



VANGUARD

OFFICIAL PUBLICATION OF THE SAN JOSE POLICE OFFICERS' ASSOCIATION

Volume 49 : No.4 • July 2021



LIES AND DEFLECTION;

THE HOURS AFTER AN O.I.S. *-Page 6*



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- Writers are assured freedom of expression within necessary limits of space and good taste.
- Please keep letters and/or articles legible.
- The editor reserves the right to add editor's notes to any letters submitted if necessary.

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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:

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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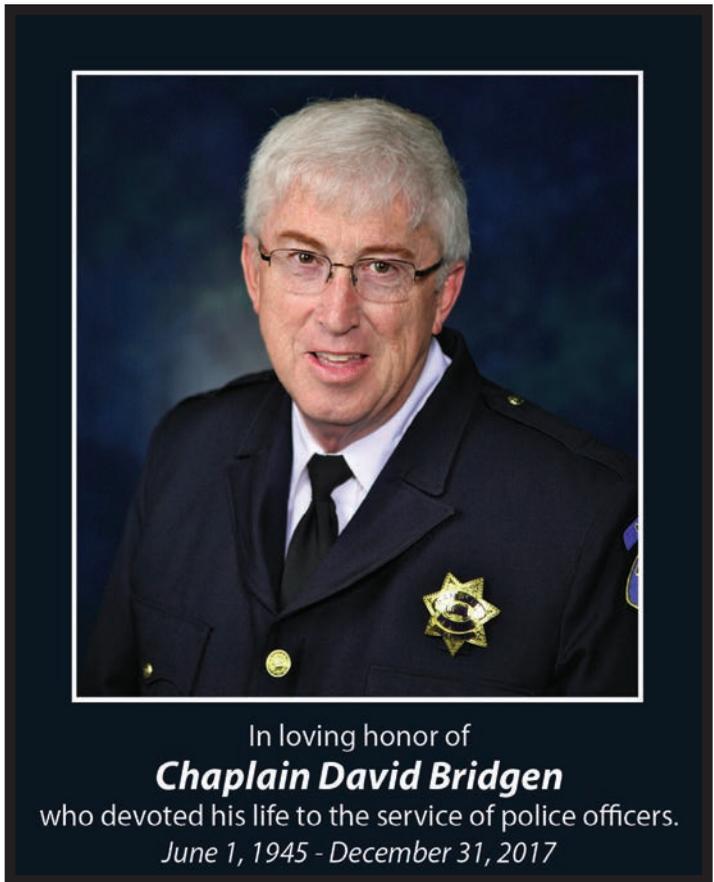
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Dave Wilson, LDF Administrator

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Board Representative: 1

Attorney Request: 0

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Lies And Deflection; The Hours After An O.I.S.

On Monday, May 31st, 2021, gunfire exploded in the night air on an otherwise quiet street in North San Jose. A San Jose police officer killed Demetrius Stanley.

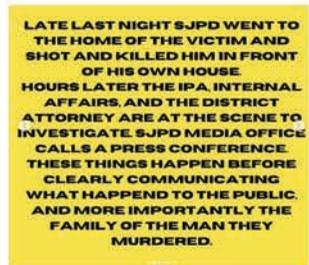
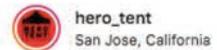
SOME OF STANLEY'S FAMILY MEMBERS AND FRIENDS immediately expressed outrage over the tragic event. They claimed that Demetrius could never have done anything to deserve being shot, especially by a police officer. No, Demetrius was an upstanding member of the community, a hero just trying to protect his family.

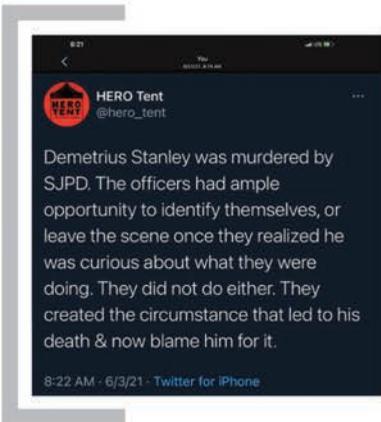
After the shooting, organizations and individuals purporting to represent the community instantaneously condemned the shooting and initiated a coordinated media disinformation campaign that culminated in street protests, the closing of a freeway, and marches to the Mayor's home and the

San Jose Police Department.

The rally cries spread like wildfire on social media. From Blackoutreach SJ: "2 SAN JOSE POLICE OFFICERS SHOT AND KILLED AN UNARMED BLACK MAN LAST NIGHT" and from Hero Tent: "SJPD killed a black man and they're actively trying to cover it up." Tweet after Tweet and post after post all intended to fire up a crowd to take to the streets. The Kremlin couldn't gin up as well as an oiled disinformation machine as what we see in the aftermath of officer involved shootings.

Unfortunately, in the immediate aftermath of this shooting, some in the media provided a platform that allowed the disinformation to spread further beyond social media and into traditional TV, print, online, and radio news. One spokesperson for the protesters is quoted by ABC News saying, "They're going to try and say that it was as simple as he pointed





guns at police officers, but that's not what happened" said Lou Dimes, president of BLACK Outreach SJ.

