

REPORT ON THE OFFICER INVOLVED SHOOTING DEATH OF  
HERBERT OMAR BENITEZ ON OCTOBER 15, 2015



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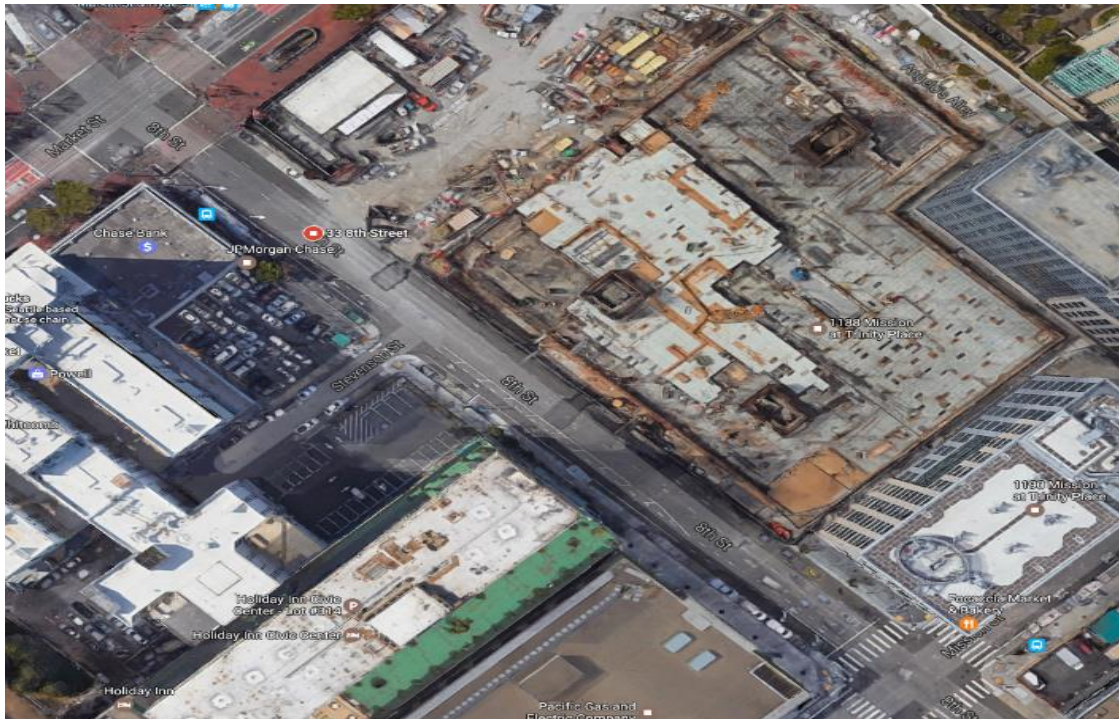
## **INTRODUCTION**

The San Francisco District Attorney's Office (SFDA) has completed its independent review of the officer involved shooting that resulted in the death of Herbert Omar Benitez near 33 8<sup>th</sup> Street on October 15, 2015, at approximately 12:06 pm. 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.

