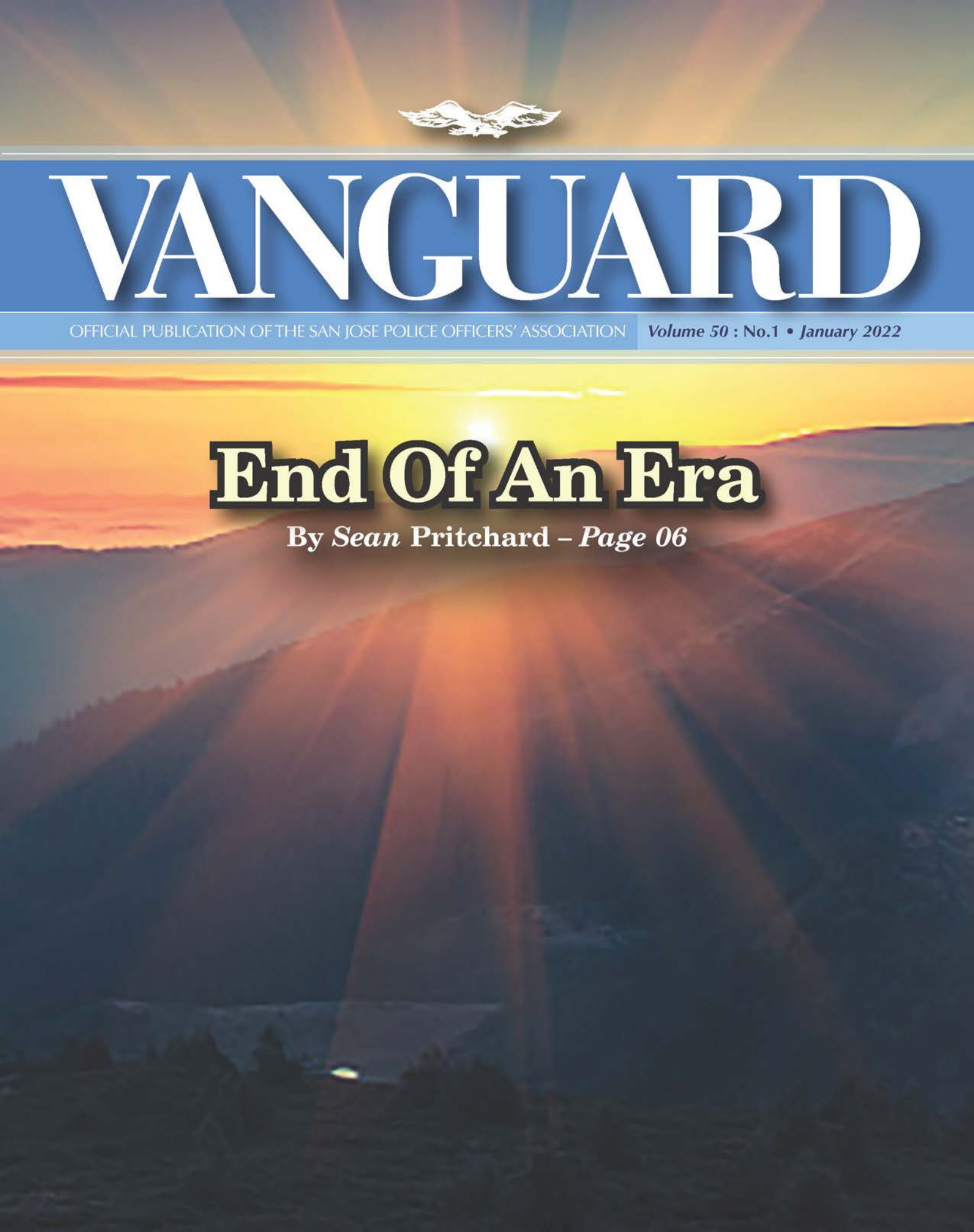

VANGUARD

OFFICIAL PUBLICATION OF THE SAN JOSE POLICE OFFICERS' ASSOCIATION | *Volume 50* : No.1 • *January 2022*

End Of An Era

By *Sean* Pritchard – *Page 06*

VANGUARD
Official Publication Of The San Jose Police Officers' Association

The Truth Is Its Own Defense

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Meeting Dates For 2022:

The following dates for SJPOA Membership Meetings are subject to change based on COVID-19 restrictions:

April 5, 2022; June 7, 2022; October 4, 2022; December 6, 2022; *Tuesdays 0730 hrs.*

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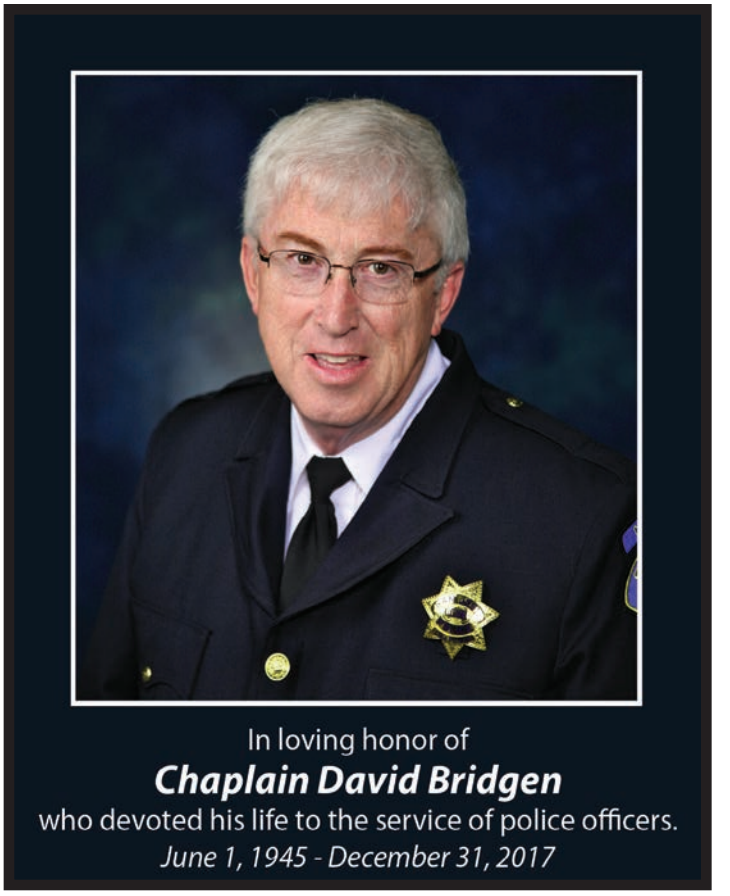

