VANGUARD

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San Francisco Ends Cash Bail For All Criminal Cases

By Associated Press – *Page 06*

VANGUARD

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The Truth Is Its Own Defense

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Meeting Dates For 2020:

April 7, *Tuesday 0730 hrs.* **June 2,** *Tuesday 0730 hrs.*
October 6, *Tuesday 0730 hrs.* **December 1,** *Tuesday 0730 hrs.*

POA Christmas Open House: **Thursday, December 17th**
Santa at the POA: **Tuesday, Dec. 8th & Friday, Dec. 11th**

This schedule is subject to change, please contact the POA office for confirmation of dates and times.

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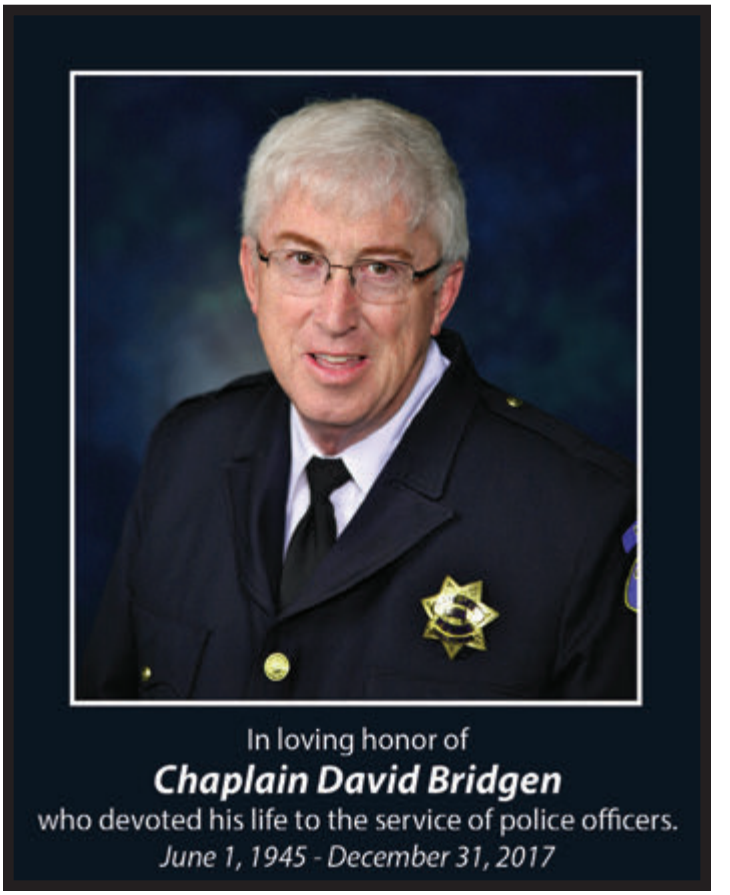

VANGUARD
Contents:

Legal Defense Fund Report

Franco **Vado**, LDF Administrator

Requests: 2
Approved: 2
Denied: 0
Board Representative: 1
Attorney Request: 1

THIS IS A SYNOPSIS OF LDF TRUSTEE ACTIONS FOR the month of December 2019. 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.

Door Prizes

Vendor:	Prize:	Name:
Golden Harvest Catering *John Nguyen*	$50 Cash	*Mark Stephens*
Derendinger Insurance *Marc Derendinger*	$50 Gift Card Nick The Greek	*Matthew Kurrle*
Assoc. Of Retired Police & Firefighter	$25 Gift Card Starbucks	*Nathan Trang* *Gilbert Fox*
Messing, Adam & Jasmine	$50 Gift Card Pete's Coffee	*Doug Potwora*

WWW.SJPOA.SHUTTERFLY.COM

Paul Kelly

President's Message

Don't let what has happened in San Francisco happen anywhere else!
Please read the article below from U.S. News & World Report. The City of San Francisco is in serious trouble with a District Attorney like Boudin!

BY *ASSOCIATED PRESS, WIRE SERVICE CONTENT*, JANUARY 23, 2020

San Francisco Ends Cash Bail For All Criminal Cases

San Francisco's new top prosecutor says his office will no longer ask for cash bail as a condition for defendants' pretrial release, fulfilling one of his key campaign promises.

SAN FRANCISCO (AP) – SAN FRANCISCO'S TOP PROSecutor announced his office will no longer ask for cash bail as a condition for defendants' pretrial release, fulfilling one of his key campaign promises.

District Attroney Chesa Boudin, who took office two weeks ago, said Wednesday prosecutors will use a "risk-based system" and weigh whether a defendant might flee or pose a threat to public safety. The former public defender has often said the cash bail system unfairly affects indigent defendants and people of color, the San Francisco Chronicle reported.

"For years I've been fighting to end this discriminatory and unsafe approach to pretrial detention," Boudin said in a statement. "From this point forward, pretrial detention will be based on public safety, not on wealth."