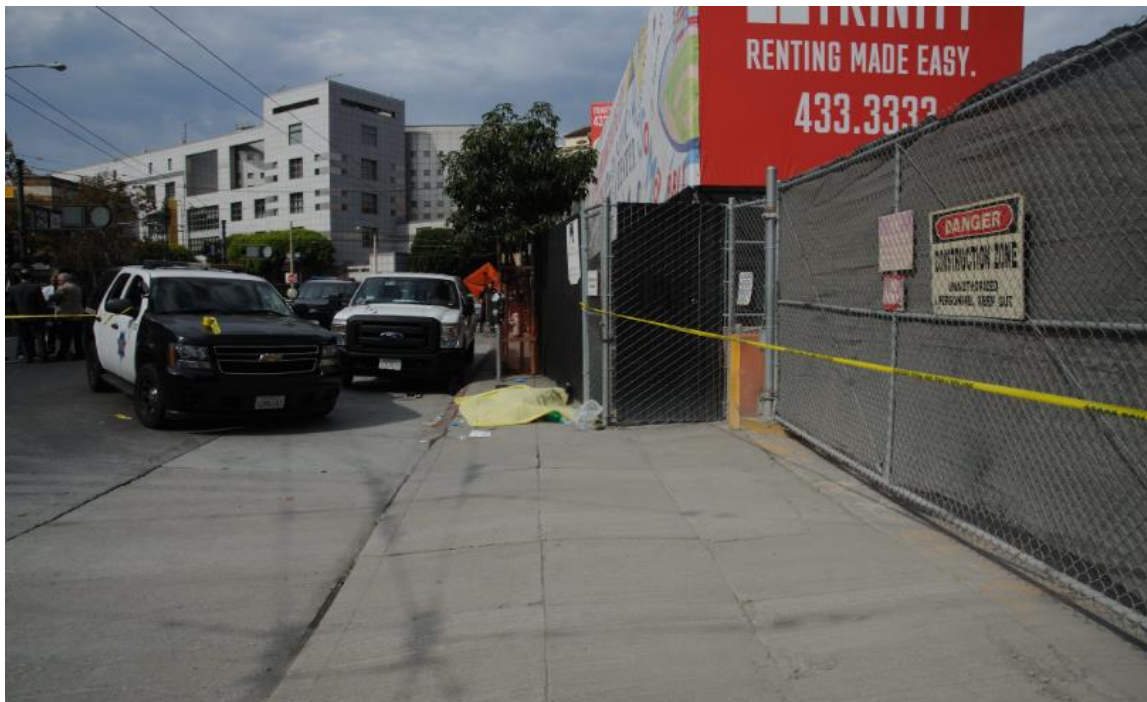
In brief, the investigation revealed that SFPD Sergeants Joseph McCloskey (Star No. 2151) and Michael Koniaris (Star No. 1919) were flagged down by construction workers complaining about Benitez's breaking glass bottles near their worksite. When the SFPD Sergeants spoke with Benitez, they detained him and tried to get him to sit down on the sidewalk. Benitez physically resisted and attacked the officers, falling on top of Sergeant McCloskey. Sergeant Koniaris fell on Benitez's back. During the struggle, Benitez pulled Sergeant McCloskey's gun from his holster and pointed it at the Sergeant McCloskey's head. Sergeant McCloskey was able to grab the gun's slide and was struggling to keep the gun away from his face as he yelled that Benitez had his gun. In response, Sergeant Koniaris shot Benitez twice during the struggle. As detailed below, the available evidence supports the conclusion that Sergeants Koniaris's actions were taken in defense of another individual. The District Attorney, therefore, declines to pursue criminal charges in this matter.

## **DESCRIPTION OF THE SCENE**

This incident occurred on the east sidewalk in front of a large construction site at 33 8<sup>th</sup> Street. 8<sup>th</sup> Street runs in a north and south direction. At the time of this incident, there was a construction vehicle only parking/access lane along the north quarter of the east side of the street. The incident occurred near that drive way along the east side of 8<sup>th</sup> Street, approximately 50 feet south of Market Street.



