



## PUBLIC RELEASE MEMORANDUM

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**Date:** September 3, 2020

**Subject:** **Non-Fatal Officer-Involved Incident**

**Involved Officers:** Officer Michael Babineaux,  
Rialto Police Department

**Involved Subject:** Lawrence Ray Bender (DOB 5/23/91)  
**Subject's Residence:** Rialto, CA

**Incident Date:** June 29, 2019

**Case Agent:** Detective Brian Lewis  
San Bernardino Police Department

**Agency Report #:** 2019-82931

**DA STAR #:** 2019-60975

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**PREAMBLE**

The summary of this non-fatal incident is drawn from a submission of materials prepared by the San Bernardino Police Department (SBPD), a transcript of the preliminary hearing held in San Bernardino Superior Court, case no. FSB19002422, *People v. Lawrence Bender*, and the expert report of Kevin Fries dated August 26, 2020.

The submission reviewed includes the following: reports of witness law enforcement; reports summarizing interviews of the involved law enforcement officers and civilian witnesses; audio police dispatch recordings, body-worn camera (BWC) video recordings; audio or video recordings of law enforcement officer and civilian interviews; law enforcement photographs; scientific investigation reports. The investigating case agent for this submission was Detective Brian Lewis.

**FACTUAL SUMMARY**

On June 29, 2019, at approximately 8:11 p.m., Rialto Police Department (RPD) Officer Michael Babineaux fired his duty pistol at 28-year-old Lawrence Bender in the City of San Bernardino. Mr. Bender was injured as a result. Mr. Bender survived his injuries.

This officer-involved shooting was the unusual culmination of what began as a routine traffic stop. Officer Babineaux was a relatively new officer who had just finished field training approximately two months prior. At approximately 7:34 p.m., Officer Babineaux responded to a traffic stop in progress on North Macy Street, between West Spruce Street and Foothill Boulevard. The driver of a 1991 red Jeep Cherokee was arrested by RPD Officer Justin Breen and taken away from the scene. Officer Babineaux pulled his patrol unit behind the Jeep and remained at the scene to coordinate towing and impounding it.

Witness #1—a tow-truck driver, responded to the scene just before 8:00 p.m. and pulled to the curb in front of the Jeep. As he began taking steps to tow the Jeep, he noticed Mr. Bender walking by. Mr. Bender caught Officer Babineaux's attention, as well, and although he was completing other work inside his patrol unit, he began recording with his BWC. Mr. Bender had no known connection with the Jeep in tow, nor with the driver taken away from the scene previously.

Both Witness #1 and Officer Babineaux watched as Mr. Bender ultimately sat down on the street curb across from them. It was approximately 8:09 p.m. The tow truck was audibly running, and its bed was tilted back. Then, Mr. Bender walked up to the tow truck's cab and opened the driver's-side door. From inside the Jeep, Witness #1 screamed, "hey!" Officer Babineaux got out of his patrol unit and ran towards Mr. Bender. The officer had his duty-weapon drawn and pointed at Mr. Bender, and yelled, "Yo! Get away from the truck. Get away from the truck. What

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are you doing? Sit down!” Officer Babineaux was concerned that Mr. Bender was trying to steal the tow truck and that the Jeep (with Witness #1 inside) was attached to it.

Witness #1 described Mr. Bender as appearing in his mid-30’s or early 40’s, standing six feet tall, having a muscular build, and weighing approximately 260-270 pounds. In comparison, Witness #1 believed Officer Babineaux to be “short in stature.” All three men were in the middle of the street, next to the tow truck.

Over the course of about 80 seconds, Officer Babineaux was unable to gain Mr. Bender’s sustained compliance, even though the officer had his pistol trained on him. Instead, Mr. Bender vacillated between compliance and non-compliance, rapidly and without warning. Meanwhile, traffic approached the scene, including Witnesses #2 and #3, and Witness #1 tried to avert them.

Initially, Mr. Bender got on the ground into a push-up position and repeatedly motioned upwards. Officer Babineaux placed his foot on Mr. Bender’s back, in between his shoulder blades to try to control Mr. Bender’s movements. Officer Babineaux also radioed for emergency assistance. Mr. Bender continued to struggle against the officer, however, and managed to scramble up to standing and came close to knocking Officer Babineaux’s weapon away. Officer Babineaux exclaimed, “I will shoot you!” Mr. Bender’s hands shot straight up with his palms facing forward, as if to surrender and said, “I don’t have a gun!” Officer Babineaux continued to hold Mr. Bender at gunpoint, and again ordered him to the ground.

Mr. Bender again moved to the ground. As before, Mr. Bender went down in a push-up position. Almost immediately after doing so, Mr. Bender motioned upward. Officer Babineaux push-kicked Mr. Bender down to the ground to create distance between the officer and Mr. Bender. In response, Mr. Bender stumbled forward to the ground and unexpectedly rebounded back onto his feet while making a jumping hook punch with his left fist at Officer Babineaux. Mr. Bender narrowly missed Officer Babineaux’s gun in doing so. Almost instantaneously with Mr. Bender’s jumping hook punch, Officer Babineaux backed away and shot at Mr. Bender, twice. Officer Babineaux explained that he believed that Mr. Bender was trying to kill him, either by disarming him or knocking him out to use his gun against him.

After firing his weapon, Officer Babineaux immediately announced to his dispatch, “shots fired, one subject down.” Mr. Bender initially turned away and fell after being shot, though he popped up onto his feet momentarily, only to fall forward onto the ground once more.

Additional RPD officers arrived within two minutes and they began administering first aid to Mr. Bender. The officers determined that Mr. Bender suffered at least two gunshot wounds—one in the left arm and another in the upper left shoulder. Mr. Bender was transported to Arrowhead Regional Medical Center (ARMC), where he received further medical care. Mr. Bender later admitted to investigators that he was “high” on methamphetamine at the time of the confrontation.

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At the scene of the shooting, two fired cartridge casings were located in the roadway, west of the tow truck bed.

**STATEMENTS BY LAW ENFORCEMENT OFFICERS<sup>1</sup>**

**Officer Michael Babineaux** gave a voluntary statement to Detective Michael Siems, in the presence of his attorney on July 1, 2019, approximately 39 hours after the shooting incident. Officer Babineaux reviewed his body worn camera (BWC) footage of the incident prior to his interview.