Sorry Lou, but that is exactly what happened.

Demetrius Stanley, a wanted felon, pointed a loaded handgun at the face of a San Jose police officer who was sitting in a parked car. Stanley was shot by the officer. The entire

incident was captured on video. Stanley, wanted for armed robbery, with the gun in his hand. One undercover officer running away from Stanley to avoid a confrontation. Stanley walking past the surveillance vehicle, then, unprovoked, turning back around and yanking the car door open and pointing the gun at the officer.

But it doesn't matter.

Without regard to fact or circumstance, the "defund the police" protest machine was flipped into high gear. This is the anatomy of the anti-police lies that follow officer-involved shootings. A mixture of shock, grief, manufactured outrage, and hate launched instantly and spread exponentially by Instagram, TikTok, Twitter, and Facebook. Sentence fragments, persuasive memes, and disingenuous short video clips intended to add fuel to the lies to forever wipe away the appetite or attention for the truth by too many in our country.

The facts, the video, and the truth of any incident are cast aside so that the defunders can exploit, divide, inflame, and lie to the public to promote their dream of a police-less society. Some sort of utopian myth where crime disappears, and because there are no police, well then everyone will be safer. Right.

Some defund activists, track-shoe wearing ambulance chasing lawyers, and other phonies, frauds, and finaglers, will try to sell books, make movie deals, or buy

multi-million-dollar homes while exploiting the shooting victim's families to line their own pockets. The truth be damned.

What happened in San Jose, happens all across the country. No one wants to see a police officer kill anyone. When it does happen, logic, reason, and critical thinking are abandoned as the professional activists swoop in to exploit the natural grief and emotion that a community may feel following a tragic incident. Every good story needs a victim, a hero, and a villain—and it's easy rush to make the police officer the villain. So, all the ills of society, every condition that may have led up to that moment is slammed down upon the shoulders of police officers. See, when that happens, then no one has to take any personal responsibility for their actions, because no matter what, it's law enforcement's fault. In these tragedies, the cop is the villain.

Don't have broadband at your house? It's the cop's fault.

Can't afford a house? It's the cop's fault.

Don't have healthcare? It's the cop's fault.

Don't have a job? It's the cop's fault.

Didn't finish school? It's the cop's fault.

Convicted of domestic violence? It's the cop's fault.

Assault someone in a road rage incident? It's the cop's fault.

Open a car door and point a gun at someone's face? It's the cop's fault.

When defund the police activists and their enablers can successfully push a lie about the circumstances surrounding an officer-involved shooting, it allows them to avoid looking in the mirror and reflecting on what actually happened. Deflect, deflect, and deflect.

It is a tragedy that Demetrius Stanley is not longer alive, but where were his family members in the years, months, days, and hours before his death? Where were the defund the police activists and organizations when he pointed a gun at a teenage driver and robbed him just months before this incident? Where were they when he was being arrested for domestic violence? They come out in droves after an incident, but where are they before the incident? Where was their outrage over the victims





of Stanley's crimes?

Who ultimately is responsible for the demise of Demetrius? Where is Demetrius' responsibility in all this? And why doesn't the media call out the defund the police activists for lying?

On Wednesday, June 2nd, 2021, the actual story of what occurred in that quiet San Jose neighborhood was disclosed first privately to Mr. Stanley's family, and then to the public by the San Jose Chief of Police at a press conference. Prior to the video of the incident being played, the first question that was answered was, "Why were undercover police officers on the street to begin with?" The answer was that Demetrius Stanley was wanted for armed robbery and police officers were trying to determine his whereabouts.

The armed robbery referred to occurred on March 12th, 2021.

Police say Stanley was involved in a road rage incident with another person. The incident was filmed by a witness. During an exchange between Stanley and the other driver, Stanley pointed a handgun at the juvenile driver while the juvenile had his hands over his head. Stanley then proceeded to open the center console of the juvenile's car and take a handgun from the car. A warrant for armed robbery was issued for Stanley's arrest.

On March 26th, 2021, Santa Clara County Sheriff's deputies pulled Stanley over and he was taken into custody on the armed robbery warrant. While being interviewed by the SJPd, Stanley confessed to the March 12th, 2021, armed robbery. Because of a previous domestic violence incident, Stanley was prohibited from possessing a gun, let alone the unregistered ghost gun he pointed at the SJPd officer.

Stanley was booked into the county jail and bailed out the same day. A new arrest warrant was issued with new charges including assault with a deadly weapon and possession of a firearm by a prohibited person.

On the night Stanley was shot, two plainclothes San Jose police officers, one on foot and another in an unmarked car, were on Tofts Drive. They were attempting to determine if Stanley was home. They were not prepared



to confront Stanley. In fact, the video of the incident clearly shows one officer run at full speed in the other direction of Stanley. This is de-escalation on steroids.

The other officer is in the driver's seat of the unmarked car and does not confront Stanley, even though he observes the gun in Stanley's hand and in the waistband of his shorts. It was Stanley who walks past the driver's side door and then quickly turns around and with one hand rips open the door and with the other, points his gun at the officer.