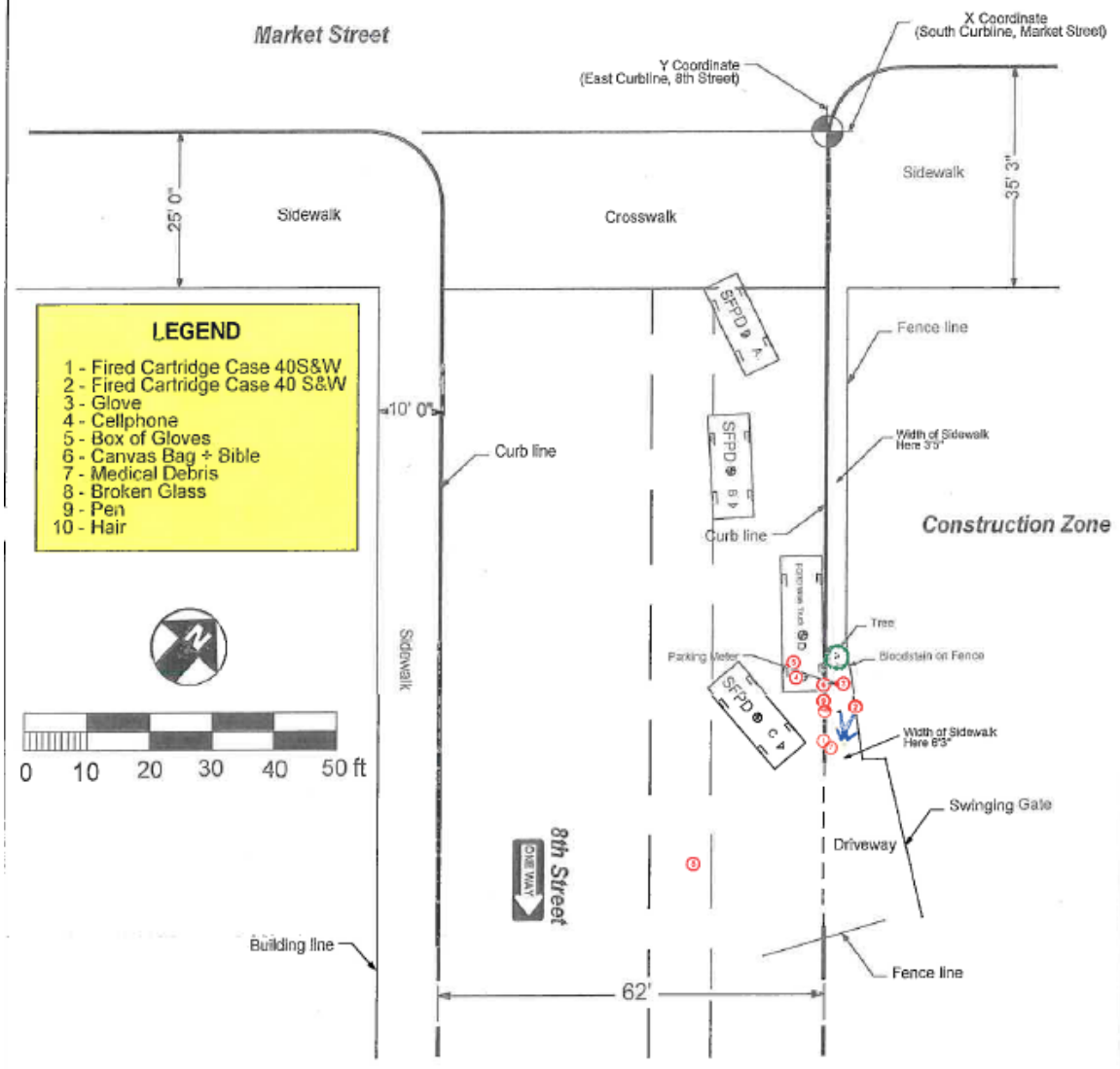
*Google Maps Earth View of the shooting scene*



*CSU Scene Photograph*

# Area of 8th Street and Market Street, Depicting Evidence

COPY



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SFPD Case Number: 150 902 467	Incident Type/Date: OIS/10-15-15	Drawn By: Games/911	Date Drawn: 10-16-15	Tech. Review: 10/20/15	Page: 9/10
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CSU Scene Diagram

## **FACTUAL SUMMARY**

### **SFPD Officers' Accounts**

On Thursday, October 15, 2015, at about 12:05 p.m., San Francisco Police Department Sergeants Joseph McCloskey and Michael Koniaris were in full SFPD police uniform driving in a marked black and white sport utility vehicle (SUV). Sergeant McCloskey was driving and Sergeant Koniaris was riding in the front passenger seat.

As Sergeants McCloskey and Koniaris passed Market Street while driving south on 8<sup>th</sup> Street, they were flagged down by witnesses Brian M. and Chris A., who were standing on the east sidewalk in front of the construction site. Brian M. spoke to Sergeant McCloskey through the open driver's side window. Brian M. pointed to a man, later identified as Herbert Omar Benitez, standing close by, and said that Benitez had just thrown a bottle in the street in front of the driveway of the construction site. He said the broken glass was posing a hazard to construction traffic entering and exiting the construction site.

Sergeant McCloskey pulled to the east curb line near Brian M. and Benitez, and exited the police car. Sergeant Koniaris exited the police car as well and walked to the curb from the street traffic side. Sergeant McCloskey informed Benitez that he wanted to check on his welfare. Sergeant McCloskey observed a bulge in the front of Benitez' sweatshirt. Benitez told Sergeant McCloskey, "Don't talk to me. People are watching. Don't touch me." Sergeant McCloskey removed the bulging items from the front of Benitez' sweatshirt and told him he was being detained.

