VANGUARD

OFFICIAL PUBLICATION OF THE SAN JOSE POLICE OFFICERS' ASSOCIATION | *Volume 49* : No.2 • *February 2021*

A Look Ahead

By *Paul* Kelly And *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 2021:

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

April 6, June 1, October 5, December 7, 2021;
Tuesdays 0730 hrs.

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

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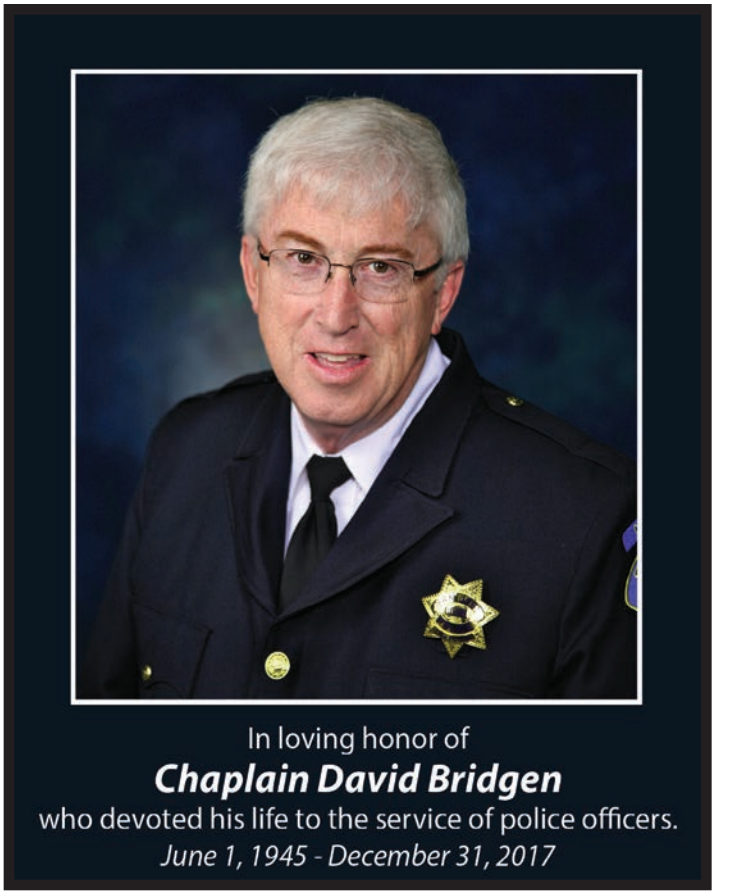

In loving honor of
Chaplain David Bridgen
who devoted his life to the service of police officers.
June 1, 1945 - December 31, 2017

VANGUARD
Contents:

Legal Defense Fund Report

Franco **Vado**, LDF Administrator

Requests: 16
Approved: 16
Denied: 0
Board Representative: 16
Attorney Request: 0

THIS IS A SYNOPSIS OF LDF TRUSTEE ACTIONS FOR the month of December 2020. 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.

Paul **Kelly** V **Sean Pritchard**

President/VP's **Message**

2021 A Look Ahead

As the world around us is filled with negativity, remaining optimistic becomes that much more challenging. As much as we need to be honest in our view of the political climate that continues to drag down law enforcement, we must also look forward and lend a hand when possible in helping the advancement of legislation that will protect you in little and big ways.

REASONABLENESS, WHAT'S THAT? CHANGE IS ALWAYS difficult. There's an old unwritten saying, "Cops hate two things: change and constant." The reality is law enforcement has always learned to adapt but with an understanding of reasonableness. We have proven ourselves and our willingness to meet somewhere in the middle, but at what point does the willingness begin to cease?

Sacramento has proven itself to follow the same disastrous course for law enforcement legislation as 2020 did. We have seen the rebirth of legislation involving areas in the restriction of use of force and punitive measures for sustained complaints. On a national level there are an equal amount of bills in the infancy stages that go after law enforcement as well as attempts to protect and provide more benefits for law enforcement.

So everyone has a clear sense of the tidal wave of bills coming forth, below is an outline of just a few proposed bills both in Washington, D.C. and Sacramento.

"Reasonableness, what's that? Change is always difficult. There's an old unwritten saying, 'Cops hate two things: change and constant.' The reality is law enforcement has always learned to adapt but with an understanding of reasonableness. We have proven ourselves and our willingness to meet somewhere in the middle, but at what point does the willingness begin to cease?"

Washington, D.C.