At the time of the shooting incident, Officer Babineaux had been a police officer for approximately six and a half months. Prior to that he was a RPD parking enforcement officer and police cadet. The officer was driving a marked RPD SUV-style patrol unit and was wearing a department-issued blue (Class B) long-sleeve uniform with RPD patches and his badge and nameplate on his chest. He was carrying his department-issued Glock 22, .45 caliber handgun, that he had previously loaded with 14 rounds, plus one round in the chamber.

Additional relevant portions of Officer Babineaux's statement can be summarized as follows:

Officer Babineaux responded to the incident location at North Macy Street and Foothill Boulevard as a backing officer on a traffic stop made by RPD Officer Breen. Officer Breen arrested the subject of the stop and left the location. Officer Babineaux stood-by to take an inventory of the arrestee's car and arranged to have it towed.

While Officer Babineaux waited for the tow-truck to arrive, he sat in his closed patrol unit to complete other work. The officer then saw Mr. Bender walking southbound on Macy and sit on the curb across from him. Officer Babineaux did not immediately contact Mr. Bender because he was not interrupting and was just observing. However, Officer Babineaux next saw Mr. Bender stand and walk towards the cab of the tow truck. The tow truck was running and its hydraulics were engaged. The officer entertained the thought that Mr. Bender may be approaching to talk to the tow truck driver—Witness #1. Except, he noticed that Witness #1 was in fact in the driver's seat of the car to be towed. Mr. Bender had opened the tow truck cab's door and stepped up to it. Officer Babineaux got out of his patrol unit and ran towards the tow truck with his duty weapon drawn and pointed at Mr. Bender. Officer Babineaux explained that his concern was that Witness #1 would be in danger if Mr. Bender drove the tow truck away, and that this may have been a felony carjacking in progress.

Officer Babineaux recalled giving Mr. Bender orders to get away from the tow truck and show his hands. Mr. Bender initially complied, but after the officer told him to get on the

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<sup>1</sup> Herein is a summary only. All reports submitted were reviewed, but not all are referenced here. No law enforcement personnel became aware of or used any civilian person's name until investigations revealed it, or as otherwise specified. All references to any witness or Lawrence Bender by name are made here for ease of reference.

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ground, Mr. Bender was hesitant. Officer Babineaux stated that after Mr. Bender got on the ground, that Mr. Bender began to stand up as the officer got close. The officer kicked Mr. Bender back down to the ground. The officer explained that this was not normal behavior from a person who has a firearm pointed at them. Officer Babineaux believed that Mr. Bender may be under the influence of some narcotic.

Mr. Bender kept trying to get up from the ground even after the officer kicked him to the ground, so Officer Babineaux placed his foot in the middle of Mr. Bender's shoulder blades and leaned into him to keep him on the ground. Officer Babineaux radioed dispatch to ask for another unit because Mr. Bender continued to resist.

Next, Officer Babineaux explained that Mr. Bender was able to wriggle out from beneath his foot, stand up and try to knock the officer's gun out of his hands. Officer Babineaux stated that Mr. Bender was unusually strong for his size. Officer Babineaux perceived Mr. Bender to be about five feet and nine inches tall, and matched him in size. Yet, the officer did recall feeling at the time that he was "in a bad spot" because he believed his nearest backing unit was far away and Mr. Bender was not listening, and he had no other options available to gain compliance.

After Officer Babineaux kicked Mr. Bender down again, the officer recalled that Mr. Bender scrambled back onto his feet and made a jumping punch movement towards the officer's firearm. In response, Officer Babineaux fired two rounds at Mr. Bender. Officer Babineaux believed that Mr. Bender's jumping punch could have either rendered him unconscious and allow Mr. Bender to take his weapon or knocked the firearm out of the officer's hand. Officer Babineaux explained that he was "scared the whole time." The officer explained that, "it's a scary feeling seeing someone swinging at your gun when you're obviously in a police uniform and you're giving them a lawful order and they're physically resisting it." The officer was afraid that Mr. Bender would fight him, take his gun or use it to kill him or Witness #1. Officer Babineaux stated that he was afraid for his life.

Officer Babineaux did not recall seeing Mr. Bender with any weapons, but he was also never certain that Mr. Bender was unarmed. Officer Babineaux explained that at no point during the contact that he felt Mr. Bender was compliant enough to safely transition from his handgun to a less-lethal option. At the time, Officer Bender did have an asp and taser gun.

Throughout this incident, Officer Babineaux believed he was in a high crime and drug area. The officer grew up not far from this area, was aware of its demographic and that the *Five-Time Crip* gang had a strong influence there. Officer Babineaux had also recovered weapons and drugs in this area during his time as a RPD officer, and was familiar with several shootings in the vicinity that were being investigated by SBPD.

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Almost three months after the shooting, Officer Babineaux testified about the lethal force event in the San Bernardino Superior Court. In sum, Officer Babineaux's testimony was materially similar to the statement he gave Detective Siems. During his testimony, Officer Babineaux clarified that this incident occurred approximately two months after he began patrolling without a training officer. Officer Babineaux explained that on approaching Mr. Bender initially, he was going to exhibit his firearm to get Mr. Bender to comply, as it appeared to him that Mr. Bender was attempting to steal the tow truck. However, despite doing all that he could to keep the situation from escalating, including pointing his firearm at Mr. Bender, Mr. Bender would not comply with commands. Ultimately, Officer Babineaux stated simply that he shot at Mr. Bender because Mr. Bender swung at him and/or at his firearm.

**STATEMENTS BY CIVILIAN WITNESSES<sup>2</sup>**

**Tow-Truck Operator.** Witness #1, a 50-year-old tow-truck operator, was interviewed by the case agent just before midnight on the day of the shooting incident. Witness #1 stood less than ten feet from Officer Babineaux and Mr. Bender when the shooting occurred.

Witness #1 was dispatched to the scene at approximately 7:44 p.m., and arrived just before 8:00 p.m. Witness #1 immediately noticed that Officer Babineaux was in his RPD patrol car, behind a red Jeep. To prepare to tow the Jeep, Witness #1 turned his headlights and flashing lights on, tilted back his tow bed and was planning to drive the Jeep onto it. As Witness #1 worked to try to get the Jeep started, he noticed Mr. Bender walking towards him on Macy Street. Witness #1 described Mr. Bender as appearing in his mid-30's to early-40's, standing six feet tall, having a muscular build, and weighing approximately 260-270 pounds. It appeared to Witness #1 that Mr. Bender was looking at him and his truck, back and forth, and that Mr. Bender was "really amped up." Witness #1 explained that Mr. Bender was fidgety in his movements, like he was having mental issues or had "drug issues."