The officer reacted to this gun being a few inches from him and shot and killed Stanley.

This was not an "unarmed black man" as the social media salvo aimed to inflame emotions claimed. And when that lie was exposed, the activists changed course and claimed the police were "stalking" Stanley so he was acting in self defense. They turned their story on a dime and never looked back.

Once the video clearly showed Stanley was armed and had pointed his loaded gun at the officer at point blank range, the activists pivoted again to say, "Well the police didn't identify themselves." Really? One officer is clearly





shown literally running away and around a block when Stanley is walking up the street toting a gun. The other was in the car, clearly not wanting a confrontation.

Stanley rips open the door of a random car with a random person in it, points a gun at that random person, and that behavior is not condemned by his family, friends, or activists. If the officer would not have reacted as he did, he may not be here today. By the time he could have said, "San Jose Police," it could have been over for the officer. Permanently.

The activists don't care about what actually happened. They care about self-promotion, fueling a lie, and lining their pockets. The family will file the obligatory lawsuit and demand a huge payout, likely in the millions, but at no time will they take any responsibility for what occurred before the shooting.

No one living in the house with Stanley knew about his road rage incident where he was arrested for pointing a gun at a teenager's head? No one knew about his possession of a ghost gun? No one knew about any anger issues? Who bailed him out the last time he was arrested? Did they try and find help for Stanley? Where are all the activists? Did they help?

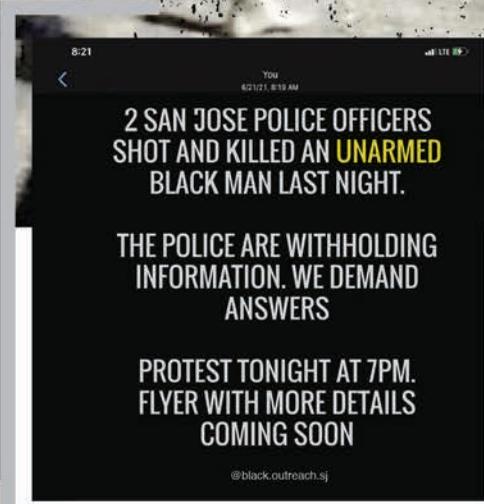
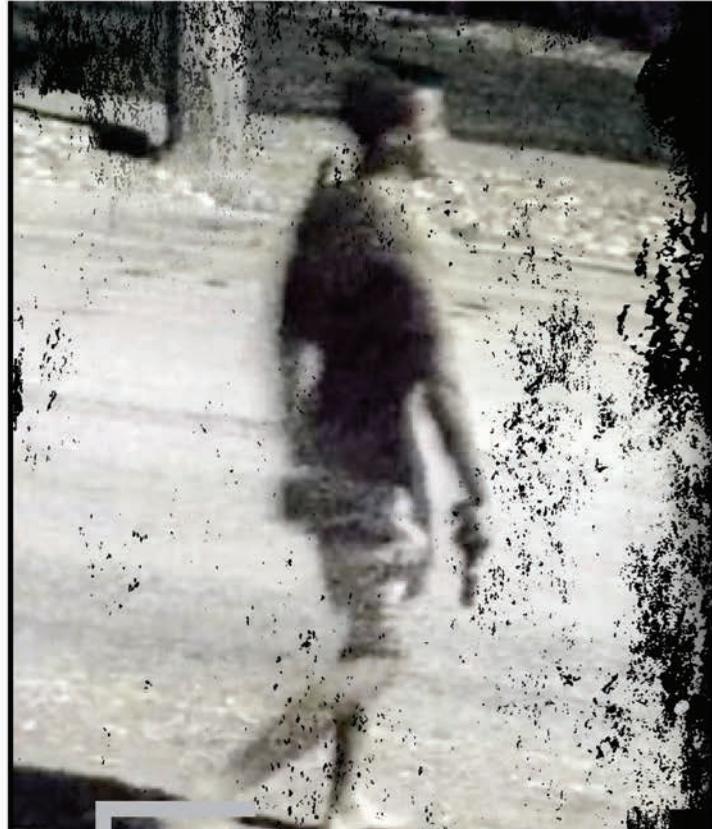
Will the media confront the professional agitators and the defund the police crowd and call out their lies in the aftermath of this shooting? After all, in this day and age, these professional protesters wield incredible power to influence public opinion, influence investigations, and yes, ultimately, even influence charging decisions. Do they not carry some responsibility for their actions?

Does anyone care about the trauma the officer is going through having a loaded gun put in his face and knowing he was milliseconds from potentially losing his life? As studies have shown, he will likely endure years, if not a lifetime, of trauma related impacts because he was forced to take the life of another.