- **(<u>One Bright Spot</u>) H.R. 82 Social Security Fairness Act:** This bill repeals provisions that reduce Social Security benefits for individuals who receive other benefits, such as a pension from a state or local government. The bill also eliminates the government pension offset, which in various instances reduces Social Security survivors' benefits for spouses, widows, and widowers who also receive government pensions of their own. Finally, the bill eliminates the windfall elimination provision, which in some instances reduces Social Security benefits for individuals who also receive a pension or disability benefit from an employer that did not withhold Social Security taxes.
- **H.R. 155 Providing Officer Licensing to Increase Confidence for Everyone (POLICE) Act:** This would require the Attorney General to develop and issue licensing standards to federal law enforcement officers. Officers must be licensed and receive continuing education. The bill would also require states to institute a comparable system or lose 50% of funding under the Edward Byrne Memorial Justice Assistance Grant (JAG) Program.
- **H.R. 288 To amend the Revised Statute to codify the defense of qualified immunity in the case of any action under section 1979.** No legislative text available yet.

Sacramento

- **AB 48 Use of kinetic energy projectiles and chemical agents:** This bill would prohibit the use of kinetic energy projectiles or chemical agents, as defined, by any law enforcement agency to disperse any assembly, protest, or demonstration, except in compliance with specified standards set by the bill, and would prohibit their use solely due to a violation of an imposed curfew, verbal threat, or noncompliance with a law enforcement directive. The bill would prohibit the use of chloroacetophenone tear gas or 2-chlorobenzalmalononitrile gas by law enforcement agencies to disperse any assembly, protest, or demonstration.
- **AB 26 Use of Force:** This bill would make a peace officer who is present and observes another peace officer using excessive force, and fails to report the use of excessive force to a superior officer, an accessory in any crime committed by the other officer during the use of excessive force.

As we work strategically in the protection of you, one area in particular will remain a focus for us as it was last year. In 2020, when the federal CARES Act monies became available at the local level, we worked behind the scenes to ensure the monies that San Jose received would be used in the appropriate ways for the police department's budget. There is no question that bringing to light the money the city received and highlighting the fact the money could be used for law enforcement payroll, reduced the impact our department felt, prevented any potential downsizing, and allowed academies to continue.

New monies are now being discussed at the federal level and the impact, or trickle-down effect, is an unknown. But rest assured we are utilizing every ability we have to obtain accurate information so access to the monies is offered up to law enforcement where permissible. What does that mean? We are in the midst of contract negotiations, retirements continue at a feverish pace, and recruiting is an issue with supply and demand. If we can make sure you receive just compensation for the sacrifices you make and ensuring the community has the resources (more officers) to deal with the increase in crime, then just like we did in 2020 we will do again now.

It's Sunday night and the work never stops. Having your back does not have a time clock and the limits we go to to ensure representation for you remains at its highest levels.

As always, be safe, take care of each other, and we are here for you 24/7.

– Paul and Sean

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

Matthew **Taylor**

Legal News

POA Secures Temporary Restraining Order Against Nicholas Robinson To Prevent Him Harrassing Officers And POA Staff

Over the years, many of you have had the misfortune of encountering Nicholas Robinson, a security guard who is consumed by his grudge against law enforcement. He routinely shows up at police scenes threatening and otherwise harassing POA members. He has even directed his anger toward the POA by trespassing on the union hall's property, threatening POA members and its non-police staff. On one evening, he accosted the POA's Executive Director, who was unarmed and alone, in the POA's parking lot. He was clad in body armor, from head-to-toe, and held a Taser in his raised hand. Thankfully, the employee was able to quickly get in her car and drive off without physical harm.

"We urge you to keep an eye out for Robinson. He has violated the temporary restraining orders that were in place prior to the Court's December 7th decision."

SINCE MAY 2019, THE POA HAS MADE CONSIDERABLE effort to protect its employees and members from Robinson's hostility. This persistence finally paid off. The POA first enlisted the support of the City to pursue legal challenges against Robinson's conduct. Cooperating together, the POA's lawyers and the City Attorney's Office quickly obtained temporary restraining orders against Robinson. However, this was only the beginning of a very long process with no guarantee that these orders would be renewed on a more permanent basis.

For a year and a half, both sets of lawyers filed multiple legal briefs and appeared in court multiple times to argue for a three-year (the maximum amount of time under the circumstances) restraining order against Robinson. Each time, Robinson argued that he did nothing wrong. On the contrary, he believed that he was fulfilling his civic duty to uncover police misconduct. Thus, as he argued, various police officers violated his civil rights by stopping him from observing or video-taping police incidents and using unjustified force against him.

His story did not hold up against the facts, however. Attorneys for the POA and the City made clear the extent to which Robinson threatened the safety of police officers and POA employees by relating the following events. In addition to confronting POA employees on POA property, he acted aggressively as follows:

- He parked his car, with the engine running, on the wrong side of the road so that it was aimed at police officers who were conducting a vehicle stop.

