VANGUARD

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In Memoriam

By *Paul* Kelly, *Sean* Pritchard, *Dave* Wilson, & *Steve* Slack – *Page 06/07*

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:

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.

WWW.PROTECTSANJOSE.COM

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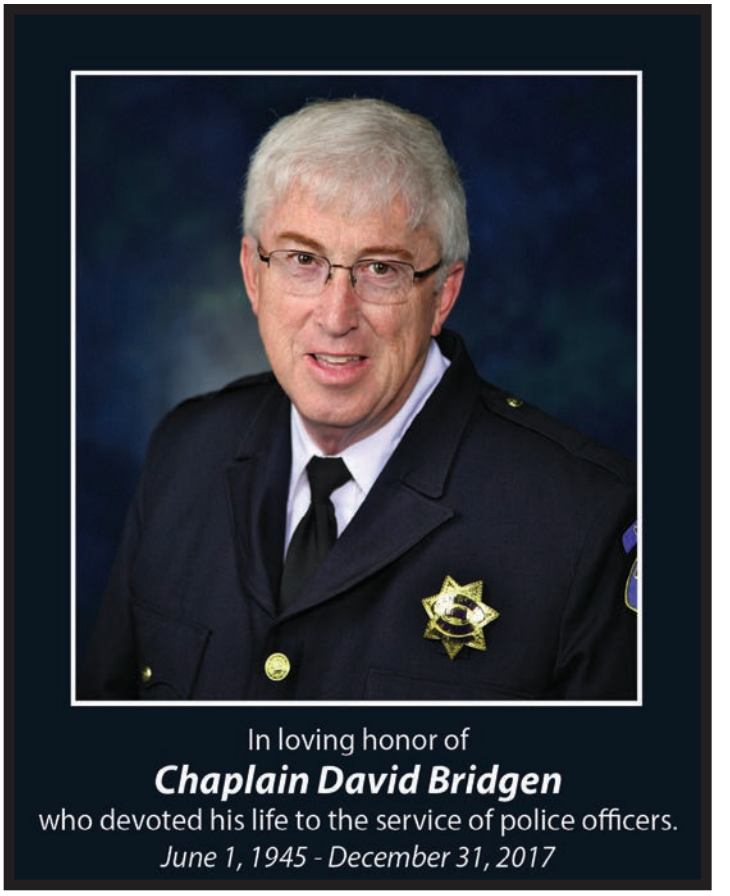

In loving honor of
Chaplain David Bridgen
who devoted his life to the service of police officers.
June 1, 1945 - December 31, 2017

VANGUARD
Contents:

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Legal Defense Fund Report

Dave **Wilson**, LDF Administrator

Requests: 11
Approved: 11
Denied: 0
Board Representative: 11
Attorney Request: 0

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

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

Paul **Kelly**

President **Message**

Fallen Officers' Memorial Speech

MY POSITION HAS ALLOWED ME TO BE BLESSED TO speak on the day we honor our fallen San Jose Officers. Police work is not a one man or woman show, it's a team, it's family, it's all of us being united which includes not just the rank and file wearing the badge, but the family and friends that support that badge every single day. I felt it necessary this year to include my POA Executive Team who is the voice for our Board, our membership, and yes, sometimes the fallen too. On this day, and all the days to follow as we remember our lost brothers, it has never been about the President of the POA, the Chief of Police, or the Mayor giving a speech; it's about our police family and community respecting and honoring them every day.

These words from my brothers are as real as it can get. Thank you guys. I want to end by sending a message to all of the San Jose Police families who lost their loved ones. We will continue to fight, bleed, and love the badge and patch that they all once wore. We will not take their lives for granted, ever! The honor that we will show to you and them may sometimes be unseen, but know it is given. Please remember, we have you, we are with you always, and that can never be broken. □

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

Sean **Pritchard**

Second Chair's **View**

For Whom The Bells Toll

FOR WHOM THE BELLS TOLL, IT TOLLS FOR THEE. TO the families of our fallen, any officers' death is a loss to all of us, but your loved ones were not just any person. They were a son, a husband, a brother, a friend, a partner. And to us, like you, they are forever a part of us; their very being is woven deeply through us.

To my fellow brothers and sisters, may this day not just serve as a day of remembrance or a day of sorrow, rather may it serve as a reminder that the greater purpose you serve will outshine the evil you face. For each of you, I pray that those bells never toll again, but should they, please know the strength of this patch, the shine of this badge, the bond as police officers, and everything you stand for will never fade.