Sadly, we know the answers to these questions. We also know that not many will pursue the answers to those questions. The better we understand the process used by

those who want to destroy public safety in our communities, the better we will be able to look at each incident objectively. Rest assured, we will continue to confront the lies and speak truth to liars. □

Editor's Note: To contact the San Jose Police Officers' Association Board of Directors, email vanguard@sjpoa.com



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Third Degree Communications: Training Bulletin

BUT THEY DID IT FIRST! The Private Search Doctrine

Americans enjoy the privacy protections afforded them by the 4th Amendment's right to be free from unlawful, warrantless search and seizure. However, the 4th Amendment only protects against unreasonable searches undertaken by the government or its agents, not private citizens. It does not afford protection against a search initiated by a private person, even one that is unreasonable, unless the private person is acting as an agent of the government or with the participation or knowledge of an officer. So, the 4th Amendment does not protect a person from the computer or phone technician who opens and searches the file labeled "child porn" even though the person told them not to. And once that private search has taken place, the expectation of privacy as it relates to the items searched has been destroyed. If the private party then reveals the existence of that evidence to police, police can perform a review of that evidence so long as their search of the evidence does not exceed the scope of the search already conducted by the private party.

FOR EXAMPLE, IN *UNITED STATES V. JACOBSEN* (1984) 466 U.S. 109, employees of a private freight carrier found

“Remember to stay within the confines of the private party's search and you should be fine. Do not direct the private party to expand their search because you will turn an otherwise legal search into a 4th Amendment violation.”

apparent narcotics during the search of a package. They returned the substance to the package and informed narcotics agents. The agents' removed the substance from the package and field tested a trace amount of the substance. The removal of the substance from the package obviously did not exceed the private party's search. Did the test? The Court held that although exceeding the scope of the private search, the testing of the trace amount did not invade any reasonable privacy interest and therefore did not constitute a search beyond the scope.

As it relates to computer files, states still differ on how broad the application of the Private Search Doctrine runs, but all seem to agree that if a document or photo has been opened by a private party, an officer can review that file or photo without a warrant. In *People v. Wilson*, (2020) 56 Cal. App. 5th 128, police opened 4 images they received from NCMEC (the National Center for Missing and Exploited Children) who received the images in a CyberTip from Google. Neither NCMEC nor Google had opened these images in this case, but all 4 images had been reviewed by



Google in the past and identified previously as child porn by their matching hash values. So here, the officer's actions – consisting of opening the electronic files submitted to it by NCMEC and viewing the four images attached to Google's Cybertip – did not exactly replicate Google's private actions. The *Wilson* court set out to determine the *degree* to which the officer's additional invasion of Wilson's privacy exceeded the scope of Google's private search (the search of his emails against known hash values). Before the officer even received Wilson's photographs, Google had already reviewed identical images in the past; scanned all of Wilson's electronic communications to search for content with matching hash values; flagged four of Wilson's images as matching images Google had previously observed; classified the matching images as depictions of prepubescent minors engaged in sexual acts; forwarded all four images to NCMEC as part of a Cybertip report; and terminated Wilson's account. The *Jacobsen* case above explained that, "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Id.* at 117. Because Google's actions already frustrated any expectation of privacy Wilson possessed in the four photographs at issue, no privacy interest remained in the four images, so no expectation of privacy was violated. *Wilson* at 219. Because the assigned hash values, or "digital fingerprints," are representative of the contents depicted in the photographs themselves, the government gained no new material information by viewing the images. The agent merely confirmed Google's report that Wilson uploaded content constituting apparent child pornography. *Id.* at 220.

The Private Search Doctrine does not extend to the warrantless search of homes unless some other exception to the 4th Amendment exists. So, if the maid enters a home and sees pounds of cocaine, unless some exigency exists, you need to get a search warrant. The maid's observations can be used as probable cause for the warrant. However, if a burglar breaks into a house and sees a domestic violence assault taking place, flees and flags down a police officer, exigency would allow the officer to enter the house due to fear of imminent harm to the victim. This is true even though the burglar illegally entered the home. Law enforcement can use the evidence discovered by the private party search, whether legally or illegally obtained, as probable cause for a search warrant.

To that end, when evidence is searched or seized in violation of the 4th Amendment, courts will exclude the evidence's admission at trial to deter future police misconduct. The Private Search Doctrine applies and prevents the exclusion of evidence so long as the private citizen acted without the knowledge, approval, consent, or direction of law enforcement personnel.

What does this mean for you? Remember to stay within the confines of the private party's search and you should be fine. Do not direct the private party to expand their search

because you will turn an otherwise legal search into a 4th Amendment violation. □

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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Officer *Michael*
KATHERMAN,
Badge #3900

Killed on June 14, 2016, due to an on-duty traffic collision.



Sergeant *Morris*
VAN DYCK HUBBARD,
Badge #21

Killed on July 12, 1924, by a hostage-taking gunman in a close range shoot-out.



Officer *Henry*
BUNCH,
Badge #2076

Killed on July 29, 1985, by an intoxicated arrestee who wrestled the officer's weapon away and shot him.



Officer *Richard*
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Karen Nelsen



Real Estate Perspective

Don't Wait To Sell Your House...