In loving honor of
Chaplain David Bridgen
who devoted his life to the service of police officers.
June 1, 1945 - December 31, 2017

VANGUARD
Contents:

Legal Defense Fund Report

Dave **Wilson**, LDF Administrator

Requests: 15
Approved: 15
Denied: 0
Board Representative: 15
Attorney Request: 0

THIS IS A SYNOPSIS OF LDF TRUSTEE ACTIONS FOR the month of November 2021. Due to an individual's right of privacy, specific details of LDF cases cannot be revealed by your LDF Trustees without written authorization from the involved member.

Your Legal Defense Plan provides you with legal services for acts or omissions arising in the course and scope of your employment as a San Jose Police Officer. Be advised that incidents which arise while you are performing duties associated with off-duty employment are excluded from coverage under the Plan. □

SJPOA Office

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Please note that the (408) 277-4012 number is no longer in service.

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San Jose, CA 95112

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200 E. Santa Clara St.
San Jose, CA 95113

C

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(408) 297-9500

Physical address: 471 Santa Clara St.
Enter through rear of building.

Sean Pritchard

President's Message

End Of An Era

Communication is constantly evolving, and we are always evaluating how we can be more effective in our outreach to the members, which is a continuous challenge. The truth of the matter is the makeup of our active membership has changed the way we must compose, filter, and ultimately, deliver information. The way communication occurs currently is much different from generations ago. And as important as appreciating and respecting where we came from, we must also not ignore when change is necessary. The old saying of, "Change is the only constant" remains true to this day.

"We say THANK YOU to all of the POA Boards that have contributed to a rich history of articles, valued guest authors, and numerous businesses that have advertised over the lifetime of the Vanguard. We will not forget you and we hope to build upon your legacy as we transform into a new era of communication."

DECADES AGO, THE VANGUARD BECAME THE FACE OF communication for the POA. As the years passed one thing became evident and that was the Vanguard has dwindled in viewers to the point that its virtually un-readable. This does not suggest in any way that the content is irrelevant. It only speaks to the reality that generations, both new and old, have adapted to a new way of receiving information.

The question now becomes, "Where do we go?" With much pause and careful consideration, we have concluded this will be the last Vanguard. We will be working on a new communication platform that will consist of a POA app and quarterly newsletter. Of course, we will continue with regular email blasts that cover hot topics and important issues.

We say THANK YOU to all of the POA Boards that have contributed to a rich history of articles, valued guest authors, and numerous businesses that have advertised over the lifetime of the Vanguard. We will not forget you and we hope to build upon your legacy as we transform into a new era of communication.

Stay tuned for more to come.

– *Sean*

Editor's Note: *Please send any comments to Sean Pritchard at:* ***president@sjpoa.com***

POST Certificate Requirements

Basic

- Successful completion of the Police Academy.
- 1 year police service.

Intermediate
(5% incentive pay)

- 4 years of law enforcement experience with an Associate Degree.
- 2 years of law enforcement experience with a Baccalaureate Degree.

Advanced
(2.5% incentive pay)

- 9 years of law enforcement experience with an Associate Degree.
- 6 years of law enforcement experience with a Baccalaureate Degree.
- 4 years of law enforcement experience with a Master Degree.

** Please submit your paperwork to the Training Unit 60 days in advance of your anniversary date. Officers should have copies (not originals) of college degrees, transcripts and/or any course certificates on file as part of their training files. These documents need to be attached to POST certificate applications.*

Marc F. Derendinger

Insurance News

Wellness Cash Incentive
Double-Dip: Get Cash From Both Insurance Policies

The New Year often begins with a cash-flow hangover from Christmas. If you enrolled in Allstate's Cancer and Critical Illness plans, get quick cash by submitting a one-page claim form for the wellness benefit. Get paid even faster by signing up for direct deposit.

Helpful Tips

BOTH THE ALLSTATE CANCER AND THE ALLSTATE Critical Illness policies contain the Wellness Incentive Provision. Collect from both with a single cancer screening test (see list of qualifying tests further below). In addition to one Cancer Screen per year, additional benefits are payable for Cervical Screen and Mammogram…so make sure all your family members are covered (children are eligible through age 25).