Sergeant McCloskey recognized that Benitez' demeanor suggested he was potentially in an "altered mental state" (AMS) and wanted to evaluate him for a possible 5150 Welfare and Institution Code (WIC) hold.<sup>1</sup> Sergeant McCloskey told Benitez to sit down on the curb. Benitez did not comply so Sergeant McCloskey took hold of Benitez's right arm to gain a degree of control. Sergeant Koniaris took hold of Benitez' left arm to assist in the detention and/or handcuffing process.

Benitez forcefully resisted and a struggle ensued, resulting in Sergeant McCloskey falling to the ground on his back. Benitez fell face down on top of Sergeant McCloskey and Sergeant Koniaris fell on Benitez' back, sandwiching Benitez. Sergeant McCloskey was pinned down by Benitez and was unable to move his arms. Sergeant McCloskey told Sergeant Koniaris to radio for assistance.

Benitez then pulled hard at Sergeant McCloskey's gun. Sergeant McCloskey yelled to Sergeant Koniaris that Benitez was trying to get his gun. Moments later, Benitez successfully removed the gun from Sergeant McCloskey's holster and pointed it at Sergeant McCloskey's head. Sergeant McCloskey was able to partially free his right hand and get his hand on top of the slide of his gun. However, Benitez pulled the gun free from Sergeant McCloskey. Sergeant McCloskey kept struggling to try and redirect the gun from pointing directly at the side of his head to a position pointing across his face. During the struggle, Sergeant McCloskey screamed at Sergeant Koniaris, "He's got my gun! He's got my gun! Shoot him! Shoot him! Shoot him!"

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<sup>1</sup> WIC § 5150 is the legal authority that allows a peace officer to place a dangerous or gravely disabled person, incapable of caring for themselves, or a threat to others, into custody for a 72 hour psychiatric hold for evaluation.

Believing that Sergeant McCloskey was in imminent danger of being killed, Sergeant Koniaris fired once at Benitez, and upon seeing no effect, he fired a second time into Benitez's torso. After the second shot was fired, Benitez fell to the side of Sergeant McCloskey, enabling Sergeant McCloskey to roll over, recover his weapon from the sidewalk, and eventually stand on his feet.

According to the officers, this incident occurred so fast that Sergeant Koniaris was not able to request assistance over his radio. Sergeant McCloskey eventually made the initial radio broadcast after the confrontation was over, while lying on the ground and grasping to recover his equipment and firearm. SFPD Officer Jason Maxwell (Star No. 1000) was the first back-up officer on scene and saw Sergeant McCloskey recover his duty firearm from the ground.

Sergeant McCloskey then saw Sergeant Koniaris standing nearby and asked him if he was okay because he saw Sergeant Koniaris was bleeding from the face. Sergeant McCloskey told a responding firefighter that Benitez had been shot and pointed out possible witnesses to SFPD Lieutenant Georgia Sawyer (Star No. 1565).

At least six civilians, Brian M., Chris A., Harold K., Jason R., David B., and Juan Z., witnessed a portion of the confrontation described above. Their accounts were largely consistent with Sergeants McCloskey's and Koniaris' descriptions of the events.

### **Civilian Witness' Accounts**

#### **Witness Brian M.**

Brian M. was returning to the construction site on October 15, 2015, at approximately 12:05 p.m. When he got to the main gate, he saw Benitez holding a green bottle and "looking out of place." He walked past Benitez and after taking about 10 steps into the gate area heard a "bottle explode" behind him. He looked behind him and saw a "shattered bottle" on the ground in front of the entryway to the construction site.

Brian M. went back outside the gate and confronted Benitez and said, "What in the fuck do you think you are doing? You dumb ass! We got trucks coming in and out of here all day! What the hell were you thinking?" He said Benitez just stood there.

Brian M. said Benitez told him to "Call a cop." Brian M. further stated, "And pure coincidence, I look over his (Benitez's) shoulder and there's two of your guys right there in the lane right next to us with a window down. I said, 'Hey! This brain surgeon decided to throw a bottle right here where our truck traffic is.'"

Brian M. saw Sergeant McCloskey pull over and he figured "my part's done," so he walked back toward the construction site. He took about 10 steps and heard two gun shots. When he turned around, he saw, "Chris A. standing there, kind of amazed. And I walk back towards him and that's when I saw the one officer (Sergeant McCloskey) pinned kind of under, you know, it looked like he was stuck between the truck tire and the curb. And the other guy (Benitez) was just down."