We're in the ultimate sellers' market right now. If you're a homeowner thinking about selling, you have a huge advantage in today's housing market. High buyer demand paired with very few houses for sale makes this the optimal time to sell for those who are ready to do so. Whatever the move you want to make looks like, here's an overview of what's creating the prime opportunity to sell this summer.

High Buyer Demand

DEMAND IS STRONG, AND BUYERS ARE ACTIVELY searching for homes to purchase. In the Realtors Confidence Index Survey published monthly by the National Association of Realtors (NAR), buyer traffic is considered "very strong" in almost every state. Homebuyers aren't just great in number right now – they're also determined to find their dream home. NAR shows the average home for sale today receives five offers from hopeful buyers. These increasingly frequent bidding wars can drive up the price of your house, which is why high demand from competitive homebuyers is such a win for this summer's sellers.

Low Inventory Of Houses For Sale

PURCHASER DEMAND IS SO HIGH, THE MARKET IS running out of available homes for sale. Danielle Hale, Chief Economist at *realtor.com*, explains: "For most sellers listing sooner rather than later could really pay off with less competition from other sellers and potentially a higher sales price.... They'll also avoid some big unknowns lurking later in the year, namely another possible surge in COVID cases, rising interest rates, and the potential for more sellers to enter the market."

NAR also reveals that unsold inventory sits at a 2.4 months' supply at the current sales pace. This is far lower than the historical norm of a 6.0 months' supply. Homes are essen-

“A seller will always negotiate the best deal when demand is high and supply is low. That's exactly what's happening in the real estate market today.”

tially selling as fast as they're hitting the market. Below is a graph of the existing inventory of single-family homes for sale: At the same time, homebuilders are increasing construction this year, but they can't keep up with the growing demand. While reporting on the inventory of newly constructed homes, the U.S. Census Bureau notes: "The seasonally-adjusted estimate of new houses for sale at the end of April was 316,000. This represents a supply of 4.4 months at the current sales rate."

What Does This Mean For You?

IF YOU'RE THINKING OF PUTTING YOUR HOUSE ON the market, don't wait. A seller will always negotiate the best deal when demand is high and supply is low. That's exactly what's happening in the real estate market today. As vaccine rollouts progress and we continue to see the economy recover, more houses will come to the market. Don't wait for the competition in your neighborhood to increase. If you're ready to make a move, now is the time to sell. Let's connect today to get your house listed at this optimal moment in time. □

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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Valerie Cregan



Home & Auto News

Home Safes: Here's Why You Need One

Your home and the personal property inside are your most valuable assets. If the unexpected were to happen, give yourself peace of mind by knowing your personal possessions have an extra layer of protection by placing them in a home safe.

KEEPING A DURABLE SAFE INSIDE YOUR HOME IS one of the best ways to ensure your valuables, personal belongings, and other important documents inside remain secure in the event of a burglary, fire, or natural disaster. But buying a safe that is water, fire, and/or theft-resistant can be quite a monetary investment.

If you are questioning whether it's "worth it" to purchase a home safe, here are some important factors to remember.

You'll have quick access to important information: If you need cash or important documents like your Home Warranty, you won't have to jump through any hoops or wait to get the information you need. All of your important information will be in one place that is quickly accessible to you and your family.

Your important items will remain safe: In the event of a disaster, there may not be time to grab all of the items you would like to bring with you. With a home safe, no matter the occurrence, your important possessions will remain secure.

You can also use it for firearm and weapon storage: If you keep weapons in your home, you can rest assured knowing that they will be locked away in your safe, out of sight and reach from your children and any guests (wanted or unwanted).

What Kind of Safe Should I Purchase?: Not all safes have the same functionality. Before you purchase a safe of your own, do your research on what will work best for you and your family. If you live in a flood or wildfire-prone area, be sure to invest in a safe that protects against water or fire. If

“Home safes also come in many different sizes, with the average home save being 1.2 – 1.3 cubic feet. If you have an area of your home that you know you would like to place keep your safe (out of the eyes of an intruder) be sure to purchase a safe with the correct dimensions, so it will fit properly in your space.”

you chose to use your safe for weapon storage, remember to find a safe that protects against humidity.

Home safes also come in many different sizes, with the average home save being 1.2 – 1.3 cubic feet. If you have an area of your home that you know you would like to place keep your safe (out of the eyes of an intruder) be sure to purchase a safe with the correct dimensions, so it will fit properly in your space.

The size of your safe should also take into account what you will keep inside of it. For example, if you are storing multiple family heirlooms, along with all of your emergency documents and a full emergency kit, you may want to invest in a larger safe.

Here are some examples of what you can keep in your home safe.



Items To Keep Inside Your Safe

Personal Documents: Birth certificate, passport, social security card, marriage license, vaccination & medical history, tax returns

Important Information: Passwords, health insurance information, legal documents, wills, death decrees, immigration paperwork, and external hard drives

Money & Bank Information: Cash, bank account numbers, checks, credit cards, bonds, stock certificates, & precious metals like gold or silver

Home & Auto Information: Insurance information, contracts, warranties, permits, deeds, and titles

Weapons: Firearms, knives, bows, & ammunition

Jewelry: Expensive necklaces, bracelets, earrings, watches, diamonds, gemstones, & engagement or wedding rings

Spare Keys: House keys, deposit box keys, car keys, garage door openers, and neighborhood facility keys

Heirlooms: Trinkets, photos, and items from childhood or passed down from generations

Emergency Information: List of family cell phone numbers and addresses, family disaster plan, emergency kit, and home inventory

Owning a safe is one of the easiest ways to make sure your personal property stays protected. Save yourself worry and stress by investing in a safe for your home today – your future self will thank you.