- Critical Illness Premiums start at just $3.65 per pay period
- Cancer Plan: Super low premiums start at 16.00 per pay period for Family coverage!
- Purchasing Tip- If you enroll before retirement, you may continue these policies for life. Plus, the younger you apply, the lower your Critical Illness premiums. For more information, email **info@derendinger.com**

Highlights

WELLNESS BENEFIT: A $100 BENEFIT WILL BE PAID IF one of the following wellness tests is performed while not hospital confined:

- Blood test for triglycerides
- Lipid panel (total cholesterol count)
- Pap Smear, including ThinPrep Pap Test
- PSA (blood test for prostate cancer)
- Bone Marrow Testing
- CA15-3 (blood test for breast cancer)
- CA125 (blood test for ovarian cancer)
- CEA (blood test for colon cancer)
- Chest X-ray
- Colonoscopy
- Flexible sigmoidoscopy
- Hemocult stool analysis
- Serum Protein Electrophoresis (test for myeloma)
- Biopsy for skin cancer
- Stress test on bike or treadmill
- Electrocardiogram (EKG)
- Carotid Doppler
- Echocardiogram

Mammography Benefit – In addition to the above, Allstate pays the actual charges up to $100 for a covered person as follows: baseline mammography for women ages 35 to 39,

inclusive; mammography every 2 years, or more frequently upon a physician's recommendation for women ages 40 to 49, and annual mammography for women ages 50 and over. There is no limit to the number of years wellness tests can be received, and the benefit is paid regardless of the result of the test(s). Limited to one test each calendar year for each covered person.

How To File Your Claim

- Claim Form: **https://www.allstatebenefits.com/Producers/Resources/ViewForm/4**
- Website: **https://www.allstatebenefits.com/mybenefits/User/Login/**
- Request a form by email: **info@derendinger.com**

Why Is Cancer And Critical Illness Coverage Offered?

HEALTH INSURANCE ONLY COVERS HALF THE COST

of Cancer. In addition to the Wellness incentive, Allstate pays supplemental cash to help with these extra costs. Nearly 1 in 2 men and 1 in 3 women are affected by Cancer according to the American Cancer Society. The plans offer an excellent value, and our recommendation is to enroll in the Cancer and Critical Illness plans (it is too late to enroll after you retire).

Note: Unlike the Cancer and Critical Illness, the Accident plan does not have wellness benefits. Our suggestion is to drop the Accident plan at retirement, and keep the Cancer and Critical Illness plans for life.

…with Allstate, you're in Good Hands. Enjoy peace of mind while you and your loved ones focus on getting well. □

Editor's Note: *Marc Derendinger is our SJPOA Insurance Broker and can be reached at* ***408.252.7300*** *or by email at* ***info@derendinger.com***

Karen Nelsen

Real Estate Perspective

What Everyone Wants To Know: Will Home Prices Decline In 2022?

If you're thinking of buying a home in today's housing market, you may be wondering how strong your investment will be. You might be asking yourself: if I buy a home now, will it lose value? Or will it continue to appreciate going forward? The good news is, according to the experts, home prices are not projected to decline. Here's why.

WITH BUYERS STILL OUTWEIGHING SELLERS, HOME prices are forecast to continue climbing in 2022, just at a slower or more moderate pace. Why the continued increase? It's the simple law of supply and demand. When there are fewer items on the market than there are buyers, the competition for that item makes prices naturally rise. And while the number of homes for sale today is expected to improve with more sellers getting ready to list their houses this winter, we're certainly not out of the inventory woods yet. Thus, the projections show continued appreciation, but at a more moderate rate than what we've seen over the past year.

See the graph at the end of this article for a look at the latest 2022 expert forecasts on home price appreciation:

What's the biggest takeaway from this graph? None of the major experts are projecting depreciation in 2022. They're all showing an increase in home prices next year.

And here's what some of the industry's experts say about how that will play out in the housing market next year:

Brad Hunter of *Hunter Housing Economics* explains:

"...the recent unsustainable rate of home price appreciation will slow sharply...home prices will not decline... but they will simply rise at a more sustainable pace."

Danielle Hale from realtor.com agrees:

"Price growth is expected to move back toward a normal range, but this is on top of recent high prices,...So prices will [still] hit new highs.... The pace of price growth is going to slow notably...."

"While home price appreciation is expected to continue, it isn't projected to be the record-breaking 18 to almost 20% increase the market saw over the past 12 months. Overall, it's important to note that price increases won't be as monumental as they were in 2021 – but they certainly won't decline anytime soon."

What Does This Mean For The Housing Market?

WHILE HOME PRICE APPRECIATION IS EXPECTED TO continue, it isn't projected to be the record-breaking 18 to almost 20% increase the market saw over the past 12 months. Overall, it's important to note that price increases won't be as monumental as they were in 2021 – but they certainly won't decline anytime soon.

What Does That Mean For You?