Next, Witness #1 described that Mr. Bender walked to the driver-side door of his tow truck and pulled the door handle, like he was ready to get inside and take off. Witness #1 yelled "hey" at Mr. Bender, and Officer Babineaux ran by him with his firearm drawn and pointed at Mr. Bender. Witness #1 heard Officer Babineaux command Mr. Bender to "get down" and show his hands, and saw the officer pull Mr. Bender to the ground in the middle of the street.

Witness #1 saw Officer Babineaux put one foot on top of Mr. Bender, with the officer's other foot on the ground. It appeared to Witness #1 that Officer Babineaux was trying to make a radio call, but each time he would start to talk, that Mr. Bender would start fidgeting and moving around. Witness #1 stated that Mr. Bender would not stay still and kept putting his arms underneath his body, even though Officer Babineaux kept nudging him with his foot and telling

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<sup>2</sup> Every civilian statement was reviewed in totality. However, only the relevant parts of those statements are included here. Any reference to Mr. Bender or Officer Babineaux by name here is made for ease of reference only. Unless otherwise noted, no witness referred to Mr. Bender or Officer Babineaux by name.

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him not to move. Witness #1 perceived Officer Babineaux to be approximately five feet and five inches, with a slim build. Witness #1 stated:

Normally, I don't try to get involved in officer-related things, but [Mr. Bender] looked pretty spun out. He looked like a pretty big guy, and the officer looked short in stature and had a lot going on, like his hands were kind of busy... . I shouted at [Mr. Bender] to show him that besides the officer there were other people there that were telling him the same thing so he would like, you know, get it through his head to stop moving.

At one point, Witness #1 stated that his attention was diverted to traffic pulling up to the scene, until he heard a scuffle and yell. When Witness #1 looked back at the officer and Mr. Bender, he saw Mr. Bender get up and either lunge or fall toward the officer. Officer Babineaux, in response, backed up and fired two gunshots at Mr. Bender at a distance of approximately four to five feet.

On September 23, 2019, Witness #1 testified about the incident in the San Bernardino Superior Court. Witness #1's testimony was generally consistent with the statement he gave Detective Lewis in the late night after the shooting.

**Suburban Witnesses.** Thirty-eight-year-old Witness #2 was driving southbound on North Macy Street, with her husband—32-year-old Witness #3, in a dark-colored Chevy Suburban when they happened upon Officer Babineaux and Mr. Bender in the roadway. Witness #2 and Witness #3 stopped approximately two to two and a half car-lengths north of the Witness #1's tow truck and watched the incident until additional officers arrived.

Witness #2 and Witness #3's recall of the incident was generally consistent with each other and with the events captured by Officer Babineaux's BWC footage. Witness #2 and Witness #3 were interviewed separately at SBPD in the early-morning hours of June 30, 2019, at approximately 2:00 a.m. and 1:20 a.m., respectively.

By the time that they arrived at the scene, Witness #2 and Witness #3 saw that Mr. Bender was on the ground and Officer Babineaux had his foot on Mr. Bender's back. They recalled that the officer had his gun pointed at Mr. Bender and was also telling Mr. Bender to stop moving or to stay down. However, Mr. Bender was not complying. Instead, Mr. Bender kept trying to get up. Witness #3 believed that Mr. Bender was able to get up because Officer Babineaux lifted his foot. Witness #3 described the officer as maybe being a "rookie" or "looking nervous." Witness #2 observed Mr. Bender "get up and kinda wrestle" with Officer Babineaux. Both witnesses also perceived the tow truck driver was trying to help the officer. Witness #2 and Witness #3 saw Officer Babineaux kick or trip Mr. Bender, causing Mr. Bender to fall down, and then saw Mr. Bender make a hook swing at Officer Babineaux. Both Witness #2 and Witness #3 saw Officer Babineaux fire two gunshots at Mr. Bender.

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**INCIDENT AUDIO/VIDEO**

**Police Dispatch Recordings.** RPD dispatch recordings were submitted for this review, including a 9-1-1 call by Witness #3 made at approximately 8:13 p.m. Witness #3's 9-1-1 call was primarily consistent with the statement he gave. Officer Babineaux's radio broadcasts were consistent with those indicated in his BWC footage, with the exception of his first attempt to radio "shots fired," which was either not successfully broadcasted or not recorded.

The timing of RPD's radio dispatch recordings is not apparent from the recordings themselves. However, the companion dispatch log in this shooting event notes these approximate timestamps for radio communications initiated by Officer Babineaux and summarized as follows:

7:31 p.m.	On scene at the incident location.
7:43 p.m.	Request for tow truck.
8:10 p.m.	One subject causing a public disturbance.
8:11 p.m.	Shots fired.

**Body-Worn Camera Footage.** BWC's were worn and resulting footage was uploaded by RPD and SBPD officers who responded to the incident scene. For the most part, the BWC video footage submitted pertained to the post-shooting investigation. Two BWC videos captured the originating traffic stop. Only one BWC video captured the shooting incident—that footage was recorded by Officer Babineaux's BWC device.

All BWC's appear to have been worn at the chest plate. It is therefore understood that the resulting footage is subject to the limitations of the camera mechanism and the view resulting from being worn on the officer's chest; BWC footage does not recreate what the wearing officer perceived by his senses. Also, despite the late hour of the day that the incident took place, the video quality of Officer Babineaux's BWC recording does suggest that people and things were visible in the summer dusk. With those conditions in mind, below is a summary of events captured in a portion Officer Babineaux's BWC recording, with audible statements indicated in boldface type:

The tow truck has flashing lights on its cab, activated. Mr. Bender can be seen walking southbound on North Macy Street toward the west curb. Mr. Bender then sits on the west curb across (and to the left) where Officer Babineaux is seated, for about 13 seconds. Officer Babineaux's vantage point appears to be from the inside of his patrol unit with the doors closed. Next, Mr. Bender approaches the cab of the tow truck. As Mr. Bender reaches for the cab door, Officer Babineaux abruptly gets out of his patrol unit. Both Witness #1 and Officer Babineaux start yelling.

Babineaux: **Yo. Get away from the truck. Get away from the truck.**

The sound of the running tow-truck is loud and constant. Mr. Bender steps away from the tow truck, with his hands up high above his head and he faces Officer Babineaux.

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Babineaux: **What are you doing? Sit down.**

Mr. Bender bends forward at the waist, west of the double yellow lines, and continues to walk while bent toward the west curb with his hands touching the ground, popping up slightly then bending back down.