SJPOA members: you help keep us safe all year long; let us help you keep your valuable possessions safe too. Click here to enter to win one of THREE Liberty Safes filled with 5.11 Gear courtesy of California Casualty!

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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 warrantless search and the defense of self-defense. I look forward to hearing from you about ideas for future columns, as well as any other comments you might have.

A Firefighter Unlawfully Searches A Backyard Shed And Cabinet After Responding To A Call Of A Structure Fire And Finding No Fire And No Smoke

A call of a whole structure fire generally indicates the potential for imminent danger. What can firefighters, police officers, and other first responders do when the response initially reveals no active fire at all?

RECENTLY, THE SIXTH DISTRICT COURT OF APPEAL looked at this question in the case of *People v. Nunes* (2021) _____ Cal. App. 5th _____.

In the *Nunes* case, a fire captain in Santa Clara County responded to a residence belonging to Joseph Nunes late one afternoon based on a call of a "whole structure fire" with fire coming from the house. When the captain arrived at the residence, he saw no fire and no smoke. He spoke with neighbors and was told that they recently had seen a plume of smoke coming from the backyard.

A police officer also responded to the residence. The officer pounded on the door, but got no response.

The fire captain opened a gate and went into the backyard. He immediately smelled smoke that didn't smell like smoke from cooking. He began looking around to investigate whether there was imminent danger.

Looking around the yard, the fire captain did not observe any active fire. Because there was still an odor of smoke, he and four other firefighters continued to look around. The smoke smell was around the entire backyard. The firefighters were unable to determine the source of the odor.

The backyard was littered with some test tubes and chem-

istry equipment as well as a homemade toy rocket that looked like it had burned.

The fire captain's attention was drawn to a closed shed. No smoke was coming from the shed and the shed did not appear to be the source of the smoke smell. The fire captain opened the shed in order to make sure that everything was clear.

When the fire captain opened the shed, he observed a metal cabinet. There was nothing unusual about the cabinet and there was nothing about the cabinet that caused the fire captain to feel like he needed to inspect the inside of the cabinet. Nonetheless, he was curious and opened the cabinet. Looking inside, he saw bottled chemicals that he did not recognize.

The fire captain contacted the hazardous material team and also requested that additional police respond to the residence. The police obtained a search warrant for the residence, based in part on the chemicals found in the cabinet. The search revealed materials for making explosives and explosive materials.

Nunes was arrested and was charged with numerous offenses for possessing explosives and explosive materials. In the trial court, Nunes made a motion to suppress the evidence found in the searches of the cabinet and the residence. He argued that the searches violated his Fourth Amendment rights against unreasonable searches and seizures.

The trial court denied Nunes' motion and he pleaded no contest to possessing an explosive and possessing a destructive device. He was placed on probation.

Nunes then appealed his conviction to the Court of Appeal. He argued that the trial court should have granted his



motion to suppress the evidence. The trial court agreed with Nunes and overturned his conviction.

In its written decision, the Court first stated, “The Fourth Amendment to the United States Constitution prohibits warrantless searches of places where someone has a reasonable expectation of privacy. Since privacy expectations are particularly strong in the home, warrantless searches of residences are presumed invalid. Indeed, physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. The search in this case is considered a home search for Fourth Amendment purposes, because it occurred within the ‘curtilage’ (the area immediately surrounding and associated with the home). The close connection between the curtilage and the home means that the curtilage is entitled to the same degree of privacy protection as the home itself.”

The Court continued, “Recognized exceptions to the general rule against warrantless home searches must be narrowly construed to prevent the exceptions from swallowing the important Fourth Amendment right. One exception is when an exigent circumstance makes the needs of law enforcement so compelling that a warrantless search becomes objectively reasonable. The exigency asserted here is an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property.” The Court pointed out that the justification for a search based on exigent circumstances ends when the emergency passes.

The Court then stated, “Whether exigent circumstances justify a search depends on the circumstances known to the officer at the time of the search. According to his testimony, the fire captain initially entered the backyard because of the neighbor’s statement about seeing smoke and also the initial report of a structure fire coming from the house. That action was reasonable and permissible under the Fourth Amendment because it was premised on a specific, articulated exigency sufficient to justify warrantless entry – a possible house fire. But by the time the fire captain became aware of the cabinet, the circumstances had changed significantly. Contrary to the initial report, the house was not on fire at all. And after an inspection of the backyard and a look inside the shed, there did not seem to be an active fire anywhere on the premises. Nor was there any visible smoke, only a persistent odor in the general area that was not consistent with cooking. We must evaluate whether there was an exigency sufficient to justify the search of the cabinet based on the circumstances known to the fire captain at the time of that search – which, again, had changed substantially from the time he arrived. The question thus becomes: Does the persistent odor of unspecified smoke allow for a warrantless search of a cabinet within a shed in the backyard? In this case the Fourth Amendment’s strong protection of the right to privacy within the home requires us to answer the question in the negative.”