WITH MOTIVATED BUYERS IN THE MARKET AND SO

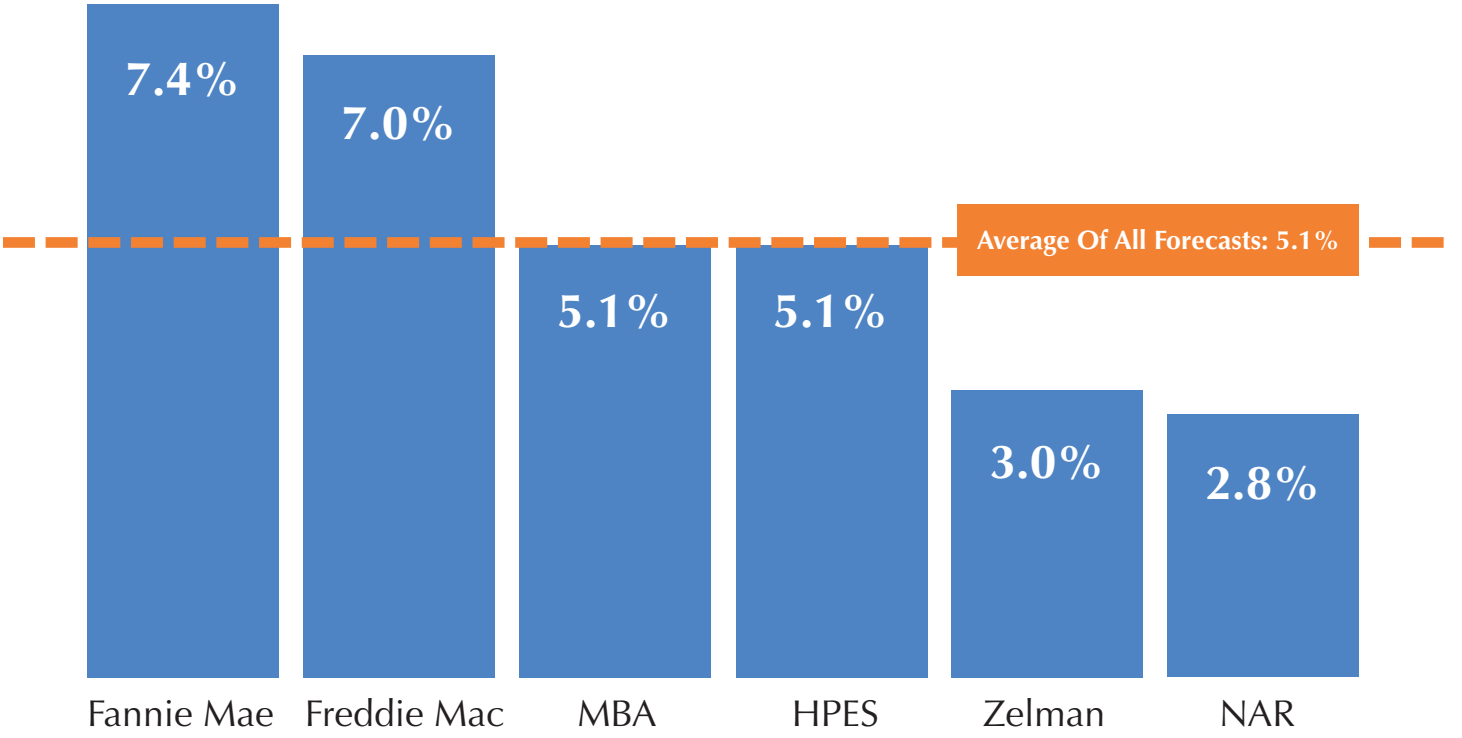
few homes available to purchase, the imbalance of supply and demand will continue to put upward pressure on home prices in 2022. And when home price appreciation is in the forecast, that's a clear indication your investment in homeownership is a sound one.

It's important to know that home prices are not projected to decline in the new year. Instead, they're forecast to rise, just at more moderate pace. Let's connect to make sure you're up to date on what's happening with home price appreciation in our market, so you can make an informed decision about your next move.

Editor's Note: *Article brought to you by Karen Nelsen, GRI REALTOR® Intero Real Estate Services, 175 East Main Avenue, Suite 130 Morgan Hill, CA 95037. Office:* ***408.778.7474*** *Cellular:* ***408.461.0424*** *Email:* ***knelsen@interorealestate.com*** *BRE License: 00891921*

2022 Home Price Forecasts

Based on Expert Projections



Johnene **Stebbins**

Third Degree **Communications:**

Training **Bulletin**

You Can Run, But You Can't Hide... Wait, Maybe You Can! *(Lange v. California* - US Supreme Court 2021*)*

Suspect Lange drove past the California Highway Patrol listening to loud music with his windows down and repeatedly honking his horn. There were no cars in front of Lange, so the officer was unsure why Lange was honking his horn. The officer began to follow Lange, and finally lit the patrol car's overhead lights to signal Lange to pull over. At that point, Lange was only 100 feet or so from his home. Lange did not stop, and instead pulled into his driveway, into his attached garage and began to close the garage door. The officer approached the garage door, stuck his foot in front of the sensor causing the garage door to reopen, and entered the garage to speak to Lange. Lange claimed he did not see the officer. Lange displayed signs of intoxication. Lange failed the Field Sobriety Tests and a blood test later showed Lange to be three (3) times the legal blood-alcohol limit. Lange was charged with misdemeanor Driving Under the Influence and a noise infraction.

LANGE MOVED TO SUPPRESS ALL THE EVIDENCE OBtained after the officer entered his garage, which would encompass all the DUI evidence, arguing the warrantless entry violated the 4th Amendment. The prosecution argued that Lange committed a misdemeanor by failing to stop after the officer activated his overhead lights, and as such there was probable cause to arrest Lange for this misdemeanor offense and that exigent circumstances of "hot pursuit" justified the warrantless entry into Lange's garage. The prosecution and the California courts all relied on the US Supreme Court's precedence laid out in *United States v. Santana* where the US Supreme Court held that the "act of [a suspect] retreating into her house," could "not defeat an arrest" that had "been set in motion in a public place." *Lange v. California*, 141 S. Ct. 2011, 2019 (2021). Many states, including California in the *Lange* case, interpreted the Santana decision to support a rule permitting warrantless home entry when police officers (with probable cause) are pursuing any suspect – whether a felon or a misdemeanant.

The question presented to the US Supreme Court in *Lange v. California* then is whether the pursuit of a fleeing misdemeanor suspect always qualifies as an exigent circumstance. The US Supreme Court has decided in *Lange* that it does not. A great many misdemeanor pursuits involve exigencies – to prevent imminent harms of violence, destruction of evidence, or escape from the home – allowing warrantless entry. But whether a misdemeanor pursuit does must now be resolved on the particular facts of the case. In misdemeanor cases, flight does not always supply the exigency that this Court has demanded for a warrantless home entry.