Witness #1: *(unintelligible)*

Bender: *(unintelligible)*

Babineaux: **Sit down.**

Bender: *(unintelligible)*

Babineaux: **Lie down. Lie on the ground.**

Mr. Bender gets into a plank-type position, with his stomach facing the ground and his palms flat under him; his body is not fully down.

Bender: *(unintelligible)*

Babineaux: **Don't move. Lie on the ground.**

Mr. Bender is still hovering over the ground and appears to be rising up again. Based upon Officer Babineaux's statement, it sounds like the officer then kicked at Mr. Bender, though the footage angle does not capture this. The footage does show Mr. Bender go flat onto the ground, with his arms extended forward and his palms flat on the ground.

Babineaux: **The fuck is wrong with you? Put your hands behind your back. Put your hands behind your back.**

Bender: *(unintelligible)*

Mr. Bender appears to move his hands from the extended position to his back.

Babineaux: **30-Grace start me another unit, I have one four-15.**

Bender: *(unintelligible)*

There is movement in the footage to suggest that Mr. Bender has again shifted upward, but Mr. Bender's movements are not visible.

Babineaux: **Stay on the ground. Stay on the ground. Don't move.**

Babineaux: **30-grace. Have them come code.**

There is another movement in the footage to suggest that Mr. Bender has again shifted, but Mr. Bender's movements are not visible. Based upon witness accounts and Officer Babineaux's interviews, Mr. Bender would not stop moving. The following statements captured on Officer Babineaux's BWC footage is consistent with the witness and officer statements, but Mr. Bender's movements are out of view:

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Babineaux: **Stay down. Don't move.**  
Bender: *(unintelligible)*  
Babineaux: **Stay on the ground. Stop moving.**  
Bender: *(unintelligible)*  
Babineaux: **I will shoot you in your face. Stop.**  
Bender: *(unintelligible)*  
Babineaux: **I don't care where you're going. Shut up.**  
Babineaux: **Stay on the ground.**  
Bender: *(unintelligible)...man, get the fuck...(unintelligible)*

Immediately after Officer Babineaux's last order to "stay on the ground," the BWC footage depicts significant camera movement and Mr. Bender can be seen getting up. Officer Babineaux stated in his interview that as Mr. Bender makes this movement, Mr. Bender's hand swipes within inches of the officer's handgun.

Babineaux: **I will shoot you.**  
Bender: **I don't have a gun.<sup>3</sup>**

Mr. Bender is standing upright and facing Officer Babineaux. Both of Mr. Bender's hands are in the air over his head, with open palms facing the officer. Officer Babineaux appears to be holding his duty weapon pointed at Mr. Bender's chest.

Babineaux: **Stop moving. Get on the ground.**  
Witness #1: **Get on the ground.**

Mr. Bender brings his hands down, and motions towards his left, and appears to be getting down again near the double yellow lines in the road.

Babineaux: **Get on the ground.**

Witness #1 is standing just east of the double yellow lines, towards the tow truck. As Mr. Bender gets to the ground parallel and west of the double yellow lines almost facing south, Witness #1 steps to his left, until he walks to the west of the double yellow lines and out of the officer's BWC camera frame.

Babineaux: **Stay on the ground.**  
Witness #1: **Stay down.**

It appears that Mr. Bender gets up. Per Officer Babineaux's statement, the officer "push-kicked" Mr. Bender away from him and toward the tow truck. Mr. Bender can be seen

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<sup>3</sup> Officer Babineaux stated during his interview that when he reviewed his BWC footage, he heard Mr. Bender deny having a gun. However, Officer Babineaux stated that at the time he was actually in the situation, he did not recall hearing Mr. Bender deny having a gun.

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stumbling toward the tow truck, with both of his hands touching the ground. In a reflex-type motion, Mr. Bender pushes up off the ground, faces and steps toward Officer Babineaux.

Bender: *(unintelligible)*...**I got you.**

Mr. Bender makes a hook swing with his left hand toward Officer Babineaux. Officer Babineaux's left hand goes up as if to swat at Bender's swing, and the sound of two gun shots ring out. Mr. Bender instantly turns counter-clockwise (south/southeast toward the tow truck bed) and stumbles to the ground onto his belly. Mr. Bender is screaming now. The officer's BWC footage shows the front of patrol unit; no emergency lights are flashing.

Babineaux: **30. Shots fired, one subject down.**

Mr. Bender pops back up onto his knees, screaming, gets to his feet, then falls back down, laying on top of his hands.

Babineaux: **Stay on the ground. Don't move.**

Witness #1: **Stay down.**

Babineaux: **Don't move.**

Bender: *(unintelligible)*

Witness #1: *(unintelligible)*..lay down...*(unintelligible)*

Babineaux: **Put your hands behind your back where I can see it.**

Bender: **I can't. I can't.**

Babineaux: **Put your other hand behind your back.**

Mr. Bender's right hand can be seen with the palm facing up and at the small of his back.

Bender: **I can't. I wanna be a God. I really need to be a God. I really need to be a God.**

Babineaux: **30. Shots fired, one subject down. Start RP.**

Bender: *(unintelligible)*

Babineaux: **Stay on the ground. Don't move. Don't move.**

Witness #1: *(unintelligible)*...wait... *(unintelligible)*...lay down...  
*(unintelligible)*

Babineaux: **30. I confirm.**

The above summarized events and statements transpire over the course of approximately three minutes and 15 seconds. Approximately one minute and 21 seconds pass between the first order given by Officer Babineaux and the time that gunshots are heard.

A review of the BWC footage taken by Officer Babineaux and Sergeant Quarker show that about four minutes after the shooting, Officer Babineaux gave a rough sketch of what had just

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happened, that was generally consistent with the officer's BWC footage and the statement he gave Detective Siems. In less than 90 seconds, Officer Babineaux told the sergeant that Mr. Bender was not complying with orders, that after kicking Mr. Bender several times, that Mr. Bender kept getting back up and that he fired at Mr. Bender because Mr. Bender "wanted to fight" the officer.

**INCIDENT SCENE INVESTIGATION**

**Detective William Flesher** reported the description of the incident scene on North Macy Street, north of Foothill Boulevard. At the time, the street at that location was a two lane, two-way asphalt-paved roadway with a solid double yellow line separating the north and southbound traffic lanes. There were raised concrete curbs on both east and west sides of the street, that ran along vacant fields

Witness #1's tow truck was found running, and stopped in the northbound lane of Macy Street, with the flatbed tilted and extended backwards. The headlights and emergency flashers were activated on the tow truck. Parked directly behind the tow truck with the engine off, was a red Jeep Cherokee Laredo. Officer Babineaux's marked RPD patrol unit was parked behind the Jeep.