The Court continued, “We acknowledge that the smell of an unspecified kind of smoke, the source of which is not apparent, can justify further investigation and warrantless entry.

“When the fire captain opened the shed, he observed a metal cabinet. There was nothing unusual about the cabinet and there was nothing about the cabinet that caused the fire captain to feel like he needed to inspect the inside of the cabinet. Nonetheless, he was curious and opened the cabinet. Looking inside, he saw bottled chemicals that he did not recognize.”

But in this particular situation, it did not rise to the level of an emergency sufficient to bypass obtaining a search warrant for the contents of a cabinet which did not appear to be the source of the smell. We are not persuaded that opening the cabinet in the shed was necessary to avoid imminent danger to life or serious property damage, given that the urgency of the situation had dissipated. Indeed, the fire captain’s testimony was that nothing ‘in particular’ about the cabinet led him to open it. The exigent circumstances exception therefore does not extend to the cabinet search. Application of the exception requires both a specific articulation of an emergency threatening life or destruction of property, and an explanation of why the action in question was immediately necessary to address the specified emergency. With regard to the cabinet search, we see neither in this record.”

The Court concluded, “In conducting our independent review, we are mindful of the paramount privacy interest in the home (including its curtilage), and of our duty to narrowly construe exceptions to the Fourth Amendment warrant requirement. We therefore conclude that the fire captain’s opening of the cabinet inside the shed, however prudent and well intentioned, was not an action necessary to prevent imminent danger. Defendant’s motion to suppress should have been granted as to the evidence found in the cabinet.”

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Reliable Informer

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The Court's ruling in the *Nunes* case reminds law enforcement of the limitations to the emergency exception to the warrant requirement. The decision did, however, result in a strong dissent from one of the three justices on the panel. In his dissent, the dissenting justice stated, "The fire captain testified that there was a strong smell of smoke throughout the backyard. He found a homemade rocket device in the backyard. The device appeared burnt, but the fire captain could not determine whether the device was the source of the smoke. The discovery of the homemade device caused the fire captain to be concerned about the presence of 'explosive material.' The fire captain also observed chemistry equipment – including test tubes, flasks, and beakers – littered about the backyard. In my view, given the smell of smoke with no definitive source and – crucially – the pos-

sible presence of explosive material, it was reasonable for the fire captain to be concerned that the contents of the shed posed a possible fire danger. His decision to open the shed was likewise reasonable under the circumstances. Entry into the cabinet was justified for the same reasons. The source of the smoke smell was still unknown after entry into the shed and the fire captain's concerns about the possible presence of explosive material had not been allayed. Even if the fire captain did not suspect that anything in the cabinet was actively burning, he could reasonably have been concerned that as-yet unidentified smoldering material in the cabinet, shed, or yard – or whatever ignited the initial apparent fire – might ignite the explosive materials he reasonably suspected were present."

Because of the significant disagreement between the two majority justices and the one dissenting justice, hopefully the California Supreme Court will weigh in on this issue to resolve the conflict. □

A Defendant Claiming Self-Defense Must Prove He Subjectively Believed In The Need To Defend And Such Belief Was Objectively Reasonable

When a suspect commits a violent offense, such as a homicide, the suspect may assert the defense of self-defense. When is the suspect allowed to claim a greater right to defend himself or herself because of physical limitations?

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

In the *Horn* case, a retired deputy sheriff named Jack Horn went for a hike on a trail in Orange County on a fall morning. At the time, Horn was 73 years old and was hiking with his wife. While on the trail, Horn encountered the victim, a 64-year-old, who was with his three off-leash dogs. Horn confronted the victim and told him to leash his dogs.

According to the victim, Horn was angry because the victim's dogs were not on leashes and made a stabbing motion toward one of the dogs with his walking stick. He may have threatened to kill the dog. The victim bent down towards

the dogs. At that point, the victim reported that Horn swung the stick at him, but he managed to block the blow slightly with his hand. The stick struck him on the side of his head. According to the victim, Horn began punching him and a struggle over the walking stick ensued. Eventually, the victim grabbed the stick and threw it into the bushes.

The victim stated that he attempted to walk away, but that Horn passed him on the trail and then turned around to face the victim. Horn had a gun in his hand. The victim told Horn to ease up. Horn's wife told him to put away the gun. Horn fired a shot into the victim's chest. The bullet narrowly missed the victim's heart. The victim managed to call 911. Horn and his wife remained on the trail with him and eventually he was airlifted to a hospital. The victim was given emergency surgery that likely saved his life.