The child of incarcerated parents, Boudin's policy goes a step further than his predecessor, George Gascón, who scaled back requests for cash bail by introducing an algorithmic risk assessment tool in 2016. The district attorney's office on Wednesday said this tool "has allowed prosecutors and judges to preserve the constitutional protection of presumed innocence, while maintaining public safety through objective data."

Disparities in cash bail requirements in San Francisco have resulted in African American defendants paying an average of $120 per year for pretrial release compared to $10 for white defendants, according to the district attorney's office. Officials said this kind of inequality has led to a transfer of wealth in communities of color to private industry.

> **"'Mr. Boudin is in the process of building the largest criminal justice revolving door imaginable, and San Franciscans will pay a heavy price for it,' said Tony Montoya, president of the San Francisco Police Officers Association."**

San Francisco's police union criticized Boudin's decision.

"Mr. Boudin is in the process of building the largest criminal justice revolving door imaginable, and San Franciscans will pay a heavy price for it," said Tony Montoya, president of the San Francisco Police Officers Association. "Relying solely on an arbitrary math equation regarding who remains in custody and who gets out early will endanger residents and police officers but it sure will make career criminals

and gang members happy."

Note: *Associated Press, Wire Service Content. "San Francisco Ends Cash Bail for All Criminal Cases." U.S. News & World Report, https://www.usnews.com/news/best-states/california/articles/2020-01-23/san-francisco-ends-cash-bail-for-all-criminal-cases*

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

Sean Pritchard

Second Chair's View

will return in the next issue

Franco Vado

C.F.O.'s Report

San Jose Police Officers' Association Meeting Notes

JANUARY 7, 2020

Membership Meeting

President Paul Kelly began the meeting by asking Chief Garcia to swear in the Board of Directors. Chief Garcia advised the membership that the current staffing is at 1,151 and he is asking the city for a lot more officers.

PRESIDENT KELLY THEN TALKED ABOUT AN UNAUthorized email that went out to around 200 officers' city email addresses. It talked about a picture of Councilmember Sergio Jimenez and Bobby Seale of the Black Panthers. The photo was from when Councilmember Jimenez was attending San Jose State. He has always supported law enforcement and immediately removed the picture.

The negotiations team has begun meeting and as soon as there is something to report back, we will get the information out to you. The anti-police bills are continuing. We anticipate that what was proposed in the fall should be coming out soon.

The 3rd Annual SJPOA Blue Christmas Toy Drive was very successful. The POA gave out over 1,000 toys to kids.

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"Vice President Sean Pritchard addressed the members about the continued high rate of suicide among law enforcement. Suicide is outpacing line of duty deaths. The POA is looking at some national programs to find resources to bring to San Jose."

The POA will be hosting a new fundraising event to benefit the San Jose Police Chaplaincy. It will be a Bourbon & BBQ dinner on April 24th. More details will be provided soon.

Vice President Sean Pritchard addressed the members about the continued high rate of suicide among law enforcement. Suicide is outpacing line of duty deaths. The POA is looking at some national programs to find resources to bring to San Jose.

POA Attorney Gregg Adam gave a legal update. In 2020, the department developed a new Use of Force policy. The POA has asked to meet and confer on its content and changes. We are pushing the department to create a written policy that will ensure members will be notified when there is a request to see their personnel file. The city council is set to approve the FLSA settlement at the end of January. They will then begin notifying affected members. □

Editor's Note: *Please send any comments to Franco Vado at: cfo@sjpoa.com*

SAN JOSE SHARKS

FIRST RESPONDERS APPRECIATION NIGHT

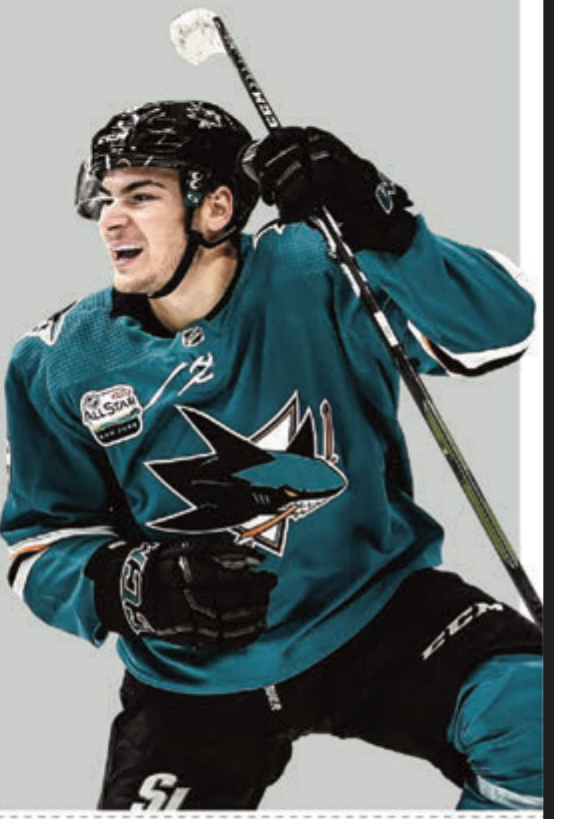
VS.