Detective Flesher noted two fired cartridge casings in the roadway, west of the tow truck bed.

**INJURED PARTY**

**INJURIES.** Mr. Bender was transported to and received medical treatment at ARMC after the shooting incident. Investigations did not confirm how many gunshot wounds Mr. Bender sustained. No medical records were submitted by the case agent. However, the BWC footage recorded by RPD Officers Constantino and DeSchepper suggest that Mr. Bender sustained at least two gunshot wounds—one in the left arm and another in the upper left shoulder.

**INJURED PARTY'S STATEMENT.** Mr. Bender gave a voluntary statement to the case agent, on July 3, 2019. Mr. Bender was still under medical observation at ARMC at the time.

Mr. Bender told Det. Lewis that he was "high" on methamphetamine at the time of the incident. He admitted trying to get into the tow truck, but didn't know why. Then, he recalled someone grabbing him, hitting him in the face and slamming him down onto the ground. Mr. Bender did not recall being told by the officer not to move. He said the first time he knew he was dealing with an officer was after he got up and faced him. He recalled thinking to himself, "why am I facing an officer?" Mr. Bender then recalled being shot by the officer, three or four times. Mr. Bender did not recall taking a swing at the officer, but he did recall the officer telling him to get on the ground and put his hands behind his back, *after* the officer shot him.

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**CRIMINAL HISTORY.** As a result of Mr. Bender’s conduct relative to the shooting incident, this office filed a criminal case against him. The pending matter (San Bernardino County Superior Court, case no. FSB19002422) includes one felony count—a violation of Penal Code, §69.

Mr. Bender has been convicted of the following:

Case No. FSB1495049 Convicted on 10/29/14 of Pen. C.§273.5(a) [corporal injury to cohabitant] (felony). Initially, sentenced to 210 days jail, 36 months probation. Due to a subsequent probation violation, was sentenced to 2 years state prison.

Case No. MSB1505033 Convicted on 11/10/15 of Pen. C.§148.9 [false report to police officer] (misdemeanor). Sentenced to 30 days jail.

Case No. 16CR013684 Convicted on 5/19/17 of Pen. C.§243(D) [battery causing serious bodily injury] (felony). Sentenced to 2 years state prison, concurrent with FSB1495049.

**APPLICABLE LEGAL PRINCIPLES**

A police officer may initiate contact with anyone in a public place. (*People v. Divito* (1984) 152 Cal.App.3d 11, 14; *People v. King* (1977) 72 Cal.App.3d 346.) An officer may approach a person to investigate possibly criminal behavior even though there is no probable cause to make an arrest.” (*Terry v. Ohio* (1968) 392 U.S. 1, 22.) If the officer believes a person has committed a public offense, he may use reasonable force to effect an arrest. (Calif. Penal C. §835a)<sup>4</sup> Should the arresting officer encounter resistance, actual or threatened, he need not retreat from his effort and maintains his right to self-defense or to use reasonable force to effect that arrest. (*Id.*)

An arrestee has a duty to refrain from using force to resist arrest, if he knows or should know that he is being arrested. (Penal C. §834a.) In the interest of orderly resolution of disputes between citizens and the government, a *detainee* also has a duty to refrain from using force to resist detention. (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4<sup>th</sup> 321, 332-333.) An arrestee or detainee may be kept in an officer’s presence by physical restraint, threat of force, or assertion of the officer’s authority. (*In re Gregory S.* (1980) 112 Cal. App. 3d 764, 778, *citing, In re Tony C.* (1978) 21 Cal.3d 888, 895.) The force used by the officer to effectuate the arrest or detention can be justified if it satisfies the Constitutional test in *Graham v. Connor* (1989) 490 U.S. 386, 395. (*People v. Perry* (2019) 36 Cal. App. 5th 444, 469-470.)

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<sup>4</sup> All references to code sections here pertain to the California Penal Code, as they existed at the time of the incident. Significant modifications were made to sections 196 and 835a pursuant to Assembly Bill 392. (Assem. Bill No. 392 (2018-2019 Reg. Sess.) as Chaptered August 19, 2019.) However, those modifications do not apply retroactively. Even if they did, the conclusion of the analysis would be the same.

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Moreover, an officer-involved shooting may be justified as a matter of self-defense, which is codified in Penal Code at §197. These authorities are pertinent to the analysis of the conduct involved in this review and are discussed in greater detail below.

**PENAL CODE SECTION 197.** California law permits *all persons* to use deadly force to protect themselves from the imminent threat of death or great bodily injury. Penal Code §197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others.

The pertinent criminal jury instruction to this section is CALCRIM 505 (“Justifiable Homicide: Self-Defense or Defense of Another”). The instruction, rooted in caselaw, states that a person acts in lawful self-defense or defense of another if :

- (1) he reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury, and;
- (2) he reasonably believed that the immediate use of deadly force was necessary to defend against that danger.

(CALCRIM 505.)

“Imminence is a critical component of both prongs of self-defense.” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.) A person may resort to the use of deadly force in self-defense, or in defense of another, where there is a reasonable need to protect oneself or someone else from an apparent, imminent threat of death or great bodily injury. “An imminent peril is one that, from appearances, must be instantly dealt with.” (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) The primary inquiry is whether action was instantly required to avoid death or great bodily injury. (*Humphrey, supra*, 13 Cal.4th at 1088.) What a person knows and his actual awareness of the risks posed against him are relevant to determine if a reasonable person would believe in the need to defend. (*Id.* at 1083.) In this regard, there is no duty to wait until an injury has been inflicted to be sure that deadly force is indeed appropriate. (*Scott v. Henrich* (9th Cir. 1994) 39 F.3d 912, 915.)

There is no requirement that a person (including a police officer) retreat even if safety could have been achieved by retreating. (*Id.*, see also CALCRIM 505.) In addition, police officers are not constitutionally required to use all feasible alternatives to avoid a situation where the use of deadly force is reasonable and justified. (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 348.) The court in *Scott* explained:

Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment...Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves.

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(*Scott v. Henrich, supra*, 39 F.3d at 915.)