And as we remember our fallen brothers today, carry on the same purpose without deterrence. Letting that quiet determination of leaving the streets, the neighborhoods, a better place for the people of our city, just as our fallen did in valor. In doing so, we signify with a conviction that we live each day with a purpose, just as our beloved brothers did with their sacrifice. □

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

Dave Wilson

C.F.O.'s Report

An Honorable Privilege

TODAY WE HONOR THE 13 SAN JOSE POLICE OFFICERS who have paid the ultimate price in protecting and serving our community.

John 15:13 tells us, "Greater love hath no man than this, that a man lay down his life for his friends."

Wearing this uniform and badge is an honorable privilege. We do this willingly to help others knowing that we too may end up paying that ultimate price.

For the loved ones left behind to mourn this most difficult sacrifice, you did not have a choice in the profession that your loved one chose as their mission and life's work.

However, I hope you can take some comfort in knowing that your loved one made a difference in this world before they moved on to the next.

Please know, you do not mourn alone. You are family, we are a family, and we mourn with you.

"Blessed are the Peacemakers, For they Shall be called the children of God."

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

Steve Slack

Sergeant At Arms

Thirteen Good Men

18TH CENTURY IRISH STATESMEN EDMUND BURKE stated, "The only thing necessary for the triumph of evil is for good men to do nothing."

Please let me reinforce that the 13 good men we've tragically lost at our department WERE doing something. They were doing what all of us who have chosen law enforcement as our profession, do every day. Putting on our uniforms and going out into the community to serve, however we can, to keep evil at bay.

To the families, know that your loved ones are heroes and are not forgotten now, nor will they ever be. To the active sworn, remain steadfast and strong in honoring our fallen brothers by exhibiting courage and integrity as you carry out your commitment to stand watch together and proudly protect our community.

Editor's Note: *Please send any comments to Steve Slack at:* ***sgtatarms@sjpoa.com***

CLICK HERE TO WATCH THE FALLEN OFFICERS' MEMORIAL CEREMONY

In **Memoriam**

Sergeant ***Morris*** **VAN DYCK HUBBARD**, *Badge #21*

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

Officer ***John*** **BUCK**, *Badge #10*

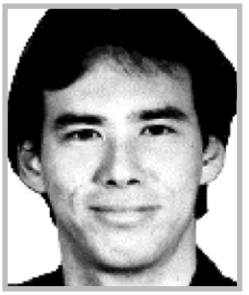
Died on April 5, 1933, from gunshot wounds sufferd five weeks earlier while attempting to apprehend armed robbery suspects in a car.

Officer ***John J.*** **COVALESK**, *Badge #70*

Shot and killed on November 15, 1950, by an armed burglar whom Covalesk found burglarizing a business.

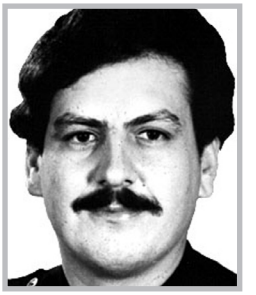
Officer ***Richard*** **HUERTA**, *Badge #47*

Killed on August 6, 1970. Shot by a gunman intent on randomly killing any officer he encountered that evening.



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

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

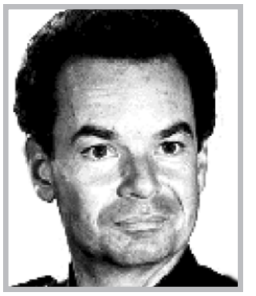


Officer ***Henry*** **BUNCH**, *Badge #2076*

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

Officer ***Robert*** **WIRHT**, *Badge #1596*

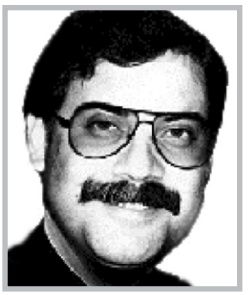
Killed on September 8, 1988, while on a police motorcycle pursuing a speeding motorist, and then being struck by another errant motorist in traffic.



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

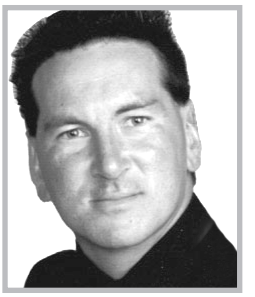
Killed on January 20, 1989 by a mentally ill pedestrian who wrestled away the officer's handgun and shot him.

In **Memoriam**



Officer ***Gordon*** **SILVA**, *Badge #1512*

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



Officer ***Desmond J.*** **CASEY**, *Badge #2705*

Killed on October 25,1999, when the police helicopter he was piloting crashed.