- He ran into the street in oncoming traffic to jump in front of a moving police car for no apparent purpose.
- He has placed himself in a fighting stance while police officers question him.
- He has routinely screamed profanities at police officers while performing their duties.
- He has shined flashlights in officers' faces to the point where they cannot see.
- He has consistently disobeyed lawful police orders resulting in his arrest.

The POA also informed the Court that the Department's Special Investigations Unit, which is tasked with investigating individuals who pose a threat to police officers, has monitored Robinson. And, he is known by that unit to be one of the worst cases of an individual threatening police.

At the end of this long road, the POA and the City were finally vindicated. On December 7, 2020, the Superior Court of Santa Clara issued a series of restraining orders that for the most part bar Robinson from approaching police officers, police department buildings, POA employees, and POA headquarters. For example, he must "stay at least 100 feet away from employees of the San Jose Police Department, their vehicles, anyone in their custody or acting on their behalf, and any tape lines or other scene boundaries or barriers…" The primary exception to the above is that he is able to enter a police department facility if he has "immediate lawful business there."

The win here was by no means a foregone conclusion given current public sentiment that increasingly demands law enforcement be held under a microscope and be restrained from interfering with individuals' rights to protest. In the end, the Court got it right by carefully considering the arguments made by the POA and the City and correctly applying the law.

Thankfully, the POA had significant help from its members to present a solid case. While various members provided helpful written testimony, Officers Mitchell Gutierez and Joshua Schwitters sacrificed their time on numerous occasions to appear at court. So did our executive director. We also credit Deputy City Attorney Julia Van Roo and one of her primary witnesses at the Department, Lieutenant Messier, for being strong partners with the POA and its lawyers during the litigation.

We urge you to keep an eye out for Robinson. He has violated the temporary restraining orders that were in place prior to the Court's December 7th decision. It is therefore likely that he will at some point violate the Court's new orders.

Be safe. □

Editor's Note: *MAJ attorney Matthew Taylor led the POA's efforts in this case and wrote this summary.*

Johnene **Stebbins**

Third Degree **Communications:**

Training **Bulletin**

Spousal Consent: *Maybe Not the Best Way To Achieve Spousal Distancing!*

After months of being locked in your home with your spouse, exercising social distancing due to COVID19, I suspect you have all come up with excuses for some spousal distancing time. Well, one spouse's ability to give consent to the search of your home or your personal effects, if you are committing crimes, may provide that distance you desire. When can a spouse (or more generally a co-habitant) give consent to the search the home or home computer?

"The 4th Amendment protects against warrantless searches. However, officers can conduct a lawful warrantless entry and search of a home or personal effects within the home so long as the officer obtains the voluntary consent of an occupant who has authority over the area or item in common."

THE 4TH AMENDMENT PROTECTS AGAINST WARRANTless searches. However, officers can conduct a lawful warrantless entry and search of a home or personal effects within the home so long as the officer obtains the voluntary consent of an occupant who has authority over the area or item in common. A couple scenarios have been settled by the United State Supreme Court with regards to the co-occupant consent-to-search rules.

We know from *United States v. Matlock*, 415 U.S. 164 (1974), that the U.S. Supreme Court determined it lawful consent when a co-habitant gives permission to enter and search those areas and items they possess shared authority over. In the *Matlock* scenario, the Defendant, who ultimately argued for the suppression of the items found in the search, was in a patrol car down the street, absent from the scene. The U.S. Supreme Court held that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom the authority is shared." Id. at 170.

Next, the U.S. Supreme Court addressed the scenario where the person giving police consent "appeared" to have authority to do so, but ultimately did not. In *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the U.S. Supreme Court held that police can rely on consent of an occupant who shares, or is reasonably believed to share, common authority. In *Rodriguez*, officers received consent from Gail Fischer to enter the suspect's apartment. Gail Fischer represented that the apartment was "our[s]" and that she had clothes and furniture there, she unlocked the door with her key, and gave the officers permission to enter. It turns out that Gail Fischer had actually moved out of the apartment; however, the evidence showed that the officer's belief that Ms. Fischer had authority was reasonable based on the totality of the circumstances known to the officer at the time.

In *Georgia v. Randolph*, 547 U.S. 103 (2006), the U.S.