In his defense, Horn later stated that the victim responded to his direction to leash his dogs by charging towards Horn. Horn stated that he held up his walking stick and took out his gun for protection. He told the victim to stop and stay away, but the victim snatched the stick and raised it up as if to strike Horn in the head. Horn later said that he shot the victim because he felt that he had no other option. Horn stated that he suffered from severe spinal stenosis. He said



“The victim stated that he attempted to walk away, but that Horn passed him on the trail and then turned around to face the victim. Horn had a gun in his hand. The victim told Horn to ease up. Horn’s wife told him to put away the gun. Horn fired a shot into the victim’s chest. The bullet narrowly missed the victim’s heart. The victim managed to call 911. Horn and his wife remained on the trail with him and eventually he was airlifted to a hospital.”

that his doctor told him that he could become paralyzed if he ever took a hard fall. He said that he was very concerned about his physical state when the victim charged at him and he drew his gun out of fear that he would become paralyzed.

Horn was arrested and was charged with attempted premeditated murder, assault with a semiautomatic firearm, and with sentencing enhancements for inflicting great bodily injury and for using a firearm.

Horn took his case to trial. He claimed that he acted in self-defense when he shot the victim. The jury rejected his defense and found him guilty of attempted voluntary manslaughter and assault and found the sentencing allegations to be true. Horn was sentenced to serve nine years in state prison.

Horn appealed his conviction to the Court of Appeal. He argued that the conviction was based on improper argument by the prosecutor that Horn’s physical impairments were not relevant to the defense of self-defense. In his first closing argument, the prosecutor did not mention Horn’s spinal condition, but argued that Horn was not a credible witness. In rebutting the defense closing argument, the prosecutor said, “The defense told you you have to get into the defendant’s boots. That is not true. You do not consider the de-

endant’s sickness, his physical limitations. It is a reasonable person standard.” The prosecutor also read to the jury a case quotation that purportedly stood for the proposition that a defendant’s physical limitations are irrelevant to the objective reasonableness required to prove self-defense. The prosecutor also read the “objective reasonableness” portion of the self-defense jury instruction. The Court of Appeal agreed with Horn that the prosecutor did not correctly state the law, but upheld Horn’s conviction, ruling that the trial court sufficiently admonished the jury to disregard the misstatements.

In its written decision, the Court first stated, “The general parameters of the law on self-defense are clear.... For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. If the belief subjectively exists but is objectively unreasonable, there is ‘imperfect self-defense,’ i.e., the defendant is deemed to have acted without malice and cannot be convicted of murder, but can be convicted of manslaughter. To constitute ‘perfect self-defense,’ i.e., to exonerate the person completely, the belief must also be objectively reasonable. In other words, self defense requires both actual subjective believe and objective reasonableness. These principles also apply to self-defense in the context of *attempted* murder and *attempted* voluntary manslaughter.”

The Court noted that the subjective and objective components of self-defense are not unrelated. The Court pointed out that a defendant’s personal understanding of the risks presented logically pertains to the objective reasonableness of his or her thoughts and actions. Evidence bearing on the defendant’s perception of the danger presented by the victim’s actions is important because it assists the jury in understanding the defendant’s perspective and how a reasonable person would have acted under similar circumstances.

The Court stated, “Although the belief in the need to defend must be objectively reasonable, a jury must consider what would appear to be necessary to a reasonable person in a similar situation and with similar knowledge. It judges reasonableness from the point of view of a reasonable person *in the position of a defendant*. To do this, it must consider all the facts and circumstances in determining whether the defendant acted in a manner in which a *reasonable man [or woman]* would act in protecting his [or her] life or bodily safety.”

The Court further noted that a jury is entitled to consider all of the elements which might be expected to operate on the defendant’s mind, including the actual physical condition of the defendant. According to the Court, “Indeed,... when a defendant relies on self-defense, his [or her] physical condition is always important in determining what a reasonable [person] in the position of the defendant would have done under the same conditions.”

The Court looked at the language of a California Supreme Court decision that stated, “It is only natural that one unable to successfully resist a dangerous assault made upon

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him because suffering from disease which has impaired his strength would more readily believe he was in imminent danger than if he were healthy and vigorous. Of course, the belief of the defendant that he was in such danger would not be conclusive. It would be for the jury to determine whether as a reasonable man he was justified in so believing.”

The Court concluded that Horn was entitled to have the jury consider his spinal problems and fear of paralysis in determining whether his belief in the need for self-defense was objectively reasonable. The Court stated that those circumstances informed Horn’s subjective understanding of the risks of the victim’s actions, but they also had a logical bearing on what a reasonable person in a similar situation, and with similar knowledge, would believe. The Court found that the prosecutor had committed error in arguing that Horn’s medical condition did not matter.

The Court then looked at whether the trial court’s curative instructions were sufficient to rectify the prosecutor’s misstatements. The Court found that the trial court’s instructions were sufficient to inform the jury’s deliberations and allowed them to apply the correct legal standard.

The Court’s ruling in the *Horn* case is significant, because it takes a careful look at what effect a physical impairment may have in making a claim of self-defense. It is still up to a jury, however, to determine whether to believe a defendant or whether to find that the defendant’s claim is objectively unreasonable in light of the circumstances. □

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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