Officer ***Jeffrey*** **FONTANA**, *Badge #3702*

Shot on October 28, 2001, while initiating a car stop during the early morning hours in the Almaden Valley area of San Jose.

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

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

Officer ***Michael*** **KATHERMAN**, *Badge #3900*

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

**“I never dreamed it would be me,
and with heavy heart and bended knee,
I ask for all here from the past,
dear God, let my name be the last.”**

– Sgt. George Hahn, L.A.P.D. Retired

www.sjpoa.com/Fallen_Officers.asp

Gregg McLean **Adam**

Legal Counsel

End Running Qualified Immunity

In late March, New York City created a special local law, for which qualified immunity could not be invoked as a defense, to allow plaintiffs to sue the City and city police officers for civil rights violations. Multiple California legislators have signed onto Senate Bill 2, which aspires to something similar.

A FEW WORDS ABOUT QUALIFIED IMMUNITY: IT IS a longstanding, judicially-crafted legal doctrine that prevents public agencies and their employees from being held liable for civil rights violations so long as the employee was performing his or her official duties and did not violate a clearly-established statutory or constitutional right. Qualified immunity is routinely applied to all kinds of public officials, not just cops. It can also be waived.

The doctrine's modern origins are notable: The idea of not holding public officials liable for good faith mistakes has historical roots; however, it was the lionized "Warren Court," led by former California Governor Earl Warren (whose Court is championed by liberals for its rulings, including holding that school segregation and racial marriage segregation laws were unconstitutional, and that a constitutional right to privacy existed), which held in 1967 that a police officer acting in good faith could not be held liable for a false arrest.

Explaining the decision, Chief Justice Warren himself wrote: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." ("Mulcted" = extract money from (someone) by fine or taxation.) Chief Justice Warren had the foresight to ask why would a police officer take any risk in their job, especially with its complexities if it would expose them to personal liability.

Fifty years on from the Warren Court's decision, some jurisdictions are enacting end runs around qualified immunity.

New York City's new law. In late March, NYC City Council voted to create a new local law for civil rights violations. The new local law replicates Section 1983, the vehicle for federal civil rights actions. But whereas federal law allows use of qualified immunity as a defense, the new local law does not.

Some city leaders, including New York's Mayor, point out that the law could have been worse: originally, its provisions would have penalized individual officers. However, these were removed because of the potentially adverse effect on recruiting and retaining officers. Yet the adverse effects on recruiting and retention of more lawsuits, that will drag out longer, and produce more monetary awards against public entities and their police officers, which are the inevitable consequences of the new law, worried supporters far less. For good measure, NYC's councilors offer damages and attorneys' fees to prevailing plaintiffs.

California's Senate Bill 2. Senate Bill 2 would mimic New York's law – and go further: It would "license" officers, and permit licenses to be revoked by disciplinary panels that would include "victims of police abuse." Senate Bill 2 would also amend California's equivalent to Section 1983, Civil Code section 52.1, known as the Bane Act, to eliminate qualified immunity, but…wait for it…only its use by police officers. So much for equal protection of the law.

One important element that neither New York City's law or Senate Bill 2 appear to touch is the requirement that police officers and other public officials be indemnified for any award of damages (except punitive damages) that arise as a result of actions within the course and scope of their employment. Indemnity laws typically are creatures of state law.

So the moral of this story is that NYC and the proponents of Senate Bill 2 are making it easier to sue police officers even though public entities themselves will have to foot the bill. More litigation, fee and damages awards will deplete public fiscs. Less funds will be available to maintain public safety, to pay for schools, and to update infrastructure. Moreover, as Chief Justice Warren feared, 54 years ago, cops in NYC, and California should Senate Bill 2 be enacted, will face a dilemma: engage proactively to protect your community or proceed in an over-abundance of caution to avoid suit but sacrifice your oath of office.

Defenders of eliminating qualified immunity will argue it levels the playing field for the victims of police abuses. But that's something of a red herring. Qualified immunity

"A few words about qualified immunity: It is a long-standing, judicially-crafted legal doctrine that prevents public agencies and their employees from being held liable for civil rights violations so long as the employee was performing his or her official duties and did not violate a clearly-established statutory or constitutional right. Qualified immunity is routinely applied to all kinds of public officials, not just cops. It can also be waived."

is a defense, and public agencies can waive it – although individual officers could continue to raise it. Removing it only from police officers, who face unique split second decision-making situations, hardly levels the playing field when non-police officers can still rely on their good faith actions to evade liability. Good faith defenses exist through-out the law. For example, since the Supreme Court's *AFSCME v. Janus* ruling in 2019, in dozens of cases, labor unions have invariably avoided liability for collecting fair share fees from non-members prior to the decision based on their good faith reliance on previous Supreme Court precedents. Qualified immunity may be founded on principles of common sense and fairness but that hasn't stopped some policymakers from determining that cops in NYC, and perhaps California, should go without it. □

Editor's Note: *To contact Gregg McLean Adam, email: gregg@majlabor.com*

Johnene **Stebbins**

Third Degree **Communications:**

Training **Bulletin**

Knock-Knock…Who's There?