**REASONABLENESS.** Self-defense requires both subjective honesty and objective reasonableness. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1186.) The United States Supreme Court has held that an officer’s right to use force in the course of an arrest, stop or seizure, deadly or otherwise, must be analyzed under the Fourth Amendment’s “reasonableness” standard. (*Graham v. Connor, supra*, (1989) 490 U.S. at 395.)

The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on scene, rather than with the 20/20 vision of hindsight....The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

(*Id.* at 396-397, citations omitted.)

The “reasonableness” test requires an analysis of “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” (*Id.* at 397, citations omitted.) What constitutes “reasonable” self-defense or defense of others is controlled by the circumstances. A person’s right of self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639.) If the person’s beliefs were reasonable, the danger does not need to have actually existed. (CALCRIM 505.) Yet, a person may use no more force than is reasonably necessary to defend against the danger they face. (CALCRIM 505.)

When deciding whether a person’s beliefs were reasonable, a jury is instructed to consider the circumstances as they were known to and appeared to the person and considers what a reasonable person in a similar situation with similar knowledge would have believed. (CALCRIM 505.) When considered in the context of an officer-involved incident, this standard does not morph into a “reasonable police officer” standard. (*People v. Mehserle* (2012) 206 Cal.App.4<sup>th</sup> 1125, 1147.) To be clear, the officer’s conduct should be evaluated as “the conduct of a reasonable person functioning as a police officer in a stressful situation.” (*Id.*)

The *Graham* court plainly stated that digestion of the “totality of the circumstances” is fact-driven and considered on a case-by-case basis. (*Graham v. Connor, supra*, 490 U.S. at 396.) As such, “reasonableness” cannot be precisely defined nor can the test be mechanically applied. (*Id.*) Still, *Graham* does grant the following factors to be considered in the “reasonableness” calculus: the severity of the crime committed, whether the threat posed is immediate, whether the person seized is actively resisting arrest or attempting to flee to evade arrest. (*Id.*)

The “most important” *Graham* factor in the analysis is whether the suspect posed an immediate threat to the safety of the officer or others. (*Mattos v. Agarano* (9<sup>th</sup> Cir. 2011) 661 F.3d 433, 441-

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442.) Yet, other factors are taken into consideration when “necessary to account for the totality of the circumstances in a given case.” (*Id.*)

When undertaking this analysis, courts do not engage in *Monday Morning Quarterbacking*, and nor shall we. Our state appellate court explains,

under *Graham* we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

(*Martinez v. County of Los Angeles, supra*, 47 Cal.App.4<sup>th</sup> at 343, citing *Smith v. Freland* (6th Cir. 1992) 954 F.2d 343, 347.)

The Supreme Court’s definition of reasonableness is, therefore, “comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present.” (*Martinez v. County of Los Angeles, supra*, 47 Cal.App.4<sup>th</sup> at 343-344, citing *Roy v. Inhabitants of City of Lewiston* (1st Cir. 1994) 42 F.3d 691, 695.) In close-cases, the Supreme Court will surround the police with a fairly wide “zone of protection” when the aggrieved conduct pertains to on-the-spot choices made in dangerous situations. (*Id.* at 343-344.) One court explained that the deference given to police officers (versus a private citizen) as follows:

unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because ‘the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.’

(*Munoz v. City of Union City* (2004) 120 Cal.App.4<sup>th</sup> 1077, 1109, citing *Graham v. Connor*, [*supra*] 490 U.S. 386, 396.)

**EXPERT REPORT**

**Sergeant Kevin Fries** of the San Bernardino County Sheriff’s Department (SBCSD) prepared a report on behalf of this office, to be used in the litigation of San Bernardino Superior Court, case no. FSB19002422, *People v. Lawrence Bender*. Sergeant Fries is a 14-year veteran of the SBCSD, with extensive training in the various sub-specialties of police procedure and use of force. Sergeant Fries served as a use of force training officer and has testified as an expert on use of force, police procedures, police tactics and force options in San Bernardino County.

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After reviewing the submitted written reports and the BWC footage taken by Officer Babineaux, Sergeant Fries offered his expert opinion that Officer Babineaux was justified in using lethal force in this incident. It was Sergeant Fries' further concluding opinion that Officer Babineaux's "decisions and actions were consistent with state laws as well as standard law enforcement practices and procedures."

Sergeant Fries detailed in his report that Officer Babineaux's officer training at The San Bernardino County Sheriff's Department Regional Training Academy is both certified and utilizes a program exceeding state minimum standards for law enforcement training.

Sergeant Fries' factual findings were generally consistent with facts indicated above. Sergeant Fries explained that in the outset, since the tow truck was running, Mr. Bender posed an immediate danger to Witness #1 by entering the tow truck cab. Sergeant Fries opined that "the life of the tow truck driver was going to be in danger by being dragged along behind the tow truck." Further, it was clear that Mr. Bender was actively resisting and Officer Babineaux was "forced to make split-second decision attempting to gain voluntary compliance from [Mr. Bender]." Sergeant Fries explained that when someone is "415" (as indicated by Officer Babineaux to dispatch) it is descriptive of someone who is "challenging to fight." The sergeant elaborated that this code alerts dispatch and other officers that "the officer is encountering someone who is uncooperative and/or combative and they need immediate assistance." Also, when Officer Babineaux requested that officer respond "code," this meant that Officer Babineaux needed backing officers to expedite.

Sergeant Fries found that Officer Babineaux gave warning prior to his use of force and that lethal force was used only after Mr. Bender lunged at Officer Babineaux two separate times in what the officer believed to be "an attempt to disarm and attack" the officer or Witness #1.

**ANALYSIS**

This report evaluates the use of deadly force by Rialto Police Officer Michael Babineaux upon Lawrence Bender, on June 29, 2019 in San Bernardino. As indicated above, there are legal bases to justify an officer-involved shooting. We draw our conclusion here based upon those principles and a careful examination of the circumstances made apparent by the material referenced above.

An officer has authority to use reasonable force to effectuate an arrest or detention. The framework for determining what is "reasonable" is included in *Graham, supra*, which in turn informs the elements of Penal Code §197. Whether Officer Babineaux was justified in his use of a firearm under the principles of self-defense and defense of others per Penal Code §197 involves a two-part analysis: (1) did the officer subjectively and honestly believe he needed to protect himself or others from an apparent, imminent threat of death or great bodily injury; and (2) was the officer's belief in the need to protect himself or others from an apparent, imminent threat of death or great bodily injury objectively reasonable.