Supreme Court tackled another scenario. In *Randolph*, Mrs. Randolph told officers that Mr. Randolph was abusing drugs and that items of drug evidence were in the house. Mr. Randolph was present. Officers asked Mr. Randolph if he consented to their entry and search of the home. Mr. Randolph unequivocally refused to give consent. So, the officers turned to Mrs. Randolph (who by the way was not happy with Mr. Randolph) and asked for her consent, which she gave. Mrs. Randolph led the officer to the bedroom where a straw with a white powdery substance was located. The officer left to retrieve an evidence bag from his vehicle, and by the time he returned to the home, Mrs. Randolph changed her mind and withdrew consent. The officer took the straw (and the Randolphs) to the police station and got a warrant to search the home where more drug evidence was located. The Supreme Court suppressed the evidence holding that a physically present inhabitant's express refusal of consent to a police search is dispositive and is not overridden by another inhabitant's consent.

And the last scenario mentioned in Randolph and explained further by the U.S. Court of Appeals in *U.S. v. Thomas* 818 F.3d 1230 (2016) addresses when a co-habitant has a self-interest in objecting to the consent, and is nearby, but not present or invited to take part in the conversation regarding consent. In Thomas, Defendant's then-wife, Olausen, arrived home early one night and Thomas was on his computer, acting very nervous and his heart was racing. The next morning, while Thomas slept, Olausen turned on to the computer monitor they share in their home, answered 'yes' when asked if she wished to restore the previous searches, and found child pornography. Olausen called the police. Officers learned that Thomas was sleeping, and therefore, asked Olausen for consent to search the computer. She consented. After officers performed a brief visual search of what Olausen had found open on the computer, and after one forensic search was complete, Thomas awoke. The police asked Thomas for consent. He orally consented, but refused to sign the consent to search form, ultimately asking for a lawyer. Although not equivocal, officers took that as a refusal to consent, stopped their searches, seized the computers under an exigency theory to prevent Thomas from destroying the evidence, and obtained a search warrant. The Appellate Court applied the line drawn in the sand by the U.S. Supreme Court in *Randolph*. In *Matlock*, defendant was in a patrol car down the street. In *Rodriguez* above, that defendant, like here, was asleep in the apartment. The U.S. Supreme Court in *Randolph* held that police do not have to take affirmative steps to find a suspect and ask for consent before acting on the consent given by the co-tenant. However, the police cannot intentionally remove the suspect to prevent him from objecting to the consent.

What does this mean for you? Of course, you will always gather facts to support someone has authority to consent. Also remember, it is always safer to get a warrant. The information from Olausen as to the child pornography she witnessed on the computer when she turned it on was enough for officers to secure a warrant and would have eliminated this entire appeal. □

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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Karen **Nelsen**

Real Estate **Perspective**

Is It Affordable To Buy Right Now And Must Do's If You Are Thinking Of Selling...?

Housing Inventory Is At An All-Time Low

REALTOR.COM JUST REPORTED THAT THERE ARE 39% fewer homes for sale today than there were last year. At the same time, buyer demand remains strong. In a recent newsletter, research analyst Ivy Zelman explained:

> *"Although the headwind of severe supply constraints in most markets has contributed to slight moderation in seasonally-adjusted and year-over-year new pending contract growth for two consecutive months (albeit still growing strongly), the underlying strength of buyer demand, particularly for this time of year, remains apparent."*

Whenever there's a shortage in the supply of an item that's in high demand, the price of that item increases. That's exactly what's happening in the real estate market right now. As a result, home values are surging.

This is great news if you're planning to sell your house. On the other hand, as either a first-time or repeat buyer, this may instead seem like troubling news. Purchasers, however, should realize that the price of a house is not as important as the monthly cost. Here's how it breaks down.

There are several factors that influence the cost of a home. Two of the major ones are:

1. *The price of the home*
2. *The mortgage rate at which a buyer can borrow the funds necessary to purchase the home*

Buying a home today is just a little less affordable than it was last year, but still very affordable compared to historical housing market trends.

Why Are Homes Still Affordable Today?

THE NUMBER ONE FACTOR IMPACTING TODAY'S homebuying affordability is record-low mortgage rates.

"Whenever there's a shortage in the supply of an item that's in high demand, the price of that item increases."

There's no doubt that prices are on the rise. However, mortgage rates have fallen dramatically. Last week, *Freddie Mac* announced that the average interest rate for a 30-year fixed-rate mortgage was 2.72%. Last year at this time, the average rate was 3.68%.

If you're considering purchasing your first home or moving up to the one you've always hoped for, it's important to understand how affordability plays into the overall cost of your home. With that in mind, buying while mortgage rates are as low as they are now may save you quite a bit of money over the life of your home loan.

If You're Considering Selling Your Home This Year, Here Are 3 Must Do's...

IT'S EXCITING TO PUT A HOUSE ON THE MARKET AND to think about making new memories in new spaces. However, despite the anticipation of what's to come, we can still have deep sentimental attachments to the home we're leaving behind. Growing emotions can help or hinder a sale depending on how we manage them.