The Knock-Notice rule has garnered much attention lately. Whereas many believe that giving occupants notice and time to come to the door lessens the likelihood of violence, still others may point to situations where the occupants used that time to arm themselves, increasing danger for both officers and occupants. Regardless, the requirement to knock, give notice of authority and purpose and demand entry before entering someone's home has been codified both federally and with the states. In California, Penal Code section 844 and 1531 require entry only after an officer has demanded admittance and explained the purpose for which admittance is desired. Federally, 18 U.S.C.A. § 3109 allows an officer entry only after giving notice of his authority and purpose and being refused admittance.

"Like other aspects of the 4th Amendment, there are exceptions to the Knock-Notice rule. Further law enforcement factors exist that must be balanced against the reasons for knock-notice."

IS IT REQUIRED BY THE 4TH AMENDMENT? AT THE time of the framing of the Constitution, the common law of search and seizure recognized an officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority. Ultimately, this common-law "knock and announce" principle became part of the reasonableness inquiry under the Fourth Amendment. *Wilson v. Arkansas* 514 U.S. 927, 929, 115 S.Ct. 1914, 1915. The purpose of this knock-notice rule is to protect the privacy of the occupant, to safeguard innocent persons on the premises; to prevent violent confrontations arising from unannounced entries; and to protect the police themselves from injuries caused by a surprised or fearful householder. (*People v. King* (1971) 5 Cal.3d 458, 464, fn. 3, 96 Cal.Rptr. 464, 487 P.2d 1032.) *People v. Murphy*, 37 Cal. 4th 490, 496, 123 P.3d 155, 158 (2005).

Like other aspects of the 4th Amendment, there are exceptions to the Knock-Notice rule. Further law enforcement factors exist that must be balanced against the reasons for knock-notice. The threat of physical harm to police, the fact that an officer is pursuing a recently escaped arrestee, and the existence of reason to believe that evidence would likely be destroyed if advance notice were given may establish the reasonableness of an unannounced entry. Wilson at 927. For example, in one case, an officer acting with reasonable cause to make a narcotics arrest, kicked down defendant's door after knocking and hearing retreating footsteps. Although the officer failed to demand admittance or explain his purpose, the court upheld the seizure of narcotics found within, noting that full compliance with knock-notice requirements could delay an officer's entry and thereby permit the destruction of evidence. *Murphy* at 496–97. More recent cases have phrased the test so that strict compliance with the knock-notice rule is excused if the specific facts known to the officer before his entry are sufficient to sup-

port his good faith belief that compliance will increase his peril, frustrate the arrest, or permit the destruction of evidence. Although this may seem applicable to all drug cases, that knocking should be excused so drugs don't get flushed, there is no per se justification for a no-knock warrant. Murphy at 497. Officers must be able to articulate specific facts for that specific case.

I've heard the news lately say that California does not allow no-Knock warrants, but that appears not to be the case. In fact, it remains ambiguous in California. In 1973, the California Supreme Court in *Parsley v. Superior Court*, ruled that a police officer cannot get prior judicial authorization for a no-knock warrant because the determination should be made at the time of entry. *Parsley,* 9 Cal.3d 934. That case has not been overturned, however, the United States Supreme Court suggests that judicial authorization is reasonable. In 1997, the United States Supreme Court held that it is entirely reasonable for judges to review circumstances put forth by the affiant justifying the reasonableness of a no-Knock warrant. *Richards v. Wisconsin* (1997) 520 U.S. 385, 393. If you can articulate facts showing sufficient cause to believe that notice will result in the occupant arming himself, becoming violent, or destroying evidence, a court can authorize officers to enter without giving notice. Always better to include the circumstances, if known to you at the time, in the warrant and seek authorization. However, you should always re-evaluate those circumstances before entry to make sure those circumstances have not been eliminated.

What Does This Mean For You?