Brian M. estimated the whole incident took place in less than a minute from the time he flagged down the officers to when he heard the two shots fired and observed Sergeant McCloskey down on his back at the curb. He did not hear any verbal interaction between Benitez and the Sergeants because of the loud construction noise.

### **Witness Chris A.**

Chris A. was working at the construction site at on October 15, 2015, at approximately 12:06 p.m. He was standing inside of the fence securing the construction site when he heard a bottle break. Afterwards he observed his co-worker Brian M. in an argument with Benitez on the sidewalk. He walked out the gate to “back-up” Brian M. and “make sure nothing happened to him.”

Chris A. saw two officers driving on 8<sup>th</sup> Street. He waved the officers down and said, “Hey! Guys! Can you come take this guy or talk to him?” The officers pulled over and while they were still in their car, he turned and walked back into the job site area to get his backpack and lunch. When he turned around, he saw Benitez fighting with an officer. “The officer (Sergeant McCloskey) was pinned up against the white pick-up truck that was out there and the person (Benitez) was on top of him.” He said they were “struggling and fighting.” They were “grappling” not punching or hitting. Sergeant Koniaris was trying unsuccessfully to pull Benitez off Sergeant McCloskey.

Chris A. said, “The other officer (Sergeant Koniaris), who later did the shooting, was trying to pull the guy (Benitez) off of his partner, the older officer said, ‘Shoot him! Shoot him!’ And so the officer (Sergeant Koniaris) pulled out his gun and put two shots in his mid to lower back, and the person (Benitez) who got shot kind of slumped over.” After Benitez was shot, Benitez slumped over to the right and was still talking but Chris A. could not understand what Benitez said.

He thought Benitez had a weapon when he heard Sergeant McCloskey yell, “Shoot him! Shoot him!” However, he never saw a weapon since they were grappling and were so close together. He estimated there was only a “couple of seconds” between when he heard the commands, “Shoot him! Shoot him!” to when he heard the shots fired.

Chris A. estimated the duration of the incident from first contact between the officers and Benitez, to shots being fired occurred in less than a minute.

### **Witness Jason R.**

Jason R. was one of the construction workers who initially flagged down the police car that Sergeants Koniaris and McCloskey arrived in. The officer pulled over and got out. Jason R. figured the officer would take care of everything so he walked across the street.

When he got halfway across the street, he heard a struggle. He turned around and saw the officer struggling with Benitez up against the construction site perimeter cyclone fence. Jason R. said his view was partially obstructed by a parked truck.

Jason R. heard a “pop”, changed positions and saw the “cop’s gun was on the ground.” He said the cop grabbed for the gun. “I could see his (the cop’s) hand go back and then he fired again.” A short while later he heard a second shot. He said, “(I) saw him and the officer reach for the – for the gun – and looked like his arm was being deflected – and another shot.”

Jason R. only saw one officer involved in the struggle with Benitez but after the shots were fired there were a lot of officers. He did not see the shooting. He assumed that the officer, whom he saw retrieve his gun from the ground, shot Benitez. He did not know for certain if that gun on the ground was the officer’s or not. He made that assumption based on what he saw.



**Witness Juan Z.**

Juan Z. was working at the construction site as a laborer. At approximately noon, he was taking his break on the 4<sup>th</sup> floor of the multistory building under construction at that site. While in the break area, he looked down on 8<sup>th</sup> Street and saw that the police had stopped Benitez.

He stood up so he could look down, in a southerly direction towards Mission Street. He did not see what Benitez had done to draw the police's attention. The officers were already out on foot contacting Benitez when Juan Z. first observed the incident. Benitez was to the front of the construction site entrance near a white truck.

It appeared the officers were trying to handcuff or grab Benitez. Benitez did not cooperate. The "older" officer (Sergeant McCloskey) grabbed Benitez and twisted his arms from behind. They were all standing in the street. One officer kned Benitez and they all started moving on the sidewalk towards the fence. Juan Z. did not know which officer did the knee-strike to Benitez. All three, Benitez and the two officers, bounced off the fence. Benitez grabbed the two officers in "a bear hug" and all three fell to the ground with Benitez landing on top of both officers where he continued struggling with them. Benitez was on top and appeared to be holding the officers down.

Juan Z. stated that it looked like Benitez wanted to get up so he could run. The younger officer (Sergeant Koniaris) was able to roll to the side and get up while Benitez was still on top of Sergeant McCloskey. Benitez had his hands around Sergeant McCloskey's waist area and gun belt. Juan Z. believed they were fighting for the officer's gun and that was why the officer who was standing up (Sergeant Koniaris), later shot Benitez.