When it comes to the bottom line, homeowners need to know what it takes to avoid costly mistakes when it's time to move. Being mindful and prepared for the process can help you stay on the right track when selling your house

this year.

1. **Price Your Home Right:** When inventory is low, like it is in the current market, it's common to think buyers will pay whatever we ask when setting a listing price. Believe it or not, that's not always true. Don't forget that the buyer's bank will send an appraiser to determine the fair value for your house. The bank will not lend more than what the house is worth, so be aware that you might need to renegotiate the price after the appraisal. A real estate professional will help you set the true value of your home.
2. **Keep Your Emotions in Check:** Today, homeowners are living in their houses for a longer period of time. Since 1985, the average tenure, or the time a homeowner has owned their home, has increased from 5 to 10 years This is several years longer than what used to be the historical norm. The side effect, however, is when you stay in one place for so long, you may get even more emotionally attached to your space. If it's the first home you bought or the house where your children grew up, it very likely means something extra special to you. Every room has memories, and it's hard to detach from the sentimental value.

   For some homeowners, that makes it even harder to negotiate and separate the emotional value of the house from the fair market price. That's why you need a real estate professional to help you with the negotiations along the way.
3. **Stage Your Home Properly:** We're generally quite proud of our décor and how we've customized our houses to make them our own unique homes, but not all buyers will feel the same way about your design. That's why it's so important to make sure you stage your house with the buyer in mind.

   Buyers want to envision themselves in the space so it truly feels like it could be their own. They need to see themselves inside with their furniture and keepsakes – not your pictures and decorations. Stage and declutter so they can visualize their own dreams as they walk down the hall. A real estate professional can help you with tips to get your home ready to stage and sell.

   Today's market might be your best chance to make a move. If you're considering buying or selling, I'd love the opportunity to help you navigate through the process. □

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*

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I hereby elect to participate in the above group insurance plans and authorize the necessary payroll deductions for the contributions required of me for the various insurance plans. If I elect not to participate in the above group plans at the present time, I understand that in the event that I should desire to participate at a later date I will be required to furnish satisfactory evidence of good health.

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Stephanie Whitmore

Home & Auto News

Is Your Credit Safe?

When is the last time you checked your credit? If it's been more than a year, you may need to do it now.

WHILE DIGITAL FRAUDSTERS ARE BUSIER THAN EVER finding new ways to get our personal information and opening fake accounts, a recent survey finds half of U.S. adults have not looked at their credit report or credit score. Millions of people annually are victims of fraud. Cyber-security and credit experts warn that checking your accounts and credit is important because once someone has your personal data they can drain accounts, create accounts in your name, disrupt your credit, file a fake tax return in your name, and get medical care under your health insurance accounts.

Identity theft can take innumerable hours to clear up and can affect your ability to get a loan, the interest rate you pay on a credit card, an application for a scholarship, apartment rental applications, and your insurance rates.

Law-abiding citizens have also faced arrest because someone used their name and information to commit crimes or wrack up parking and other unpaid fines.

"Identity theft can take innumerable hours to clear up and can affect your ability to get a loan, the interest rate you pay on a credit card, an application for a scholarship, apartment rental applications, and your insurance rates."

Don't forget your children. Crooks have used a child's unblemished credit history and social security numbers to get loans to fund expensive trips, purchase all sorts of items, or apply for work. Often, the issue isn't discovered until the victims have trouble attaining a driver's license, credit card, college loan or file a tax return.

Taking precautions can help keep your personal information safe but can't stop every security breach. That's why every insurance policy (auto, home or renters) from California Casualty comes with free ID theft protection from CyberScout, one of the most respected names in the industry. As a California Casualty customer, you will have access to protection and resolution services for tax fraud support, social media compromise, email compromise, child identify theft, break-in recovery, travel identify theft, and much more. □

Editor's Note: *Learn more about California Casualty's identity theft services at www.calcas.com/identity-theft. For your current, member-only rate quote:* ***1.877.264.3854*** *or visit* ***www.readyforquote.com/Stephanie***

SUPPORT OUR FALLEN OFFICERS
GET YOUR SPECIALTY LICENSE PLATE!

www.DriveToRemember.org

The **California Peace Officers' Memorial Foundation (CPOMF)** is proud to announce The California Peace Officers Specialty License Plate. Our specialty plate in conjunction with the California Department of Motor Vehicles helps support the CPOMF mission of honoring California's peace officers who gave their lives 'In The Line of Duty' and providing support to the family members left behind.

1

SIGN UP!

Join our pre-sale list to let us know you are in and support honoring our fallen heroes.