YOUR ABILITY TO ARTICULATE FACTS IS VERY IMPORtant. Most courts will recognize that these situations require quick thought and quick actions. In some instances, waiting 5 seconds before kicking the door may be reasonable and in others it will not. Either way, currently, violation of the Knock-Notice rule when executing a search warrant does not result in the suppression and exclusion of the evidence at trial. □

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***

Marc F. **Derendinger**

Insurance **News**

Travel Assistance Plan Change – Notice Of Vendor Change

With all this pent-up demand to start traveling again, it's time to update a special benefit of SJPOA Membership, Travel Assistance, which is sponsored by Standard Insurance Company and administered by Assist America, Inc.

THIS PLAN HAS CHANGED EFFECTIVE JUNE 2020, AS Standard Insurance Company recently moved the program from Generali to Assist America. Please update your records and to avoid any confusion, discard old plan information before your next trip of more than 100 miles from home.

How It Works

WHEN YOU ARE TRAVELING 100 MILES OR MORE away from home (on trips of 180 days or less), you have access to travel medical and security assistance services from Assist America. You and your spouse are covered, and children through age 25. **Note:** *this is not an insurance product, rather a travel assistance service.*

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- **medservices@assistamerica.com**

Get the most out of travel assistance with the Assist America Mobile App. The reference code is 01-AA-STD-5201, available from the Apple App Store and Google Play.

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- Visa, weather and currency exchange information, health inoculation recommendations, country-specific details and security and travel advisories.
- Credit card and passport replacement and missing baggage and emergency cash coordination
- Help replacing prescription medication or lost corrective lenses and advancing funds for hospital admission
- Emergency evacuation to the nearest adequate medical

"This plan has changed effective June 2020, as Standard Insurance Company recently moved the program from Generali to Assist America. Please update your records and to avoid any confusion, discard old plan information before your next trip of more than 100 miles from home."

including:

- Facility and medically necessary repatriation to the employee's home, including repatriation of remains (conditions apply)
- Connection to medical care providers, interpreter services, local attorneys and assistance in coor-dinating a bail bond
- Return travel companion if travel is disrupted due to emergency transportation services or care of minor children if left unattended due to prolonged hospitalization
- Assistance with the return of your personal vehicle if your emergency transportation services leave it stranded
- Evacuation arrangements in the event of a natural disaster, political unrest and social instability

Who Is Eligible?

YOU DON'T HAVE TO ENROLL, BECAUSE AS A PARticipant in the *San Jose Police Officers' Association Insurance & Benefits Trust* group life insurance plans (Standard Insurance), you are automatically covered. Eligibility is extended to your spouse/partner and dependent children through age 25.

The SJPOA Insurance & Benefits Trust was established in the 1990s to help bring more affordable insurance options to members of the SJPOA. Backed by A.M Best-Rated insurance companies, boasting an A (Excellent) rating, the IBT offers lower rates than most city plans, and additional benefits, such as the Travel Assist Program. □

Editor's Note: *The Derendinger insurance agency has served as our SJPOA Insurance Broker since 1968. Marc can be reached at* ***408.252.7300*** *or by email at* ***sjpoa@derendinger.com****. You may find more information at* ***www.derendingerins.com****. License No. 0563986*

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Enter through rear of building.

POST Certificate Requirements

Basic

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

Intermediate (5% incentive pay)

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

Advanced (2.5% incentive pay)

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

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

Karen **Nelsen**

Real Estate **Perspective**

Four Major Reasons Households In Forbearance Won't Lose Their Homes To Foreclosure

There has been a lot of discussion as to what will happen once the 2.3 million households currently in forbearance no longer have the protection of the program. Some assume there could potentially be millions of foreclosures ready to hit the market. However, there are four reasons that won't happen.

"Banks have learned lessons from the crash of 2008. Lending institutions don't want the headaches of managing foreclosed properties. This time, they're working with homeowners to help them stay in their homes."

1. Almost 50% Leave Forbearance Already Caught Up On Payments

ACCORDING TO THE MORTGAGE BANKERS ASSOCIation (MBA), data through March 28 show that 48.9% of homeowners who have already left the program were current on their mortgage payments when they exited.

- 26.6% made their monthly payments during their forbearance period
- 14.7% brought past due payments current
- 7.6% paid off their loan in full

This doesn't mean that the over two million still in the plan will exit exactly the same way. It does, however, give us some insight into the possibilities.

2. The Banks Don't Want The Houses Back

BANKS HAVE LEARNED LESSONS FROM THE CRASH of 2008. Lending institutions don't want the headaches of managing foreclosed properties. This time, they're working with homeowners to help them stay in their homes.

As an example, about 50% of all mortgages are backed by the Federal Housing Finance Agency (FHFA). In 2008, the FHFA offered 208,000 homeowners some form of Home Retention Action, which are options offered to a borrower who has the financial ability to enter a workout option and wants to stay in their home. Home retention options include temporary forbearances, repayment plans, loan modifications, or partial loan deferrals. These helped delinquent borrowers stay in their homes. Over the past year, the FHFA has offered that same protection to over one million homeowners.

