunge.

Anthony says at the moment Brown turned to him he was afraid, so he pulled the trigger in self-defense. Anthony said he did not know what Brown was going to try to do, Anthony had not patted down Brown and did not know what Brown had on his person, Brown had threatened stabbing - he was in fear. There is no evidence to contradict that Anthony's fear was honest.

The next legal question to answer is if Anthony's honest fear was reasonable or unreasonable.

Critical to this assessment is what an individual is thinking when they make the determination that self-defense is necessary because of a perceived imminent threat. This is formally called "mental

state” or state of mind. The mental state of an individual within the context of self-defense necessarily involves the fact they held a sincere belief in the need to use force, including deadly force, to protect themselves from a perceived or actual threat. The belief in addition to its sincerity, must also be reasonably held. This subjective and objective belief may be informed by the individual who poses a threat through their actions, and/or words. Simply put, the individual who exercises self-defense must be sincerely afraid, and that fear must be objectively reasonable, of what will happen to them if they fail to protect themselves.

Anthony described in great detail that Brown repeatedly threatened to stab him even when he had control of Brown. Added to this clear verbal threat to do Anthony harm (to stab him), Brown continued to be physically aggressive. It is objectively reasonable to believe that Brown issued the threats to Anthony to convince Anthony to release Brown. Brown therefore intended that Anthony take the threat seriously. Anthony did exactly that. The fact that Anthony unholstered his weapon but held it downward (not pointing it at Brown) evinces what Anthony believed, thought, and feared and thus his mental state about the threat Brown posed.

Anthony consistently explained to inspectors that he fully intended to let Brown up and to allow Brown to leave the store. And that his sole intention was to “get distance” from Brown. Anthony also was concerned that once he released Brown that Brown would follow through on the threat to stab him. At that point, Anthony released Brown and allowed Brown to get up. Anthony thought that Brown was leaving and only maintained his gun in a downward position. But Brown did not leave and instead turned around and advanced back towards Anthony. It was only when Brown turned back, and advanced on Anthony, that Anthony with the prior threats and physical aggression by Brown in his mind, raised his gun and fired a single shot. The fact that Brown only intended to spit on Anthony was not known to Anthony. And given the gesture of Brown’s movements towards Anthony, Anthony was not required to wait to determine what Brown’s intentions were, given the context of their encounter.

Witnesses at the scene provide context to the video and corroborate Anthony’s account of the incident. Witness 1 indicated that Brown challenged Anthony to fighting “one on one” while in a physical altercation with Anthony. Witness 1 also confirmed that Anthony asked Brown to calm down when he said, “I’ll let go of you if you calm the fuck down.” Witness 1 said Brown “squared up” to “get at the guard” and assumed a fighting stance immediately before being shot. These observations by Witness 1 make it more likely that Anthony reasonably believed he was in imminent danger. Moreover, this aggressive act of “squaring up” in a fighting stance came on the heels of Brown repeatedly threatening to stab Anthony. It seems likely that Anthony believed Brown was going to stab him and therefore presented an imminent threat of great bodily injury or death.

Moreover, Witness 2, who was also present in the Walgreens, saw Brown lunge towards Anthony as if he was going to strike Anthony. Witness 2’s statement also shows that Anthony reasonably believed that he faced an imminent danger of being killed or suffering great bodily injury, particularly when—as a matter of law—the robbery remained ongoing.

In reviewing the surveillance and time stamps of each still, about one second passed between the time Brown lunges at Anthony, and Anthony fires his weapon. This shot comes after about 56 seconds, where Brown is noncompliant and aggressive and threatens to stab Anthony. All of this evidence strongly suggests that Anthony firing at Brown in self-defense was objectively reasonable. Anthony’s actions were reactions to Brown’s movements described as “squaring up” and “getting at the guard” immediately after repeatedly threatening to stab him. This ultimately led Anthony to believe that Brown posed an imminent danger of great bodily injury or death. It seems likely that others in a similar situation would have believed they were in imminent danger, especially given that two objective witnesses felt Brown was lunging back at Anthony. Under the totality of circumstances, such a belief was

reasonable.

Brown initially charged Anthony after taking items from the store, all of which amounted to a robbery. Brown also threatened to stab Anthony, after which Brown lunged back at Anthony—which was corroborated by the surveillance video and witness interviews. These facts and circumstances support a reasonable, though in hindsight mistaken, belief that Brown posed an imminent threat of great bodily injury or death.

Further, because this interaction occurs during the course and scope of a robbery, the law presumes that it is reasonable for Anthony to be in fear of great bodily injury or death. A robbery has been deemed to be a forcible and atrocious crime as a matter of law and is the type of crime whose character and manner reasonably create a fear of death or serious bodily harm because of the crime's increased likelihood for violence.

An analysis of potential character evidence, admissible under Evidence Code section 1103, was also conducted. This will not be described in detail in this report given the restrictions on publicizing that type of evidence but it was considered in weighing witness credibility and what evidence the jury would likely receive during the course of a trial.

Given the totality of the circumstances, including the threat that Anthony believed, and could reasonably believe, the evidence shows that Brown's shooting was not a criminal act because Anthony acted in lawful self-defense. Thus, Anthony is not criminally liable for the death of Brown.

Conclusion

Based on the investigation and review of evidence, along with the applicable statutes, legal principles, and the subsequent analysis, Anthony acted in lawful self-defense when he fired his weapon at Brown. Therefore, at this time, there is insufficient evidence to support a criminal prosecution of Anthony for the death of Brown.