Chief Justice Roberts points out in his concurring opinion that the Supreme Court now has brushed off decades of guidance to law enforcement where "hot pursuit' was the exigent circumstance from which warrantless entry could be made, to a new rule that provides no guidance at all. He

"To avoid motions to suppress, be sure to articulate in your reports all circumstances that led to begin pursuit – high crime area, night-time, encountered individual before, etc. The court will look at the reasonableness of the decision you made under the totality of the circumstances."

poses the scenario in which an officer on views a man assaulting a teenager and takes chase of the man who runs a few blocks and leaps over a fence and stands in his home's front yard. What is the officer supposed to do? Does the officer have to determine if the assault constituted a misdemeanor or felony before he can enter the curtilage of the home to affect and arrest? Does he have to think of other exigencies before he can act just in case the assault is deemed a misdemeanor and he will have to justify entry into the yard? What if it isn't even the suspect's home? How is an officer to determine that before the suspect runs out the backyard and escapes altogether? Chief Justice Roberts artfully points out that the balance here is not between one's right to privacy and the government's interest in prosecuting a misdemeanor like littering, but rather the risk to public safety when one flees from law enforcement. In addition to that obvious public safety concern, the Court did not address the increased danger to both suspect and officer if we require the execution of search warrants to enter a home as opposed to entry during an immediate pursuit where a single officer may enter and not even have his gun drawn. Warrants are executed by numerous officers with guns drawn, increasing the danger for everyone involved.

Ultimately, the majority of the Supreme Court did not feel like much would change with requiring this additional case by case analysis as they believe that "when the totality of circumstances shows an emergency – a need to act before it is possible to get a warrant – the police may act without waiting. Those circumstances include the flight itself, but no evidence suggests that every case of misdemeanor flight creates such a need.

What Does This Mean For You?

TO AVOID MOTIONS TO SUPPRESS, BE SURE TO ARticulate in your reports all circumstances that led to begin pursuit – high crime area, night-time, encountered individual before, etc. The court will look at the reasonableness of the decision you made under the totality of the circumstances. Important to note, the Court's opinion does not disturb the long-settled rule that pursuit of a fleeing *felon* is itself an exigent circumstance justifying warrantless entry into a home. See *United States v. Santana,* 427 U.S. 38 (1976). Also, Justice Thomas opined that the exclusionary rule should not apply if the warrantless entry during hot pursuit is deemed to have violated the 4th Amendment. He states that a criminal defendant should not be put in a better position than if he hadn't committed an additional crime – fleeing the police. □

Editor's Note: *This article was presented by The Principals of Third Degree Communications, Paul Francois and Enrique Garcia. Tel.* ***408.766.1909*** *Email.* ***info@tdcorg.com*** *or visit* ***www.tdcorg.com***

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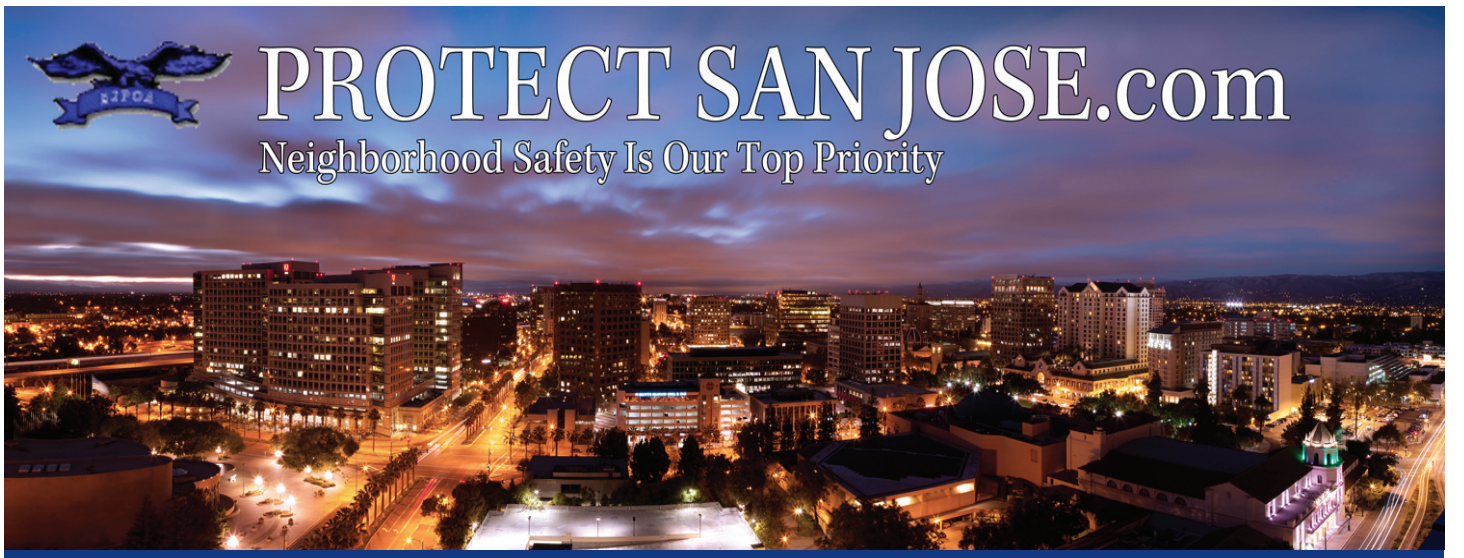

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Stephanie **Whitmore**

Home & Auto **News**

Umbrella Insurance To Cover For The Unexpected

Anyone can file a lawsuit for just about anything. The sad fact is that you could be sued because someone tripped at your home or apartment, your dog bit someone, your child hit a foul ball that hit a spectator or another player, or someone got hurt jumping on your backyard trampoline. Without enough liability protection, you could be in real financial danger.

THAT'S WHY YOU SHOULD CONSIDER AN EXCESS liability insurance policy, also known as an umbrella. There are some misconceptions about umbrellas, such as only high earners and those with a lot of assets need one, your homeowners or renters liability coverage is enough, and they cost too much.