Juan Z. saw Sergeant Koniaris take out his gun and shoot Benitez. Zamora thought Sergeant Koniaris shot Benitez with a Taser because he did not see any blood and Benitez stayed on his knees with his head on Sergeant McCloskey's chest and Benitez' arms around Sergeant McCloskey's waist.

Juan Z. heard a second shot and saw Sergeant Koniaris move Benitez off of Sergeant McCloskey and handcuff him. Benitez was no longer moving. Moments later, all the other police officers arrived and helped Sergeant McCloskey up. Juan Z. did not see anything on the ground.

**Witness David B.**

David B. was the Senior Superintendent at the construction site located at 33 8<sup>th</sup> Street. At approximately 1200 hours, Bergeron was standing on the deck of the portable office (trailer) located on the construction site. Bergeron noticed one of the electricians sitting at the construction site entrance gate. The electrician was talking to Benitez who was standing outside of the gate. Benitez kept looking up at the trailer and making eye contact with him. Bergeron thought Benitez was attempting to come in and steal something from the construction site or ask for a job at the site. Benitez was wearing an orange shirt similar to those worn on a construction site.

The electrician got up and left the gate area and Benitez looked back up at the trailer a couple times before walking away toward Market Street. Within one minute, he heard two gun shots. Bergeron walked to the front gate and saw the taller of the two officers (Sergeant Koniaris) on

top of Benitez. Bergeron saw that officer pick up a “black 9mm” gun off the ground and hold it in a “non-normal” way. Bergeron further described the manner in which the taller of the two officers was handling the firearm as being in, “protective mode,” with the gun being held towards the officer’s feet so the suspect on the ground couldn’t get to it.

David B. did not witness the events that led up to the shooting, nor did he witness the shooting itself.

**Witness Harold K.**

Witness Harold K. stated that he saw Sergeant Koniaris and McCloskey grab Benitez and start a conversation with him. Benitez Began to resist the officers and the three of them “tussled”, and ultimately they “tumbled over” to the ground, with Benitez on top of McCloskey and Koniaris trying to pull Benitez off of McCloskey. As the two officers and Benitez were “tussling”, Harold K. heard Sergeant Koniaris say “Man, just shoot him.”<sup>2</sup>

Harold K. estimated that the struggle between the officers lasted for five to seven minutes before the shots were fired. When asked whether he meant five to seven seconds, he reiterated that he meant minutes. He supported his statement by saying that he believed that this was a “very, very long struggle before the shots happened.”

**EMERGENCY MEDICAL RESPONSE**

Benitez was taken into custody and medical aid was initiated by responding SFPD Officers Ernesto Linares (Star No. 1560) and Edwin Anaya (Star No. 491) until San Francisco Fire Department (SFFD) Truck No. 3 and Medic No. 71 arrived and assumed medical care. Benitez was pronounced dead at the scene at 12:14 pm by SFFD Paramedic Eric Soto.

Both Sergeants McCloskey and Koniaris were transported to different hospitals for medical treatment. Sergeant McCloskey had pain in his hands, neck, back, and left knee, in addition to numerous scrapes and abrasions on his arms and legs. Sergeant Koniaris was bleeding from a cut below his nose and he had cuts and scrapes on his arms and legs.

SFPD Officer Anthony Assereto (Star No. 864) rode with Sergeant McCloskey and later took custody of Sergeant McCloskey’s duty belt and gun. Officer Kevin Worrell (Star No. 171) rode with him and later took custody of Sergeant Koniaris uniform and duty belt and gun.

**AUTOPSY**

Dr. Hart of the San Francisco Medical Examiner’s Office (SFME) conducted Benitez’ autopsy on October 16, 2015. Dr. Hart found two distinct penetrating gunshot wounds on the torso. She recovered two bullets, one of which perforated Benitez’s lungs and heart. Dr. Hart determined the cause of death was a gunshot wound to the torso.

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<sup>2</sup> Harold K. appears to have reversed the officers’ respective roles when compared to most of the witness statements.



*Sgt. Koniaris' Name Badge on the belt of Benitez after struggle and shooting*

Sergeant Koniaris' engraved name tag was found pinned to Benitez' belt by SFME Investigator Nagoya and SFPD Homicide Sergeant Sanders, No. 4191, during the preliminary exam of Benitez body at the scene. The side with the engraved name was facing outward and the two metal prongs were embedded into the fabric of the belt that was looped in Benitez' pants. (See photo above.)