MON, FEB 10, 2020 AT 7:30PM

SPECIAL TICKETS ARE $70 IN THE LOWER BOWL AND $45 IN THE UPPER BOWL!

SJSHARKS.COM/RESPONDERS
USE CODE: RESPONDERS

- EACH TICKET INCLUDES AN EXCLUSIVE BEANIE AND A COMPLIMENTARY TICKET TO THE SAN JOSE BARRACUDA VS. SAN DIEGO GULLS GAME ON SAT, FEB 29 AT 1:15PM



LOCATION	QUANTITY	SPECIAL PRICE	TOTAL
Lower-Bowl		$70/ticket	
Upper-Bowl		$40/ticket	
TOTAL DUE:			

____ AMEX ____ VISA ____ DISC ____ MC

CARD NO. _____

EXP. DATE _____

NAME ON CARD: _____

SIGNATURE: _____

NAME: _____ PHONE (REQUIRED): _____

E-MAIL (REQUIRED): _____

SUBMIT THE FORM WITH PAYMENT TO:

MFOFANA@SJSHARKS.COM OR MAIL FORM TO
ATTN: MOHAMED FOFANA
525 W. SANTA CLARA STREET, SAN JOSE, CA 95113

QUESTIONS? CALL 408-999-5746

Marc F. **Derendinger**

Insurance **News**

Beneficiary Review

The first of every year is a perfect time to review your Life Insurance Beneficiary Designation(s). This includes the SJPOA Insurance & Benefits Trust, City Human Resources Department, Retirement Services, and perhaps some private insurance policies.

Failure To Pay Attention To Your Life Insurance Beneficiary Designation Creates Problems For Your Survivors

SINCE 1968, OUR INSURANCE OFFICE HAS HANDLED many POA death claims, and seen some unfortunate cases of policy benefits paid to unintended recipients, e.g. old and long forgotten girlfriends, boyfriends, former spouses (even the wrong former spouse), and so on.

A simple checklist can help: Prepare a register or list for your survivors, which will serve as a quick reference in future years:

- List insurance policies separately, row-by-row.
- Add a column, titled Beneficiary Designation and record the date of the last beneficiary update for each life insurance policy or other financial instrument.
- If you are not sure, then submit a new one (it won't hurt). Remember, these policies and accounts have their own (unique) life insurance beneficiary forms. Request and update them!
- Also include columns for Face Amount, Insurer Name, Policy No., and Policy Date.

…Remember to review this list annually.

Sample Beneficiary Form

WHEN COMPLETING THE SJPOA IBT BENEFICIARY Change Form, you have the option to designate two separate types of beneficiary designations:

"Since 1968, our insurance office has handled many POA death claims, and seen some unfortunate cases of policy benefits paid to unintended recipients, e.g. old and long forgotten girlfriends, boyfriends, former spouses (even the wrong former spouse), and so on."

1). *Primary* Beneficiary Name

2). *Contingent* Beneficiary Name

How it works: If you die while the Primary Beneficiary is still living, the Primary Beneficiary (or Beneficiaries) will receive 100% of the policy benefits, and the Contingent Beneficiary will receive zero benefits. Remember, the Contingent Beneficiary is a "back-up" beneficiary, in the event your Primary Beneficiary predeceases you. You are not required to designate a Contingent Beneficiary. It is also acceptable to name more than one Primary Beneficiary by listing each name, with the corresponding amount of insurance. For example:

John Smith, Brother, born March 21, 1963 - $50,000
and Sally Smith, sister, born August 1, 1959 - $100,000

If Beneficiaries are receiving equal amounts, then you may state "Equal Shares" after their names.

Avoid naming minor children as Primary Beneficiaries (or Contingent Beneficiaries). This leads to all types of problems, as the insurance company will not pay death benefits to a minor. Your survivors may be required to go to court to sort it out, delaying access to much needed funds.

Additional SJPOA Benefit: Life Services Toolkit

SJPOA MEMBERS HAVE SPECIAL ONLINE TOOLS AND services that can help you create a will, make advance funeral plans and put your finances in order. *The Life Services Toolkit* is automatically available to participants in the SJPOA Insurance & Benefits Trust, just another benefit of SJPOA membership.

To access these services, visit the *Life Services Toolkit* website at **www.standard.com/mytoolkit** and enter the username, "assurance."