Financial experts advise that as long as you can earn a livelihood, you should have an umbrella liability policy. California Casualty offers personal umbrella policies underwritten by a leading niche provider. The reality of an unforeseen accident is very real and can result in a large lawsuit that could easily cost $1 million or more. A personal umbrella may also cover you for a libel and slander lawsuit, or a disparaging social media post.

Investing in a personal umbrella policy will provide you and your family with excess coverage above your basic homeowners or renters liability.

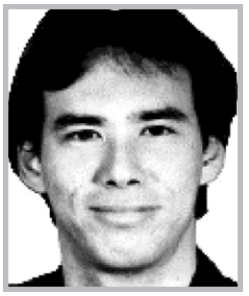
WWW.SJPOA.SHUTTERFLY.COM

"Financial experts advise that as long as you can earn a livelihood, you should have an umbrella liability policy. California Casualty offers personal umbrella policies underwritten by a leading niche provider. The reality of an unforeseen accident is very real and can result in a large lawsuit that could easily cost $1 million or more. A personal umbrella may also cover you for a libel and slander lawsuit, or a disparaging social media post."

Accidents happen every day. But you can be prepared. Call 833.989.3606 today to speak with an advisor about protecting yourself, your family and your assets. □

Editor's Note: *This article is furnished by California Casualty, your SJPOA auto and home insurance provider. If you have a question on an existing policy or would like to obtain a free, personalized auto/home/renter's insurance comparison phone* ***1.866.680.5142*** *today or request at quote at:* ***readyforquote.com/stephanie***

In Memorium



Officer ***Robert A.*** **WHITE**,
Badge #2325

Killed on January 27 1985, by electrocution while investigating an accident in which a motorist struck a high voltage transformer.

Officer **Gordon SILVA**,
Badge #1512

Killed on January 20, 1989, by gunfire in the same firefight with the mentally ill pedestrian who had just mortally wounded Officer Simpson.

Officer **Gene R. SIMPSON**,
Badge #1409

Killed on January 20, 1989 by a mentally ill pedestrian who wrestled away the officer's handgun and shot him.

Officer ***Michael*** **JOHNSON**,
Badge #3718

Shot on March 24, 2015 while responding to a call of a mentally disturbed man in possession of a firearm.

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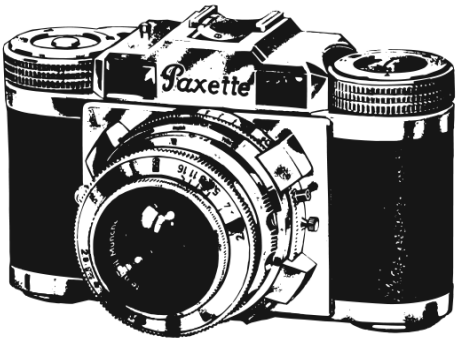

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THEN LOG IN TO

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IF YOU HAVE ANY PICTURES YOU WOULD LIKE TO SHARE, PLEASE EMAIL THEM TO NICOLE AT: NICOLE@SJPOA.COM

Lance Bayer

Reliable Informer

In this month's issue of the Reliable Informer, *I will cover two cases decided by the California Courts of Appeal. These cases look at the law relating to the crimes of attempted taking of a car and possession of a stun gun on a school campus. I look forward to hearing from you about ideas for future columns, as well as any other comments you might have.*

The Prosecution In A Felony Case Of Attempted Taking Of A Car Established The Value Of The Vehicle Through A Computer Database

In many California property crime statutes, the line drawn between a felony and a misdemeanor is whether the property is worth more or less than $950. In the case of a motor vehicle, what does it take to establish that value?

RECENTLY, THE FOURTH DISTRICT OF THE CALIFORNIA Court of Appeal looked at this question in the case of *People v. Jenkins* (2021)_____ Cal. App. 5th _____ .

In the *Jenkins* case, a couple were at home early one morning in Orange County when they heard the alarm sound on their car parked in the driveway. At about the same time, the couple were alerted on one of their electronic devices that there was movement that was shown on a security camera mounted above their garage. The wife looked outside and saw a man, later identified as Tyrus Jenkins, standing between their two cars. The wife continued to watch as she observed Jenkins going into their garage.

The husband grabbed a large piece of wood and went outside. He found Jenkins in the garage looking through a refrigerator. The husband banged his stick on the ground and told Jenkins to get out.

Jenkins left the garage. Later, the husband noticed that a plastic container with coins inside was taken from the garage.

The husband looked around the driveway and saw that the driver's side window of one of their cars was shattered. In addition, there were indications that the driver's door had been pried away from the frame. Inside the vehicle, both the glove compartment and the center console were open. It looked as though someone had rummaged through the vehicle. A piece of the ignition was broken off.

The husband called the police and provided them with a description of Jenkins. Jenkins was located nearby the residence shortly thereafter.

An officer arrested Jenkins and searched his backpack. Officers located a hammer, a screwdriver, and pliers. The officers recovered the victims' plastic container of coins as well as a garage remote and an electronic device that were taken from the vehicle.

Jenkins was taken to the police station and was interviewed by a detective. During the interview, Jenkins told the detective that he used the hammer to break the car's window and pry the door. Jenkins also stated that he tried to start the car by using the claw end of the hammer to pry the ignition. He also stated that he used the garage door opener to open the garage door.

The detective later examined the victims' vehicle. When he returned to the station, he looked at the Kelley Blue Book website to determine the value of the vehicle. He used the value of a base model because he did not know what amenities the vehicle had. He selected the trade-in value of the car, which is the lowest value provided by the Blue Book. The value he found was between $1,800 and $2,240.