Today, almost all lending institutions are working with their borrowers. The report from the MBA reveals that of those homeowners who have left forbearance,

- 35.5% have worked out a repayment plan with their lender
- 26.5% were granted a loan deferral where a borrower does not have to pay the lender interest or principal on a loan for an agreed-to period of time
- 9% were given a loan modification

3. There Is No Political Will To Foreclose On These Households

THE GOVERNMENT ALSO SEEMS DETERMINED NOT

to let individuals or families lose their homes. Bloomberg recently reported:

"Mortgage companies could face penalties if they don't take steps to prevent a deluge of foreclosures that threatens to hit the housing market later this year, a U.S. regulator said. The Consumer Financial Protection Bureau (CFPB) warning is tied to forbearance relief that's allowed millions of borrowers to delay their mortgage payments due to the pandemic…mortgage servicers should start reaching out to affected homeowners now to advise them on ways they can modify their loans."

The CFPB is proposing a new set of guidelines to ensure people will be able to retain their homes. Here are the major points in the proposal:

- The proposed rule would provide a special pre-foreclosure review period that would generally prohibit servicers from starting foreclosure until after December 31, 2021.
- The proposed rule would permit servicers to offer certain streamlined loan modification options to borrowers with COVID-19-related hardships based on the evaluation of an incomplete application.
- The proposal rule wants temporary changes to certain required servicer communications to make sure borrowers receive key information about their options at the appropriate time.

A final decision is yet to be made, and some do question whether the CFPB has the power to delay foreclosures. The entire report can be found here: Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X.

4. If All Else Fails, Homeowners Will Sell Their Homes Before a Foreclosure

HOMEOWNERS HAVE RECORD LEVELS OF EQUITY today. According to the latest CoreLogic Home Equity Report, the average equity of mortgaged homes is currently $204,000. In addition, 38% of homes do not have a mortgage, so the level of equity available to today's homeowners is significant.

Just like the banks, homeowners learned a lesson from the housing crash too.

"In the same way that grandparents and great grandparents were shaped by the Great Depression, much of the public today remembers the 2006 mortgage meltdown and the foreclosures, unemployment, and bank failures it created. No one with any sense wants to repeat that experience…and it may explain why so much real estate equity remains mortgage-free."

What does that mean to the forbearance situation? According to Black Knight:

"Just one in ten homeowners in forbearance has less than 10% equity in their home, typically the minimum necessary to be able to sell through traditional real estate channels to avoid foreclosure."

The reports of massive foreclosures about to come to the market are highly exaggerated. As Ivy Zelman, Chief Executive Officer of Zelman & Associates with roughly 30 years of experience covering housing and housing-related industries, recently proclaimed:

"The likelihood of us having a foreclosure crisis again is about zero percent."

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.*
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SIGNATURE & DATE

BENEFICIARY DESIGNATION IS NOT VALID UNLESS THIS FORM IS SIGNED AND DATED!

Valerie Cregan

Home & Auto News

California Peace Officer Memorial Foundation

May is Peace Officer Memorial Month. The California Peace Officers' Memorial Foundation (CPOMF) mission is to organize, coordinate and fund the annual California Peace Officers' Memorial Ceremony, maintain the memorial monument, subsidize survivor support groups (e.g., COPS & Peer Support groups), and support the families of our fallen heroes through our educational grant and financial assistance programs.

CPOMF IS A NON-PROFIT ORGANIZATION, RUN BY a board of volunteers from California LEO Associations. Did you know that was initially started by California Peace Officer Associations? Did you know that CPOMF is still primarily funded by donations from LEO's? There are some Corporate Sponsors that contribute to the scholarship fund but CPOMF still relies on the donations from the Law Enforcement Community and associations like yours.

California Casualty is a proud supporter of CPOMF. Our company contributes to the Scholarship Fund every year. California Casualty Representatives volunteer at the event, sponsor the Candlelight Vigil glowing pens, and have a working representative on the CPOMF Contribution Committee. Find out more about CPOMF at: **www.camemorial.org**

"While we are unable to be in person for the event this year. Our hearts and thoughts are with our Fallen Heroes, their families and their LEO brothers and sisters."