Reminder: SJPOA members have access to a free insurance check-up through the Derendinger Insurance Agency in west San Jose. Family changes, a new mortgage, and young children are all good reasons to review your coverage needs. We suggest a separate check-up when you reach your early 50's, in order to learn which SJPOA coverages follow you into retirement.

Take charge of your plan: Review your life insurance beneficiaries every year!

Follow Us: ***https://twitter.com/DerendingerIns***

Editor's Note: *Derendinger Insurance has served as SJPOA insurance broker since 1968, and offers free assistance to SJPOA members at* ***408.252.7300*** *or via email at* ***sjpoa@derendinger.com***

Johnene **Stebbins**

Third Degree **Communications:**

Training **Bulletin**

Giving Law Enforcement The Finger – Does The 5th Amendment Apply?

In the password protected world, having the authority to search is not enough if the cell phone, tablet or computer is secured by a password. And many now, in lieu of typing in a password to unlock their phones and tablets, use biometric protections like fingerprints. Can officers ask courts to compel a suspect to provide his fingerprint to unlock their devices?

WE HAVE COME A LONG WAY FROM WHEN STARSKY & Hutch (the TV show, not the movie) needed to pull over their Ford Gran Torino to make a call from a phone booth. Cellphones have developed quickly over the last decade since the first iPhone release on June 29, 2007. Cellphones are no longer just for making phone calls. People now store vast amounts of information from bank and medical records to photo files, and with that, the Court's have had to determine what a reasonable expectation of privacy applies to the information stored on cellphones. In addition to privacy issues, courts must tackle whether ordering a suspect to disclose his password or provide a fingerprint to law enforcement so they can conduct a lawful search of his devices violates the suspect's right against self-incrimination. The Fifth Amendment provides that "[n]o person...shall be compelled in any criminal case to be a witness against himself[.]" Amend. V, U.S. Const. But this privilege against self-incrimination only applies to protection from compelled testimonial communications. *Doe v. United States,* 487 U.S. 201, 207, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988). "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." Doe, 487 U.S. at 210, 108 S.Ct. 2341 (footnote omitted).

The U.S. Supreme Court has not directly addressed this issue, but many jurisdictions across the country have applied the Court's analysis in *Doe v. United States,* 487 U.S. 201(1988) to passwords and fingerprints. In *Doe*, the U.S. Supreme Court held that compelling the Defendant to sign a consent directive allowing records to be released to law enforcement did not violate his 5th Amendment rights because it was not testimonial in nature. The communication itself was not incriminating and had no testimonial value. The Court found it akin to producing handwriting samples or voice samples, which do not relay any actual disclosure of knowledge.

Jurisdictions split on their application of *Doe* to disclosure of passwords. *In State v. Stahl*, the Florida court held that "compelling a suspect to make a nonfactual statement that facilitates the production of evidence" for which the State has otherwise obtained a warrant based upon evidence independent of the accused's statements linking the accused to the crime does not offend the privilege. *State v. Stahl*, 206 So. 3d 124, 134 (Fla. Dist. Ct. App. 2016) Whereas, in Michigan, the court held that "the government is not seeking documents or objects – it is seeking testimony from the Defendant, requiring him to divulge through his mental processes his password – that will be used to incriminate him." *United States v. Kirschner*, 823 F. Supp. 2d 665, 669 (E.D. Mich. 2010).

Compelling a suspect to provide his fingerprint to unlock a cellphone seems to be landing more akin to the voice and handwriting exemplars, deemed not a violation of the 5th Amendment. In *Stahl*, the court was not inclined to believe that the Fifth Amendment should provide greater protection to individuals who passcode protect their iPhones with letter and number combinations than to individuals who use their fingerprint as the passcode. Compelling an individual to place his finger on the iPhone would not be a protected act; it would be an exhibition of a physical characteristic, the forced production of physical evidence, not unlike being compelled to provide a blood sample or provide a hand-

"We have come a long way from when Starsky & Hutch (the TV show, not the movie) needed to pull over their Ford Gran Torino to make a call from a phone booth. Cellphones have developed quickly over the last decade since the first iPhone release on June 29, 2007. Cellphones are no longer just for making phone calls. People now store vast amounts of information from bank and medical records to photo files, and with that, the Court's have had to determine what a reasonable expectation of privacy applies to the information stored on cellphones."

writing exemplar. *Stahl* at 135. Similarly, the Minnesota Supreme Court analyzed this issue saying, "[u]nlike the acts of standing in a lineup or providing a blood, voice, or handwriting sample, providing a fingerprint to unlock a cellphone both exhibits the body (the fingerprint) and produces documents (the contents of the cellphone). Providing a fingerprint gives the government access to the phone's contents that it did not already have, and the act of unlocking the cellphone communicates some degree of possession, control, and authentication of the cellphone's contents. But producing a fingerprint to unlock a phone, unlike the act of producing documents, is a display of the physical characteristics of the body, not of the mind, to the police." *State v. Diamond*, 905 N.W.2d 870, 875 (Minn.), cert. denied, 138 S. Ct. 2003, 201 L. Ed. 2d 261 (2018). In *Diamond*, the court ultimately held that providing a fingerprint to police to unlock the cellphone was not testimonial communication protected by the 5th Amendment.