Jenkins was charged with three felonies: residential burglary, vehicle burglary, and attempted unlawful taking of a vehicle. He also was charged with misdemeanor possession of burglary tools. Jenkins also was charged with various enhancements, including a previous "strike" and a prior serious felony.

In the trial court, Jenkins was convicted of all of the charges. All of the enhancements were found to be true. Jenkins was sentenced to serve 13 years in state prison.

Jenkins appealed his conviction to the Court of Appeal. He argued, in part, that the trial court should not have allowed the detective to testify to the value of the vehicle based on the use of the Kelley Blue Book website. He claimed that the Blue Book was inadmissible hearsay and should have been excluded as evidence. He also argued that there was insufficient evidence to support his conviction for vehicle burglary due to the lack of direct evidence that the vehicle was locked at the time of entry. The Court of Appeal reviewed Jenkins' case and upheld his conviction.

In its written decision, the Court first looked at the use of the Blue Book to establish the value of the vehicle. The Court first stated, "Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. This is commonly known as the 'hearsay rule.'" The prosecution and the defense agreed that the Blue Book's estimate of the car's value constituted hearsay. The issue for the Court to decide is whether the estimate of value comes within the exception to the hearsay rule as a "published compilation" under section 1340 of the California Evidence Code.

The Court then stated, "Section 1340 provides, 'Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of business as defined in Section 1270.' Five elements must be satisfied when a party seeks to admit evidence under the published compilation exception: (1) the proffered statement must be contained in a compilation; (2) the compilation must be published; (3) the compilation must be generally used in the course of business; (4) it must be generally relied upon as accurate in the course of such business; and (5) the statement must be one of fact rather than opinion." The Court noted that the trial court found that each of those elements had been satisfied.

The Court then stated, "When evaluating the admissibility of evidence under section 1340, some courts have examined the definitions of compile and compilation to get a better idea of what the statute envisions. We do the same. Compilation is defined as 'the act or action of gathering together written materials esp. from various sources.' 'To compile means to collect and put together (materials), so as to form a treatise; to collect into a volume,' and 'to make, compose, or construct (a written or printed work) by arrangement of materials collected from various sources.'"

The Court continued, "With these definitions in mind, we look at the evidence presented below and conclude substantial evidence supports the court's finding that the Kelley Blue Book constitutes a published compilation within the meaning of section 1340. [The detective at trial] described the Kelley Blue Book as a 'nationwide database' used by consumers and retail personnel to determine the value of vehicles. He explained that a person can enter certain information about a car on the Kelley Blue Book's website and the website provides a 'calculation' of the vehicle's worth based on the information provided, with ranges in value for private party sales or trade-ins. Thus, the Kelley Blue Book compiles or puts together information concerning vehicle values, which vary depending on certain criteria like the type of car, its condition, amenities, location, and type of sale. This evidence demonstrates the Kelley Blue Book is a published compilation under section 1340."

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The Court further noted that there was substantial evidence at trial that the Kelley Blue Book is generally used and relied upon as accurate in the course of business. The detective testified that he regularly used the Blue Book in determining the value of vehicles as part of his job and specifically as an auto theft and burglary detective. He further testified that he had spoken to many used car dealers who used the Blue Book to determine the trade-in value of cars.

The Court further upheld the trial court's finding that the information derived from the Kelley Blue Book is a statement of fact, rather than merely an opinion. According to the Court, "The Kelley Blue Book, like the compilers of other commodity price reports and actuarial tables, knows its product only has value if it is accurate, thus reasonably ensuring the trustworthiness of the compilation." The Court concluded that the trial court was correct in admitting the de-

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tective's testimony concerning the Kelley Blue Book's value of the car and upheld Jenkins' conviction for attempted unlawful taking of a vehicle as a felony.

The Court then looked at Jenkins' claim that he should not have been convicted of vehicle burglary because there was no direct evidence that the car was locked when Jenkins entered it.

The Court stated, "A vehicle burglary is committed when a defendant enters a locked vehicle with the intent to commit larceny. The requirement of locking as an element of vehicular burglary has been interpreted to mean that where a defendant used no pressure, broke no seal, *and* disengaged no mechanism that could reasonably be called a lock, he is not guilty of auto burglary. Therefore, because auto burglary can be committed only by entering a *locked* vehicle without the owner's consent, it is only accomplished by altering the vehicle's physical condition; at worst, by smashing a window, at best, by illegally unlocking it. These extremes, as well as other possible types of forcible entries, necessarily involve unlawfully altering the vehicle's locked state."

The Court looked at the evidence at trial and stated, "We conclude there was substantial evidence from which the jury could find the car was locked prior to Jenkins' entry. The most obvious sign was the shattered driver's side window. There were also indications an attempt had been made to pry the driver's door from the car's frame. And there was testimony the car's alarm went off while Jenkins was seen standing by the car. The jury could also consider in conjunction with this evidence, Jenkins' statement to the police. Jenkins admitted using his hammer to break the car's window and to pry the door from the frame. None of this would have been necessary if he found the door unlocked." The Court concluded that there was substantial evidence, although circumstantial, to find that the car was locked and that Jenkins altered its locked status in order to enter with the intent to commit larceny. The Court upheld Jenkins' conviction for vehicle burglary.

The Court's ruling in the *Jenkins* case is helpful in establishing the elements of two crimes, felony attempted unlawful taking of a vehicle and vehicle burglary. □

Trial Court Evidence Was Insufficient To Support A Conviction For Possessing A Stun Gun On School Grounds

California Penal Code section 626.10 makes it a crime to take a taser or stun gun onto school grounds. What type of device qualifies as a "stun gun?"

RECENTLY, THE FIRST DISTRICT OF THE CALIFORNIA Court of Appeal looked at this question in the case of In re M.S. (2021)_____Cal. App. 5th_____.