Sign-up online at www.DriveToRemember.org

2

TELL YOUR FRIENDS!

Tell your friends! Help us get the word out by sharing this news on social media and email.

3

RECEIVE YOUR PLATE!

Once the production is approved, we will email you a link to purchase your specialty license plate.

That's it!

Together we are supporting the families of our Fallen Heroes. Please help us to ensure we can honor our Fallen Officers with a specialty plate by joining our list today!

Lance Bayer

Reliable Informer

In this month's issue of the Reliable Informer, *I will cover two cases, one decided by the California Supreme Court and one decided by the California Court of Appeal. These cases look at the law relating to emergency searches and the crime of auto theft. I look forward to hearing from you about ideas for future columns, as well as any other comments you might have.*

The Warrantless Entry Of A Residence Without Exigent Circumstances Violated The Constitutional Rights Of The Occupant

When a law enforcement agency receives a call regarding suspicious circumstances at a residence, the responding officers must determine what actions to take, sometimes including whether to enter the residence without a warrant. Under what circumstances may a peace officer enter a residence without a warrant based on a call of suspicious circumstances?

RECENTLY, THE FOURTH DISTRICT OF THE CALIFORnia Court of Appeal looked at this question in the case of *People v. Smith* (2020)_____ Cal.App.5th_____.

In the *Smith* case, two police officers in Riverside County were dispatched to a residence on a fall night based on a call from a concerned member of the public. The caller stated that an unoccupied running car had been in the driveway of the residence of about half an hour. The officers arrived and met with the reporting party. The officers noted that the vehicle's engine was running, the windows were up and foggy, and the lights were on. The vehicle was registered to a car rental company.

The officers were concerned that the occupants of the now-empty vehicle were inside the residence and may be in distress or may be engaged in criminal activity. One of the officers had responded to similar calls and in one case found someone suffering from a diabetic coma.

The officers approached the residence and rang the doorbell several times. The doorbell could be heard ringing inside the residence. After waiting for 30 to 60 seconds, the officers became concerned. The door was locked.

The officers walked around outside the residence to see if anyone might be injured or if there was criminal activity taking place. About 10 feet away from the front door, the officers observed a second door, which appeared to be part of, and open to, the main residence.

One of the officers turned the handle of that door but did not knock first. The officer believed that knocking would alert people inside the residence. The officer was unaware of the interior layout of the residence and was unaware where the door led.

Turning the handle, the officer then opened the door and announced "police." The officer looked around and noticed a man who he knew to be a convicted felon lying on the floor looking back at him. The officer suspected that the man was involved in criminal activity. The officer then looked around further and located another convicted felon, who he identified as Skyler Smith, who had drug paraphernalia and methamphetamine in plain view. Smith was on probation and subject to a condition allowing for warrantless search. A further search revealed heroin and a loaded assault weapon.

Smith was arrested and was charged with possession of heroin, possession of methamphetamine, possession of methamphetamine while armed with a loaded firearm, being armed with an assault weapon, and being a felon in possession of a firearm. Smith also was charged with drug and firearm offenses from another case that occurred several months later.

In the trial court, Smith made a motion to suppress the evidence. He argued that the warrantless entry of the resi-

dence violated his Fourth Amendment rights against unreasonable searches and seizures.

The trial court denied Smith's motion and he took his case to a jury trial. He was convicted of all of the charges and was sentenced to serve 10 years eight months in prison.

Smith appealed his conviction to the Court of Appeal. He argued, in part, that the trial court should have granted his motion to suppress the evidence. The Court of Appeal reviewed Smith's case and found that the entry to the residence violated the Fourth Amendment and ruled that the evidence should have been suppressed. In its written decision, the Court first stated, "The Fourth Amendment to the United States Constitution prohibits the government from conducting unreasonable searches and seizures of private property. Warrantless searches are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."

The Court further stated, "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion. Accordingly, the Fourth Amendment has drawn a firm line at the entrance to the house. Thus, with few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."

The Court added, "Pursuant to the emergency aid exception, police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. Additionally, the exigent circumstances exception applies to situations requiring prompt police action. These situations may arise when officers are responding to or investigating criminal activity."

The Court noted that a recent decision of the California Supreme Court ruled that the so-called "community caretaking" exception was not one of the recognized exceptions to the warrant requirement. Without reliance on the community caretaking rationale, the officers' conduct was reviewed based on the standard of exigent circumstances.

The Court stated, "The question before us is whether exigent circumstances justified the warrantless search. Exigent circumstances are defined as 'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. Exigent circumstances include situations where an entry or search appears reasonably necessary to render emergency aid, whether or not a crime may be involved." The Court analyzed whether the officers' conduct was based on emergency aid or on other exigent circumstances.