What does this mean for you? So, the courts are still split as it relates to compelling passwords. The courts appear to be leaning that the ordering of a suspect to provide his fingerprint to law enforcement to unlock a phone does not implicate his 5th Amendment rights. What is consistent about all the cases is that officers used search warrants to compel a suspect to give up his password or biometrics. Hint, hint! □

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***

Keith **Rockmael**

Real Estate **News**

Vacancy Taxes Here In The Bay Area

The New Year promises to be an interesting one both at the national and local level. Locally, the close of 2019 saw the San Francisco Board of Supervisors unanimously approved the landlord vacancy tax during a special late year meeting.

IF THE VOTERS APPROVE THE BALLOT MEASURE THIS March, landlords with a storefront vacant for more than 182 days will face a fee that is calculated according to the length of their storefront and the amount of time it has been empty.

Besides the SF supervisors, many local residents have been upset at the number of vacant storefronts dotting their neighborhood streets. Even though San Francisco contains many vacancies, the City doesn't rank in the top 10 for retail vacancy rates in the country. The Inland Empire just outside of Los Angeles has the highest vacancy rate in the nation at 7.1% according to a July report based on data compiled by CoStar, a commercial real estate information company. Sacramento (6%) maintains the fifth highest rate in the nation and Fresno ranks number 8 (5.6%).

"If the voters approve the ballot measure this March, landlords with a storefront vacant for more than 182 days will face a fee that is calculated according to the length of their storefront and the amount of time it has been empty."

Many outside experts attribute the increase in retail vacancies to factors such as an increase in online shopping not just unreasonable landlords.

If the measure passes, San Francisco's tax may be the first of its kind in the United States to pertain specifically to retail space. Across the bay, Oakland implemented a vacancy tax on residential landlords as voters overwhelmingly approved Measure W last November.

The Oakland ordinance allows the city to tax a property owner $6,000 per parcel or $3,000 per condo if units remain vacant for more than 50 days.

With many vacant commercial and residential units, time will tell if this new measure signals the start of a new real estate trend here in the Bay Area. □

Editor's Note: *For real estate attorney referrals and further questions or information contact Keith Rockmael at* ***Keith@Resourcerock.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.*

Karen **Nelsen**

Real Estate **Perspective**

Housing Inventories Fall To Two-Year Low

Fewer For Sale signs means less competition for selling homeowners who want to enter the housing market at the start of 2020. A new report from realtor.com® shows that housing inventories are at their lowest level since January 2018. Housing shortages haven't appeared to cool home buyers' desire to buy.

PRICE GROWTH IS ACCELERATING FASTER THAN National averages in markets with the largest inventory declines, realtor.com® reports. Inventory across the country fell by 12% year over year in December. The median list price was $299,950, up 3% compared to a year ago.

"The market is struggling with a large housing undersupply just as 4.8 million millennials are reaching 30 years of age in 2020, a prime age for many to purchase their first home," says George Ratiu, realtor.com®'s senior economist. "The significant inventory drop we saw in December is a harbinger of the continuing imbalance expected to plague this year's markets, as the number of homes for sale are poised to reach historically low levels."

Housing inventory shortages are accelerating across price points too, including the luxury market, realtor.com®'s report notes. In December, homes priced under $200,000 plunged by 18.1% annually. Mid-tier housing priced between $200,000 to $750,000 saw a 10.2% year-over-year decline. Homes listed for more than $1 million fell by 4.4% annually.

Further, economists predict that the inventory shortages are likely to worsen over the year. As buyer demand remains strong, they expect home prices to continue to accelerate in markets the most starved for inventory.

Tech havens – such as San Jose-Sunnyvale-Santa Clara, Calif.; Seattle-Tacoma-Bellevue, Wash.; and San Francisco-Oakland-Hayward, Calif. – saw inventory declines of more than 30% in December compared to a year ago and listing price growth was above the national median.

Only three of the 50 largest metros in the U.S. saw inventory increases over the year: San Antonio-New Braunfels, Texas (up 8.8%); Minneapolis-St. Paul-Bloomington, Minn.-Wis. (up 7.4%); and Las Vegas-Henderson-Paradise, Nev. (up 4.8%), the report shows. All three also saw a year-over-year decline in their median listing prices. □

"Housing inventory shortages are accelerating across price points too, including the luxury market, realtor.com®'s report notes. In December, homes priced under $200,000 plunged by 18.1% annually. Mid-tier housing priced between $200,000 to $750,000 saw a 10.2% year-over-year decline. Homes listed for more than $1 million fell by 4.4% annually."