While we are unable to be in person for the event this year. Our hearts and thoughts are with our Fallen Heroes, their families and their LEO brothers and sisters. □

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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 the crimes of forgery and possession of counterfeiting equipment. I look forward to hearing from you about ideas for future columns, as well as any other comments you might have.*

A Forgery Not Exceeding $950 May Be A Felony If There Is A Meaningful Connection Between The Forgery And A Conviction For Identity Theft

After the voters adopted Proposition 47, the crime of forgery is a felony if the crime exceeds $950, but an exception applies for a person who is convicted both of forgery and identity theft. Under what circumstances does this exception apply?

RECENTLY, THE CALIFORNIA SUPREME COURT looked at this question in the case of *People v. Guerrero* (2020)_____ Cal. 5th_____.

In the *Guerrero* case, Raul Guerrero was arrested in Santa Clara County for violating a restraining order. Guerrero was searched incident to the arrest and an officer found a wallet in Guerrero's jacket. The wallet was placed in a plastic bag and Guerrero was booked into Santa Clara County jail. After Guerrero was booked, a corrections officer conducted an inventory of Guerrero's possessions, including the contents of the wallet.

When the corrections officer examined the wallet, he located a driver's license belonging to another person, a benefits card belonging to another person, a counterfeit $50 bill, a check from a charity, and four personal checks that were not owned by Guerrero and were not made out to him.

Guerrero was charged with one misdemeanor count of possessing the personal identifying information of another (identity theft), one felony count of concealing or withholding stolen property, one misdemeanor count of contempt of court, and one felony count of forgery by possession of a fictitious bill. Guerrero also was charged with a sentencing enhancement for having previously suffered a "strike."

In the trial court, Guerrero took his case to a jury trial. He was found guilty of all charges. He submitted to a court trial on the sentencing enhancement and the court found it to be true. Before sentencing could occur, the voters enacted Proposition 47. The trial court reduced the charge of concealing or withholding stolen property to a misdemeanor based on the new law. The judge did not, however, reduce the forgery conviction to a misdemeanor. Guerrero was sentenced to serve four years in state prison.

Guerrero appealed his conviction to the Court of Appeal. He argued that the trial court should have reduced the forgery conviction. The Court of Appeal rejected Guerrero's claim and upheld his conviction. Guerrero then requested the California Supreme Court review his case.

The Supreme Court reviewed Guerrero's case and agreed with his position. The Court ordered the forgery charge reduced to a misdemeanor.

In its written decision, the Court first stated, "Forgery is a wobbler crime punishable either as a felony or as a misdemeanor. Proposition 47 reduced forgery offenses to a misdemeanor when the amount in question does not exceed $950. It added section 473(b), which provides that 'forgery relating to a check, bond, bank bill, note, cashier's check, travelers check, or money order, where the value of the [instrument] does not exceed nine hundred fifty dollars ($950), shall be punishable by imprisonment in a county jail for not more than one year.…' Section 473(b) goes on to provide two exceptions: First, regardless of the value of the offense, forgery may be punished as a felony 'if that person has one or more prior convictions [specified] or for an of-

fense requiring registration pursuant to subdivision (c) of Section 290.' Second, section 473(b) does not apply 'to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.' The second exception – the identity theft exception – is at issue in this case."

The Court looked at a recent California Supreme Court decision in the case of *People v. Gonzales*, where a defendant was charged with felony forgery and identity theft in the same court filing, but the conduct underlying the two charges occurred years apart and had no relationship to each other. Looking at the Gonzales case, the Court stated, "The identity theft exception, we explained, is phrased in the present tense: Protection from felony punishment is unavailable 'to any person who is convicted both of forgery and of identity theft.' This is in contrast with other language in section 473(b) disqualifying a forgery conviction for reduction to a misdemeanor if the defendant has 'prior convictions' for specified violent felonies and sex offenses. If Proposition 47 had intended to preclude a forgery defendant from relief whenever the defendant also had an identity theft conviction regardless of when it was received, Proposition 47 would have included identity theft among those previous disqualifying convictions. Instead, the drafters added a separate exception using the present tense, indicating that 'conviction for the forgery offense must at least occur in a timeframe concurrent with the conviction for identity theft.'"

The Court noted that the Gonzales court "held that the identity theft exception makes forgery not exceeding $950 punishable as a felony only if the defendant is also convicted of identity theft in the same proceeding and the conduct related to the forgery and identity theft convictions were made 'in connection with' each other. The two convictions 'must bear some meaningful relationship to each other – beyond the convictions' inclusion in the same judgment." The Court in Gonzales based its conclusion on the legislative history and purpose of Proposition 47.

The Court noted that the issue in Guerrero's case is whether forgery and identity theft are undertaken "in connection with each other" for purposes of the identity theft exception in section 473(b) simply because the defendant possessed separate stolen identification and forged instruments together at the same time.