### **FIREARM INSPECTION**

Sergeant Koniaris' Sig Sauer P226 .40 caliber pistol was loaded with .40 caliber S&W cartridges. One bullet was in the firing chamber and 10 were in the 12 cartridge capacity magazine, indicating that he fired two bullets. There were visible blood spots on the pistol.

### **DNA ANALYSIS**

SFPD Officer Route conducted DNA swab tests of both sergeants' pistols and found Benitez's DNA on Sergeant Koniaris's gun.

DNA profiles of at least two people were found on blood swabs taken from Sergeant Koniaris duty gun. The major component was identified as Benitez' DNA.

DNA profiles of at least two people were found on the swab of the top of Sergeant McCloskey's duty gun. DNA profiles of at least three people were found on the swabs of Sergeant McCloskey's duty gun hand grips. However, neither combined sample had sufficient DNA to make a positive identification of anyone or comparison to either sergeant or Benitez.

### **LEGAL STANDARD**

The question presented is whether the officer committed a criminal act in shooting and killing Benitez. 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, however, 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 officer acted in self-defense or in defense of others thereby legally justifying their conduct.

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 person (1) subjectively believed in the need to resort to force in order to avert a threat of imminent and great bodily injury, and (2) the person’s 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 and defense of others 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 their position. *See Humphrey*, 13 Cal.4th at 1082-83. 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 or her to be. *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519. 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.” *Humphrey*, 13 Cal.4th at 1083. 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.

## **ANALYSIS**

Beginning first with the subjective component, both Sergeants McCloskey and Koniaris stated that they feared for Sergeant McCloskey’s life when Benitez grabbed his firearm and pointed it at his head.

As Sergeant McCloskey stated, he was pinned to the ground as Benitez pulled his gun from his holster and pointed it at his face. He was yelling for Sergeant Koniaris to first call for help and then, once his gun was removed, to shoot Benitez because he was pointing the gun at him. Sergeant Koniaris corroborated this stating: “The only thing I thought of was that this guy’s gonna kill Sergeant McCloskey, my friend. And if I don’t do something, he’s dead. And I could possibly be dead ‘cause in my mind, he has Sergeant McCloskey’s gun.” There was no evidence to undermine the sergeants’ stated belief in the need to use deadly force in the face of an imminent threat.

The remaining issue, then is to determine if the officers’ belief that they needed to resort to force to avert the threat of imminent harm was objectively reasonable. The evidence indicates that it was.

To begin, this incident happened within a short period of time, just within minutes of the arrival of the officers being summoned by the civilian witnesses at the construction site. The officers were there for a lawful reason after construction workers had flagged them down because Benitez had allegedly thrown a glass bottle at the vehicle entrance of the construction site, creating a safety hazard. The officers approached Benitez to investigate but Benitez refused to

cooperate. Sergeant McCloskey attempted to detain Benitez with an arm bar control hold when Benitez approached him but Benitez grabbed Sergeant McCloskey by his vest and ended up taking him to the ground. During the struggle, Benitez removed Sergeant McCloskey's firearm from the holster and point it at his head. Sergeant McCloskey, fearing for his life cried out to his partner to let him know that Benitez had his gun and he needed Sergeant Koniaris to shoot him.

A number of civilian witnesses, including Chris A., Juan Z. and Harold K., saw both of the officers struggling with Benitez and Sergeant Koniaris trying to pull Benitez off of Sergeant McCloskey before the shooting. Juan Z. saw Benitez grabbing the waist area and gun belt of Sergeant McCloskey as he was on the ground. Additionally, they both heard Sergeant McCloskey yell "Shoot him! Shoot him!"

Based on Sergeant McCloskey's vulnerability on the ground, Benitez taking control of Sergeant McCloskey's gun, and Sergeant McCloskey's screams to Sergeant Koniaris that Benitez had his gun, Sergeant Koniaris reasonably believed that his partner was in imminent danger. Thus, there is insufficient evidence to show that Sergeant McCloskey did not act reasonably in defense of Sergeant McCloskey's life.

### **CONCLUSION**

For the reasons discussed above, the District Attorney declines to file any criminal charges against the involved sergeant in this matter.