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*

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 battery on a peace officer and possession of burglary tools.*

The Crime Of Battery On A Peace Officer Requires An Act that Is Willful And Harmful Or Offensive

When a peace officer is touched by a suspect, the touching may be sufficient to constitute a battery on a peace officer. Under what circumstances does a touching constitute a battery?

RECENTLY, THE FIRST DISTRICT OF THE CALIFORNIA Court of Appeal looked at this question in the case of *In re Francis A.* (2019)_____Cal.App.5th_____.

In the *Francis A.* case, a minor identified in the case as Francis A. was a senior in high school in San Mateo County. One summer day at school, Francis and three other students walked out of a substitute teacher's class without permission. Francis went to the school library and sat down at a computer.

Francis was located by a school aide, who intended to escort him to the administrative vice principal's office. Initially, Francis refused to go to the office, where students were taken when they skipped class. The aide got on his radio and contacted the school resource officer, who was a police officer for the city in which the school was located and was in full police uniform. The school resource officer's primary duties were to assist with exceptional discipline problems, to assist with non-students, and to deal with students found with drugs or found to have committed crimes.

While the aide was on his radio, Francis called his father on his cell phone. He told the aide that he preferred to go to the principal's office, but it turned out that the principal's office was closed.

The school resource officer met the aide and the minor at the principal's office. The officer noticed that Francis was using his cell phone, which was a violation of school policy. The officer tried verbally to encourage Francis to go to the administrative vice principal's office.

As Francis continued his conversation with his father using his cell phone, the officer physically encouraged him to go to the administrative vice principal's office by putting his left hand on Francis' back while standing to the minor's right and exerting a light amount of force. Francis, holding his phone in his left hand, moved his arm back and away in order to get the officer's hand off his back. Francis brushed the officer's hand off of him. Francis's upper arm or elbow came in contact with the officer's left hand as the minor moved his arm back and away from the officer.

At that point, the officer decided to escalate his force and grabbed the minor's right wrist with his right hand in order to take the minor to the administrative vice principal's office. Francis attempted to pull his arm away. The officer, believing the minor had committed a battery on the officer by brushing his left hand and committed the offense of resisting a peace officer by trying to pull away, forced Francis to the ground, handcuffed him, and placed him under arrest. Once the class bell had rung, the incident caused a commotion with students observing the interaction.

Francis was charged in juvenile court with battery on a peace officer in violation of Penal Code section 243(b), resisting a peace officer in the exercise of a public duty in violation of Penal Code section 148(a)(1), and disturbing the peace by loud and unreasonable noise in violation of Penal Code section 415(2).

Francis took his case to trial. The trial court found him guilty of the battery and resisting charges, but acquitted him of disturbing the peace. He was ordered to complete 40 hours of community service and to pay a fine of $10.

Francis appealed his convictions to the Court of Appeal. He argued that there was insufficient evidence to support the convictions. The Court of Appeal reviewed Francis' case and agreed with him. The Court overturned the convictions.

In its written decision, the Court first looked at the conviction for battery on a peace officer. The Court stated, "The crime of battery is 'any willful and unlawful use of force or violence upon the person of another.' Thus, it requires (1) a use of force or violence that is (2) willful and unlawful. The first element is satisfied by any touching. The second element of battery, willfulness and unlawfulness, is satisfied by any touching that is harmful or offensive. Section 243(b) states, in relevant part, 'When a battery is committed against the person of a peace officer…engaged in the performance of his or her duties…and the person committing the offense knows…that the victim is a peace officer…engaged in the performance of his or her duties…, the battery is punishable [as a misdemeanor].'"

The Court continued, "Battery is a general intent crime. As with all general intent crimes, the required mental state entails only an intent to do the act that causes the harm. It has long been established that the least touching may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave a mark. Even a slight touching may constitute a battery, if it is done in a rude or angry way."

The Court looked at the facts of Francis' case and first noted that the officer's testimony did not indicate that the minor acted willfully or unlawfully to touch the officer. According to the Court, "the word 'willfully,' when applied to the intent with which an act is done, implies simply a purpose or willingness to commit the act. It does not require any intent to violate law, or to injure another, or to acquire any advantage. Our Supreme Court has explained, 'The terms 'willful' or 'willfully,' when applied in a penal statute, require that the illegal act or omission occur 'intentionally' and 'implies that the person knows what he is doing, intends to do what he is doing and is a free agent.'"

The Court noted that there was no substantial evidence that Francis acted willfully to touch the officer at all. The Court pointed out that the officer's testimony established that Francis' arm brushed his hand but not that he did so intentionally. The Court stated that, for that reason alone, there is insufficient evidence to support the juvenile court's finding that Francis committed battery against the officer.