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**Subjective Belief of Imminent Need to Protect.** Officer Babineaux made his initial show of force only after Mr. Bender interjected himself in Witness #1 and the officer's work. Officer Babineaux explained that he approached Mr. Bender with his gun drawn because he believed that he was witnessing a felony in progress—carjacking of a running and occupied tow truck. The officer held a pre-conceived belief based upon his experience as an officer and his extended familiarity with the area whilst growing up, that the area was notorious for crime, drug and gang activity. With the officer's approach, Mr. Bender immediately backed away from the tow truck, threw his hands in the air and began to move towards laying down on the ground—as one who understood he was now being detained by a police officer. As such, Mr. Bender had a duty to refrain from using force to resist detention or arrest. Yet, even before there was any physical contact between the Mr. Bender and Officer Babineaux, the officer believed that Mr. Bender was “staring him down.” Since Mr. Bender was unrelated to the Jeep or its driver and spent time to assess the scene before interfering, it is reasonable to infer that Mr. Bender was intentionally pursuing a confrontation with the officer.

As the interaction between Mr. Bender and Officer Babineaux proceeded to include physical contact, the officer quickly learned that Mr. Bender was “abnormally” strong for his size. Mr. Bender would not voluntarily comply with the officer's commands and repeatedly pushed up against the officer. Officer Babineaux stated that he put his whole weight onto Mr. Bender to try to keep him on the ground.

Officer Babineaux felt that Mr. Bender demonstrated his intent not to follow commands and an irrational disregard of the fact that the officer was pointing his pistol at him. Officer Babineaux stated that Mr. Bender kept trying to get up and described the situation as “spiraling out of control very quickly.” In addition, Officer Babineaux stated that he was never certain that Mr. Bender was unarmed and believed that backing officers were far off. These stated beliefs are consistent with explanations provided by Sergeant Fries—by alerting dispatch that he had someone “415,” Officer Babineaux was letting dispatch and other officers know that he had a subject that was fighting with him. Officer Babineaux also requested that an additional unit respond “code” to let officers know that help was needed immediately.

Officer Babineaux admitted being “scared the whole time,” believing that Mr. Bender would fight him, take his gun or use it to kill him or hurt Witness #1. Sergeant Fries was in agreement with these assessments. Despite his extensive training, Officer Babineaux was a relatively new officer, who had been patrolling without a training officer for only two months when the shooting happened. Coincidentally, Witness #3 guessed Officer Babineaux to be either a “rookie” or “nervous.” If Witness #3 could infer that from a distance of approximately two car lengths, logically Mr. Bender would sense this as well and may have been emboldened in his actions because of it. In addition, it was apparent that Officer Babineaux was alone now and out-matched in strength and size by Mr. Bender. Even though Officer Babineaux believed that Mr. Bender might have been “pretty much matched” to Mr. Bender in size, Witness #1 saw it quite differently: Witness #1 described Mr. Bender to be six feet tall versus the officer, at five feet five inches tall. In fact, Witness #1 was swayed from his usual practice to stay out of “officer-related things” because Officer Babineaux seemed smaller and overwhelmed. As such, the belief that

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Mr. Bender could overpower or out-maneuver Officer Babineaux to injure him or Witness #1 is a credible one.

Still, it is apparent that it was not fear alone that moved Officer Babineaux to fire his weapon. Mr. Bender got up at least three times during this contact, in direct defiance of the officer's orders. The first two times, Officer Babineaux used kicks to get Mr. Bender on the ground. However, Mr. Bender pursued the officer thereafter with a "jump punch" that the officer believed could have disarmed him or knocked him out. In court, Officer Babineaux testified that he ultimately shot at Mr. Bender because Mr. Bender took a swing at him or his firearm. Minutes after the shooting, Officer Babineaux told his superior that Mr. Bender wanted to fight him. Officer Babineaux told Detective Siems that had Mr. Bender's punch landed that he was afraid Mr. Bender would kill him or Witness #1. In total, the officer bore an honest and subjective belief that he and Witness #1 were under threat of imminent deadly harm or bodily injury.

**Reasonable Belief of Imminent Need to Protect.** More than the stated belief of Officer Babineaux, however, the materials detailed above and contemplated in total support a finding that the officer had an objectively reasonable belief of the need to use deadly force to protect himself or another.

Officer Babineaux's presence at the incident site was straight-forward. He had arranged to have a car towed and was seeing that task through. Based upon his BWC footage, Officer Babineaux was aware of Mr. Bender's presence for more than 30 seconds prior to making contact with him. During that time, Mr. Bender walked by the tow truck from the north and sat across from the officer's unit and the tow truck. Witness #1 believed that Mr. Bender was looking back and forth at him in the Jeep and at the tow truck. In fact, Mr. Bender sat and observed the scene for a sustained 13 seconds, enabling him to assess the scene. Witness #1 had not winched the Jeep onto the tow truck yet and Mr. Bender sat at a vantage point that would have allowed him to see that. It would have also been apparent that Officer Babineaux sat inside his marked unit with the window up, and might have appeared to be on or looking at his phone. Since the tow truck was audibly running, it is reasonable to believe that someone who walked up to cab of the tow truck and opened the cab door under these circumstances is indeed trying to take the truck. This is what both Witness #1 and Officer Babineaux believed was happening when Mr. Bender stepped up to the tow-truck cab and is what caused both men to yell at Mr. Bender, initially.

The preliminary *Graham* factor considers the severity of the crime at issue. This dynamic contact began with the suspected car theft or carjacking. While the simple taking of the tow truck would be a relatively low-level felony, the consequence of a taking in this particular circumstance was life-threatening to Witness #1, as indicated by Sergeant Fries. Additionally, carjacking is a violent felony that would come into play *if* the taking was by force or fear and from Witness #1's immediate presence. Officer Babineaux believed that the Jeep (with Witness #1 in it) was already winched to the tow truck; from the officer's position behind the Jeep, it is not unreasonable that he would so believe. Yet, Officer Babineaux shot at Mr. Bender only after the latter took a jumping hook swing at the officer. That triggering conduct was at a minimum, felony-level resistance (Penal C. §69) or an assault on a peace officer (Penal C. §243(c)); these

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felonies are not considered serious or violent per California statute. The triggering conduct could also be considered to be an assault with force likely to cause great bodily injury, in violation of Penal Code §245(c)—a “serious” felony per Penal Code §1192.7(c). Sergeant Fries also opined that the consequence of Mr. Bender’s conduct here could have included death or great bodily injury or death to Witness #1 or Officer Babineaux. *Graham* only contemplates what a reasonable person acting as a police officer would have believed at the time of this stressful situation, without the hindsight benefit of a complete investigation. As such, it was reasonable for someone in Officer Babineaux’s position to believe that the aforementioned serious and violent crimes were occurring.