The Court looked at whether the officers conduct was based on providing emergency aid. The Court stated, "The well-recognized emergency aid exception requires that the articulable facts support a reasonable belief that an emergency exists. It is not enough that officers seek to rule out the possibility that someone might require aid. Officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception. The test is whether there was an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger."

"Turning the handle, the officer then opened the door and announced 'police.' The officer looked around and noticed a man who he knew to be a convicted felon lying on the floor looking back at him. The officer suspected that the man was involved in criminal activity. The officer then looked around further and located another convicted felon, who he identified as Skyler Smith, who had drug paraphernalia and methamphetamine in plain view. Smith was on probation and subject to a condition allowing for warrantless search. A further search revealed heroin and a loaded assault weapon."

The Court looked at the facts of Smith's case and stated, "...[H]ere, absolutely no evidence supported a conclusion that anything was amiss inside the residence. The officers observed an unoccupied running vehicle in a residential driveway at night and what appeared to be an unoccupied dark residence with the porch light on and front door locked. No one responded to the doorbell or knocks at the door and the officer could not see or hear anything inside the house. On these facts, the officer expressed concern that someone inside the residence might be having a medical emergency."

The Court continued, "However..., the officer pointed to no facts that reasonably supported his concern that some-

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one inside the residence might be suffering from a medical emergency such as moaning or groaning from inside the home, blood or vomit near the vehicle or residence, or disarray inside the vehicle or near the home. Rather, the facts known to the officer were insufficient to provide him with an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger such that a warrantless search of the residence was justified by the emergency aid exception."

The Court then looked at whether the officers' actions were justified by the general exigent circumstances exception, based on the officers' suspicion that an in-progress burglary was taking place. The Court stated, "A burglary in progress may constitute an exigent circumstance as that phrase is used in Fourth Amendment jurisprudence."

The Court looked at the facts of Smith's case and stated, "The neighbor who reported the running car in the driveway did not see anyone fleeing the residence, or state that the neighborhood had a burglary problem. The lit porch light, locked front door, and dark interior suggested that the home was occupied, but that the occupants were not home. Moreover, an overview of the residence's exterior did not reveal any open doors or windows, flashlight beams in the home, or anything amiss. Here, while the unoccupied running car warranted investigation, it did not reasonably suggest a burglary in progress and justify a warrantless search. Common sense suggests that burglars would not announce their presence by leaving an unoccupied running getaway vehicle in the driveway of the residence being burglarized."

The Court's ruling in the *Smith* case is significant. Since California case law has negated the former "community caretaker" exception, California peace officers are more restricted in their options in investigating suspicious circumstances, as the Smith case demonstrates. □

Taking Or driving A Vehicle Worth $950 Or Less In Violation Of Vehicle Code Section 10851 Is A Misdemeanor

California Vehicle Code section 10851(a) provides that any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle...is guilty of a felony or a misdemeanor. However, after the enactment of Proposition 47, if the vehicle is worth $950 or less, taking the vehicle with intent to permanently deprive clearly is a misdemeanor only. Under what circumstances are other violations of section 10851(a) a misdemeanor only?

RECENTLY, THE CALIFORNIA SUPREME COURT LOOKED at this question in the case of *People v. Bullard* (2020) _____ Cal. 5th _____.

In the *Bullard* case, Julian Bullard stayed overnight at his girlfriend's residence. In the morning, he got up and took her car keys from her purse and drove away in her car without her permission. When the girlfriend noticed her car missing, she reported to local law enforcement that the vehicle was stolen. That night, Bullard called his girlfriend. In their conversation, Bullard agreed to return the vehicle. The following morning, Bullard drove to his girlfriend's workplace. When he got there, he was arrested for violating Vehicle Code section 10851.

Bullard gave a statement to the police. He admitted he took the car without permission, but said that the only reason he did it was that he didn't want to walk. He also said that his head was "messed up." Bullard told the police that he had nowhere to go and that he drove the car around until it ran out of gas, and then borrowed money for gas, and then eventually brought the car to his girlfriend's workplace.

At the time Bullard took the car, it was worth approximately $500.

Bullard was charged with violation of Vehicle Code section 10851. He pleaded guilty to the charge as a felony and was sentenced to serve 16 months in the county jail.

After Bullard was convicted, and after he served his time, the voters passed Proposition 47. One section of the prop-

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osition added Penal Code section 490.2, which states, in part, "Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punishable as a misdemeanor...." The proposition also provided a procedure for persons convicted of felony theft of property valued at $950 or less to have their convictions reduced to misdemeanors. Bullard availed himself of the procedure to reduce his felony conviction.