The Court then looked at whether there was substantial evidence that the touching was "harmful or offensive," which is an element of battery. The Court noted that the officer did not testify that Francis brushed the officer in a rude or angry way. The testimony was that Francis brushed the officer's hand as Francis tried to get away from him, not that Francis intended to touch him in a harmful or offensive manner.

The Court then stated, "In short, there is insufficient evidence to support either of two essential elements of the crime of battery, that the touching be willful and that it be harmful or offensive. The juvenile court's ruling sustaining the battery count must therefore be reversed."

The Court then looked at the conviction for resisting the officer. The Court stated, "Section 148 imposes liability on 'every person who willfully resists, delays, or obstructs any …peace officer…in the discharge or attempt to discharge any duty of his or her office or employment….' The legal elements of that crime are (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties."

"Battery is a general intent crime. As with all general intent crimes, the required mental state entails only an intent to do the act that causes the harm. It has long been established that the least touching may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave a mark. Even a slight touching may constitute a battery, if it is done in a rude or angry way."

The Court continued, "Section 148 is most often applied to the physical acts of a defendant. For example, physical resistance, hiding, or running away from a police officer have been found to violate section 148. However, the statute does not criminalize mere delay in responding to an officer's orders or a mere refusal to cooperate."

The Court found that there was insufficient evidence to support the juvenile court's determination that Francis willfully resisted the officer. The Court noted that there was no indication that the officer was enforcing any disciplinary

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rules in his encounter with Francis. The officer specifically testified that he did not attempt to enforce the school rule regarding cell phone use. The officer did not testify that he was addressing an exceptional disciplinary problem. In fact, the issue the officer was addressing was the desire of a class-cutting student to be disciplined at the principal's office instead of at the administrative vice principal's office. In addition, the officer testified that he only "encouraged" Francis to follow the aide's instructions, first verbally and then by placing his hand on Francis' back. According to the Court, "We fail to see how a student can be found to have resisted a peace officer's encouragement and requests. The very nature of such encouragement and requests indicates the student is being given a choice to do as encouraged or requested or not."

The Court added, "As for Francis trying to pull his arm away when [the officer] grabbed it, we will assume for the sake of argument that Francis was disrupting classes by talking loudly on his phone. Even then, there is no evidence that [the officer] said or did anything to indicate to or inform Francis that he had disobeyed an order or otherwise to explain why [the officer] was grabbing Francis' arm. There is no substantial evidence that when he tried to pull his arm away, Francis knew or reasonably should have known that [the officer] was engaged in the performance of his duties as a peace officer."

The Court's ruling in the *Francis A.* case is an important one in looking carefully at the elements of offenses against a peace officer as well as the elements of the crime of battery. The Court expressed its concern about the incident and stated, "Not only did the officer's conduct fail to enhance school safety, it elevated what should have been a minor school disciplinary matter into one with potential criminal implications." □

The Crime Of Possession Of Burglary Tools Prohibits A Person From Having Upon Him Or Her Or In His Or Her Possession The Specified Tools

California Penal Code section 466 prohibits a person from "having upon him or her in his or her possession" certain specified tools. Does that term limit the possession to items that are carried on the suspect's person?

RECENTLY, THE FIRST DISTRICT OF THE CALIFORNIA Court of Appeal looked at this question in the case of *People v. Bay* (2019)_____Cal.App.5th_____.

In the *Bay* case, a peace officer was on patrol in Napa County early one summer morning when he observed a vehicle parked illegally near a rural overlook. The officer observed three people in the vehicle. A man later identified as Dylan Bay sat in the driver's seat.

The officer pointed out a no-parking sign and asked Bay for identification. Bay did not have identification and he provided the officer with a false name. The officer knew the name was false because he was aware of Bay's true identity and knew that he was on postrelease supervision and subject to warrantless search. The officer asked Bay to step out of the vehicle. Bay complied and the officer conducted a patdown search. The officer asked Bay if he had any contraband in the vehicle. Bay told the officer that there was an amount of marijuana in a small pouch of a backpack he described that was inside the vehicle.

The officer searched the interior of the vehicle. The vehicle belonged to the woman who was sitting in the front passenger seat. It was very messy inside with a lot of items packed very tightly.

The officer found the backpack described by Bay behind the center console. The officer opened up the backpack and located the marijuana, along with a loaded .380 caliber pistol, boxes of ammunition, a lock pick set, a pipe for smoking marijuana, and a hypodermic needle.

Bay was arrested and was charged with being a felon in possession of a firearm, being a felon in possession of ammunition, providing false information to a peace officer, and possessing burglary tools. Because a butterfly knife was found in the console of the driver's side door, Bay also was charged with carrying a switchblade knife. He also was charged with sentencing enhancements for having served two prior prison terms.

Bay took his case to a jury trial. He was acquitted of the switchblade charge but was convicted of the remaining charges. He was sentenced to serve three years and eight months in state prison.