Resistance is another essential consideration in a *Graham* analysis. As discussed above, it is reasonable to conclude that Mr. Bender knew he was being detained by an officer. That Mr. Bender put his hands up and began to lay on the ground even though the officer initially had only asked that he sit down, also marked Mr. Bender as someone familiar with the detention process. Mr. Bender was obligated and Officer Babineaux could expect, therefore, that Mr. Bender should comply with the officer’s commands and not resist detention. Yet, the approximately 80 seconds that pass between the time that Officer Babineaux first runs towards Mr. Bender and when he fires at Mr. Bender, are rife with acts of resistance by Mr. Bender.

Prior to shots being fired, Officer Babineaux gave Mr. Bender 24 commands. For specificity, Officer Babineaux repeatedly ordered Mr. Bender to “get on the ground,” “stay on the ground,” “don’t move” or “stop moving.” The witnesses uniformly noted that Mr. Bender did not listen to Officer Babineaux’s commands. The witness accounts support Officer Babineaux’s belief that he was never “safe enough” to transition to a less-lethal option available because Mr. Bender was never “compliant enough.” For example, Officer Babineaux did recall that Mr. Bender initially backed away from the tow truck. However, after that, Mr. Bender reluctantly took a push-up position on the ground and would not remain still. Additionally, Witness #1 noticed that Mr. Bender would move around when the officer tried to get on his radio. It can be logically inferred that Mr. Bender was doing this to take advantage of the officer’s diverted attention or that Mr. Bender was trying to keep the officer from requesting assistance.

It cannot go without mention that the officer told Mr. Bender that he would shoot him in the face, and to “shut up.” While these are not the choicest words to offer warning or demand silence, it is apparent that Officer Babineaux was struggling to keep Mr. Bender under control at the time. Moreover, immediately after those exchanges, Mr. Bender wasn’t just wriggling on the ground anymore. Mr. Bender had scrambled upright to face the officer and came within inches of his firearm when he did so.

Despite the escalating resistance by Mr. Bender, Officer Babineaux still demonstrated restraint by not firing upon Mr. Bender and also had presence of mind to warn Mr. Bender for the second time that he would be shot. In response, Mr. Bender did bend forward and move towards the ground but then suddenly pushed upwards from the ground, yet again, as if to attempt to engage the officer again and in direct defiance of the officer’s orders. Officer Babineaux “push kicked” Mr. Bender away and towards the tow truck. The officer explained that kick was meant to put

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more distance between him and Mr. Bender. The officer's BWC footage does show that Mr. Bender stumbles further away from the officer. Witness #1 stated that the officer was also backing away. This was still another effort on the officer's part, to avoid having to shoot at Mr. Bender. Except, Mr. Bender got up for the third time, closed the distance created by Officer Babineaux and assaulted the officer.

Officer Babineaux recognized that someone in Mr. Bender's position who would so blatantly resist an officer while held at gunpoint was not normal behavior. The officer explained that, "it's a scary feeling seeing someone swinging at your gun when you're obviously in a police uniform and you're giving them a lawful order and they're physically resisting it." With reason, one who would refuse to obey commands given by a uniformed officer at gunpoint must be perceived to be especially dangerous, irrational and unpredictable.

The submission in total shows that Mr. Bender took a swinging punch at Officer Babineaux and the officer shot at him twice. Officer Babineaux, perceived and believed that Mr. Bender sought to strike him or his firearm. The officer called it a "jump punch." The Suburban Witnesses called it a "hook" punch. Witness #1 referred to it as "fall" or a "lunge" toward the officer. Sergeant Fries found that Mr. Bender twice "swung his hands towards [Officer Babineaux's] gun." Officer Babineaux's BWC footage supports the expert and eye-witness statements, showing that Mr. Bender appeared to take a wide aggressive hook-style punch with his left fist at Officer Babineaux. That Mr. Bender was shot in the left arm and shoulder would also support a finding that Officer Babineaux shot in defense of Mr. Bender's left hook punch. This one punch cannot be excised from the whole of the incident, however. Rather, Mr. Bender's intensified resistance as detailed above also gives dimension to the immediacy of the threat posed to Officer Babineaux.

Immediacy is the "most important" *Graham* factor. Mr. Bender's resistance first sought to unbalance the officer. That resistance ratcheted-up to squaring-up with the officer. Then, Mr. Bender struck at the officer. In addition, Officer Babineaux twice verbally warned Mr. Bender that he would be shot. That Mr. Bender would exclaim he did not have a gun, would support an inference that he understood he faced the potential of being shot. It was plain from the beginning of this confrontation that Officer Babineaux had his duty weapon trained on Mr. Bender, which would have made clear to Mr. Bender that he chose to aggress Officer Babineaux at his own peril. Although Mr. Bender was admittedly "high" on methamphetamine during this confrontation and Officer Babineaux suspected as much, nothing about this condition prevented Mr. Bender from complying with orders, appreciating that he was engaging a uniformed officer and that the officer had his duty weapon pointed at him. Additionally, immediately before Mr. Bender throws his jumping left hook punch, he can be heard saying, "I got you." This supports a further inference that Mr. Bender was intentionally pursuing Officer Babineaux. As such, Mr. Bender's intoxication did not make him less of a perceived threat to Officer Babineaux, under the circumstances.

Officer Babineaux was forced to make a split-second judgment under tense, uncertain and rapidly-evolving circumstances. It was reasonable for the officer to believe that one who attacks

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in the face of lethal force under these circumstances, attacks with intent to inflict lethal force. As such, Officer Babineaux had to act instantly to deflect Mr. Bender's attack, which was by all indications an immediate threat to kill the officer or Witness #1. Based on the foregoing, the use of lethal-force by Officer Babineaux is deemed to have been reasonably made and is also justifiable under Penal Code §197.

**CONCLUSION**

Under the facts, circumstances, and applicable law in this matter, the use of deadly force by Officer Michael Babineaux was justifiable in self-defense and the defense of others. Accordingly, no criminal liability based on the officer's conduct attaches in this case.

**Submitted By:**

**San Bernardino County District Attorney's Office**

**303 West Third Street**

**San Bernardino, CA 92415**

**Dated:**