In the *M.S.* case, a girl who was called in the case by the initials M.S. was involved in a conflict situation with a boy at the same high school that she attended in Solano County. One winter day, the boy hit her with a book. The boy was suspended for two days based on that incident.

About a month later, another confrontation occurred between the two. The boy completed a physical education class and discovered that his backpack was missing. M.S. was seen nearby. She was in the bushes and appeared to be hiding with her friends.

The boy confronted M.S. and accused her of taking the backpack. She denied it but hung around calling the boy names while he searched for the backpack. The boy told M.S. to back off or he would hit her with a book again. He held up a book as an example.

M.S. pulled a device out of her bag. It was pink and rectangular and had two protruding antennas on it. She told the boy that if he tried to hit her with a book, she would "tase" him in the genitals. M.S. turned on the device and it started to spark. The boy believed that the device was a taser. He panicked and then retreated.

The principal found out about the incident. He had M.S. summoned to the office and he asked her if she still had the device in her possession. She handed it over and told the principal that she had pulled it out in self-defense. The principal contacted the school resource officer, a local police officer, who took custody of the device.

M.S. was charged in juvenile court with possession of a stun gun on school grounds, in violation of California Penal Code section 626.10(a).

In the trial court, the school resource officer testified at trial that he had been a police officer for nearly seven years and had learned about tasers and stun guns during training at the basic police academy. He testified that the difference

“M.S. pulled a device out of her bag. It was pink and rectangular and had two protruding antennas on it. She told the boy that if he tried to hit her with a book, she would ‘tase’ him in the genitals. M.S. turned on the device and it started to spark. The boy believed that the device was a taser. He panicked and then retreated.”

between tasers and stun guns is that tasers deploy darts and stun guns need to make contact with the skin. Both provide an electronic charge.

The school resource officer testified that he participated in quarterly and annual training sessions related to tasers and had watched videos about them. He had experience with tasers and stun guns in the field and had seen the effects of the devices. He was duly qualified by the court as an expert.

In the trial, the school resource officer identified the device that had been possessed by M.S. as a stun gun. He said that it looked “over-the-counter.” He testified that he did not know the weapon’s voltage and that the voltage was not indicated on the device itself. He further testified that the “capability” of a stun gun depended on the voltage or “charge” of the device. Initially, he testified that the device probably could not immobilize a person. Later in his testimony, the school resource officer testified that he had been trained not to use a stun gun such as the one possessed by M.S. on pregnant women or smaller individuals due to the harm that might cause. He testified that M.S.’s stun gun could immobilize a person of smaller stature. He further testified that, depending on their size, age, and medical condition, the device could in some cases even cause death. He based this testimony on videos that he had seen of stun guns with known voltages immobilizing persons.

The juvenile court found M.S. guilty of possessing a stun gun on school grounds. The offense was reduced to a misdemeanor and M.S. was made a ward of the court and placed on probation with various terms and conditions.

M.S. appealed her conviction to the Court of Appeal. She argued that there was insufficient evidence to support the conviction. The Court of Appeal reviewed M.S.’s conviction and agreed with her. Her conviction was overturned.

In its written decision, the Court first stated, “Section 626.10(a) makes it illegal to take a taser or stun gun onto school grounds. To qualify as a stun gun for purposes of this prohibition, a device must be ‘capable of temporarily immobilizing a person by the infliction of an electrical charge.’ ‘Immobilize’ is defined in this context as ‘to make immobile, as to prevent the freedom of movement or effective use of, or to reduce or eliminate motion of (the body or a part) by mechanical means.’ ‘Temporarily,’ in turn, can mean as short as a few seconds. The question is not whether immobilization was actually caused (although that is probative of the stun gun’s capabilities), but whether the device at issue was capable of producing that result.”

The Court continued, “Here, the only evidence that M.S.’s device was capable of temporarily immobilizing a person as required for M.S.’s conviction under section 626.10(a) came from the expert testimony of [the school resource officer]. He testified that, based on his training and experience, electrical devices ‘such as’ M.S.’s ‘could immobilize or hurt and in some cases even cause death’ and that ‘a stun gun [could] immobilize somebody of smaller stature.’ Although this issue is close, we are not persuaded this testimony is sufficient to prove beyond a reasonable doubt that M.S.’s “over-the-counter” device was capable of temporarily immobilizing a person.”

The Court further stated, “The chief value of an expert’s testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from his material to his conclusion; it does not lie in his or her mere expression of conclusion. Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions. In other words, the opinion of an expert is no better than the reasons upon which it is based. Thus, some substantive factual evidentiary basis, not speculation, must support an expert witness’s opinion. If the expert opinion is not based upon facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence.”

The Court then stated, “In opining that M.S.’s particular stun gun was capable of temporarily immobilizing a person, [the school resource officer] relied on his training and experience with stun guns and tasers. The critical question, however, is whether that training and experience, in conjunction with his limited knowledge about the stun gun M.S. brandished, was sufficient to support his opinion. And that is where his opinion falls short. [The officer] testified without contradiction that commercially available stun guns have a wide range of voltages or ‘delivered charge,’ and that the delivered charge determines the effect on the per-

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son on whom the device is deployed. But nothing about M.S.'s stun gun indicated its voltage or charge, and [athe officer] conceded he did not know what voltage or charge it was capable of delivering. [The officer]'s training and experience did not fill this gap. As he testified, the videos depicting immobilizations caused by stun guns – which formed the basis for his opinion – involved stun guns with known voltages or delivered charges. Thus, [the officer] failed to provide any evidentiary support for his opinion."

The Court's decision in the *M.S.* case clearly demonstrates how expert testimony can fail if it provides an opinion to the court that is not supported with sufficient evidence. □

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