Bay appealed his conviction to the Court of Appeal. He argued, in part, that there was insufficient evidence of possession of the items and that there was insufficient evidence that he possessed burglary tools.

The Court of Appeal reviewed Bay's case and upheld the convictions for possession of the firearm and ammunition and for providing a false name, but reversed the conviction for possession of burglary tools because the court failed to provide the jury with proper instruction regarding intent.

The Court first looked at whether the firearm and ammunition found in the backpack were in Bay's possession. The Court stated, "The firearm - and ammunition-possession offenses prohibit a felon from possessing or having under custody or control the given item, and they are general-intent crimes that require knowing possession of the prohibited item. Possession may be actual or constructive. A defendant has actual possession when the weapon is in his or her immediate possession or control, i.e. when he or she is actually holding or touching it. To establish constructive possession, the prosecution must prove a defendant knowingly exercised a right to control the prohibited item, either directly or through another person. Although a defendant may share possession with other people, mere proximity or opportunity to access the contraband, standing alone, is not sufficient evidence of possession."

The Court noted that Bay knew that there was marijuana in the backpack, "which supports the conclusion that he exercised dominion and control over the backpack." The Court noted that the jury could have reasonably inferred Bay's ownership or control of the backpack, "a type of personal container not normally shared among multiple people," based on his knowledge of the marijuana's particular location. The Court also noted that Bay's providing a false name to the officer was additional evidence of Bay's guilt because it showed a consciousness of guilt.

The Court then looked at Bay's conviction for possession of burglary tools and the question of whether the tools had to be on Bay's person. The Court noted that "section 466 prohibits a person from having burglary tools 'upon him or her in his or her possession.'" On its face, the section appears to prohibit only burglary tools that are possessed "upon" the suspect's person. The Court however, found enough ambiguity to look at the intent of the Legislature.

The Court stated, "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. We begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent. The plain meaning controls if there is no ambiguity in the statutory language. Hence, it is a basic principle of statutory and constitutional construction that courts, in construing a measure, do not undertake to rewrite its unambiguous language. That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body. Whether a statute's wording is, in fact, a drafting error can only be determined by reference to the purpose of the section and the intent of the Legislature in adopting it."

"The officer found the backpack described by Bay behind the center console. The officer opened up the backpack and located the marijuana, along with a loaded .380 caliber pistol, boxes of ammunition, a lock pick set, a pipe for smoking marijuana, and a hypodermic needle."

The Court determined that the statute should have read "upon him or her or in his or her possession" and that the omission of the word "or" was due to a drafting error by the Legislature. The Court stated, "Before 1984, section 466 was not gender inclusive and prohibited a person from 'having upon him or in his possession' the specified tools. In 1984, the Legislature passed Assembly Bill No. 1895, which amended section 466. The bill's purpose was 'to deal with what is perceived to be a substantial problem related to burglary prevention' by, among other things, expanding the list of prohibited tools. To that end, the bill added several specific tools to the list of items prohibited when possessed with intent to feloniously break or enter." In amending the section, the word "or" was inadvertently omitted when the bill added gender-neutral "him or her" language.

The Court stated, "We must...conclude that the Legislature inadvertently omitted the word 'or' from section 466 and that a judicial correction will best carry out the intent of the adopting body. Thus, we construe the statute to prohibit a person from 'having upon him or her or in his or her possession' the specified tools. Under this interpretation, section 466 prohibits the constructive possession of burglary tools, and therefore substantial evidence supports Bay's conviction under it. The Legislature may wish to

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amend the statute to eliminate the confusion that could arise by relying on the statute's existing text."

The Court then looked at the failure of the trial court to instruct the jury that the offense required possessing the tools with an intent to break and enter to commit a felony. The Court stated, "To establish defendant's guilt under section 466, the People must prove (1) possession by the defendant; (2) of tools within the purview of the statute; (3) with the intent to use the tools for the felonious purposes of breaking and entering. Our state Supreme Court recently clarified that the required intent is to use an instrument or tool to break or otherwise effect physical entry into a structure in order to commit theft or some other felony within the structure." The trial court did not instruct the jury on the intent element of the crime. The Court of Appeal found that the failure to instruct the jury on this essential element was an error by the trial court. According to the Court, "...[W]e cannot conclude beyond a reasonable doubt that the instructional error did not affect the verdict, and we therefore reverse the conviction for possession of burglary tools."

The Court's ruling in the Bay case provides helpful clarification regarding issues related to the offense of possession of burglary tools.

Editor's Note: *Lance Bayer is a private attorney specializing in police training and personnel issues in the Bay Area and can be reached by writing to: Lance Bayer, 443 Lansdale Avenue, San Francisco, CA 94127, by calling* ***415.584.1022****, or by email at* ***lbayer@comcast.net***

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.