The State opposed Bullard's motion for a reduction in the charge. The State argued that Proposition 47's misdemeanor treatment only applied to the portion of Vehicle Code section 10851 that involves actual auto theft, the taking of a vehicle with the intent to permanently deprive the owner of the vehicle. The trial court denied Bullard's motion and ruled that Proposition 47 did not apply. Bullard took his case to the Court of Appeal, which also denied his motion. Because of the significance of the issue, the California Supreme Court agreed to hear the case. In a previous decision, the Supreme Court ruled that the theft-reduction provision of Proposition 47 applies to those 10851 convictions based on taking a vehicle with intent to permanently deprive the owner of possession, providing the vehicle is worth $950 or less, but does not apply to the nontheft offense of driv-

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** 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.*

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ing a stolen car after the theft is complete. The Supreme Court reviewed Bullard's case and ruled that the provisions of Proposition 47 applied to his case and reduced his conviction to a misdemeanor.

In its written decision, the Court first looked at the history of the various auto theft provisions of prior California statutes, which included a separate misdemeanor violation for "joyriding," and a separate felony for "grand theft auto," in violation of Penal Code section 487.

The Court then looked at Proposition 47 and stated, "Proposition 47 does not define the term 'theft,' but we have presumed the voters intended the term to bear the same meaning it had at common law: 'a taking with intent to steal the property – that is, the intent to permanently deprive the owner of its possession.' It follows...that those section 10851 convictions that are based on what we had previously referred to as the 'theft form' of the offense – taking a car with intent to permanently deprive the owner of possession – may now be reduced to misdemeanors under Proposition 47, while those convictions that are based on the 'nontheft' crime of driving a stolen vehicle after the theft is complete are not reducible to misdemeanors."

The Court continued, "The issue in this case arises because stealing a car and driving a stolen car are not the only two ways to violate section 10851. A section 10851 conviction that is based on unlawfully taking a vehicle can, but need not, be based on proof that the defendant intended to permanently deprive the owner of possession. The statute is, in fact, wholly indifferent to whether the defendant's intent was to steal the car or merely to borrow it; it punishes any vehicle taking 'with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle,' and 'whether with or without intent to steal the vehicle.' To the extent the statute can be violated based on the taking of a vehicle with intent merely to temporarily deprive the owner of possession – that is, without intent to steal the vehicle – the taking form of the section 10851 offense sweeps somewhat more broadly than the accepted definition of 'theft.'"

The Court then stated, "The question we must decide is what consequence ought to flow from this mismatch. Do we understand Proposition 47 to now subdivide section 10851 vehicle-taking convictions into two new categories – misdemeanor permanent takings and felony temporary ones? Or do we instead understand Proposition 47 to apply to all unlawful takings of low-value vehicles with intent to deprive the owner of possession, regardless of whether the defendant has established an intent to take the vehicle permanently?"

The Court dismissed the first interpretation and stated, "The narrow interpretation of Penal Code section 490.2 as applied to section 10851 convictions would mean that a person who intends only to take the [low-value] vehicle temporarily may be punished as a felon, while a person who also intends to take the vehicle permanently is subject only to misdemeanor punishment. The utter illogic of this result effectively eliminates the narrow interpretation of Penal Code section 490.2 as a possible construction. As in other instances when a statute blindly and literally applied would lead to obvious injustice and a perversion of the legislative purpose, we must instead choose a reasonable interpretation that avoids absurd consequences that could not possibly have been intended.... More to the point, we see no plausible reason why any reasonable voter or legislator might have intended such a result."

The Court stated, "Our holding today is narrow, and specific to the interaction between Proposition 47 and the section 10851 offense. We hold only that to interpret Proposition 47 to split the section 10851 taking offense into two offenses – misdemeanor taking with intent to permanently deprive the owner of the vehicle, and felony taking with intent to do so only temporarily – is so patently illogical that we cannot imagine any plausible reason why voters might have intended that result. The elements of taking an automobile without the intent to permanently deprive the owner of its possession are included in taking with such intent. While the initiative's drafters did not include any provisions aimed expressly at violations of section 10851, we [previously] determined that the initiative was intended to apply to thefts of low-value vehicles prosecuted under that section. We conclude here that it was also intended to ameliorate the punishment for low-value vehicle takings committed without the intent to permanently deprive."

The Court concluded, "Except where a conviction is based on posttheft driving (i.e., driving separated from the vehicle's taking by a substantial break), a violation of section 10851 must be punished as a misdemeanor theft offense if the vehicle is worth $950 or less."

In its ruling in the *Bullard* case, the California Supreme Court once again was required to clarify the effect of a provision of Proposition 47 that wasn't anticipated by the drafters of the proposition. □

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***


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