The Court stated, "We agree with Guerrero that concurrent possession, without more, does not establish a meaningful connection between the two offenses for purposes of the identity theft exception. As we said in Gonzales, the identity theft exception does not arbitrarily combine two unrelated crimes; it 'lists two offenses that tend to facilitate each other and, committed together, arguably trigger heightened law enforcement concerns.' Although our reference to facilitation in Gonzales was illustrative, we now conclude that it provides the clearest standard rooted in the purpose of Proposition 47 to evaluate whether a meaningful connection between forgery and identity theft exists. To disqualify a defendant for relief under section 473(b), the prosecution must show that the forgery offense facilitated the identity theft offense, or vice versa. The fact that both offenses were committed at the same time and place, or the fact that evidence of both offenses was found at the same time and place, does not by itself mean that one offense facilitated the other." The Court noted that forgery offenses that either facilitate or are facilitated by identity theft may result in greater economic and personal harms.

"When the corrections officer examined the wallet, he located a driver's license belonging to another person, a bene-fits card belonging to another person, a counterfeit $50 bill, a check from a charity, and four personal checks that were not owned by Guerrero and were not made out to him."

The Court continued, "An individual can commit forgery by possessing a forged instrument, and an individual can commit identity theft by possessing stolen identification. But simultaneous possession of separate stolen identification and forged instruments, without more, does not raise the same heightened law enforcement concerns that the identity theft exception in section 473(b) intended to address and is not sufficient to show a facilitative relationship. Of course, when a defendant possesses two items of contraband at the same time, those items are connected in a superficial sense – the same person possesses them. But without additional evidence of a connection, that is all that can be said. Possession of one instrument need not have facilitated possession of the other."

The Court concluded, "We hold that the meaningful connection requirement of section 473(b)'s identity theft exception is satisfied only if a defendant convicted of forgery is also convicted of identity theft in the same proceeding and only if one of the offenses facilitated the other. The sole fact that a defendant happened to possess two separate items of contraband at the same time does not demonstrate such a facilitative relationship."

The Court's ruling in the *Guerrero* case is yet another example of the lengths to which California courts must go in order to interpret the often-confusing provisions the voters enacted when they adopted Proposition 47. □

The Crime Of Possession Of Counterfeiting Equipment Does Not Require A Specific Intent To Defraud

California Penal Code section 480(a), the crime of possession of counterfeiting equipment, states, "Every person who makes, or knowingly has in his or her possession any die, plate, or any apparatus, paper, metal, machine, or other thing whatever, made use of in counterfeiting coin current in this state, or in counterfeiting gold dust, gold or silver bars, bullion, lumps, pieces, or nuggets, or in counterfeiting bank notes or bills, is punishable [as a felony]…." Does a violation of this section require an intent to defraud?

RECENTLY, THE FOURTH DISTRICT OF THE CALIFORNIA Court of Appeal looked at this question in the case of *People v. Seo* (2020) _____Cal. App. 5th_____.

In the *Seo* case, a police officer in Buena Park in Orange County responded to a motel parking lot because of a suspicious car. It was a rental car, and it had not been returned, although it was weeks past its return date. The officer began surveillance of the vehicle. After a while, a man later identified as Sung Seo started loading boxes and duffel bags into the backseat of the car. The officer lawfully searched Seo's motel room and discovered several pieces of linen paper on the floor and in the trash can. One of the pieces of linen paper had an outline of a $20 bill on it.

After other officers arrived, they lawfully searched the boxes and bags Seo had been loading into the car. During the search, officers located a loaded handgun that was registered to Seo in a computer bag. They also found evidence that Seo had been attempting to counterfeit $5 and $20 bills. They located some pieces of paper with $5 and $20 bill images printed on them. The officers also located other pieces of paper with the images of currency that were cut into the shape of regular-sized bills. One of the pieces of paper had images of the front and back of a $20 bill. Some of the pieces of paper had incomplete versions of U.S. currency.

The officers also located a piece of paper with four real $5 bills taped to it, which appeared to be a template which had been copied onto linen paper. It appeared that the copying had been done on an inkjet printer. Officers further located four bottles of paint, paint brushes, a paint pen, and acetone nail polish remover. In addition, the officers located an inkjet printer, a laptop computer, and additional linen paper. All of these items are commonly used in counterfeiting currency.

As part of their investigation, the officers contacted a special agent with the United States Secret Service, who examined the evidence and provided an expert opinion that the inkjet printer, linen paper, and acetone were used in manufacturing counterfeit currency.

Seo was arrested and was charged with carrying a loaded firearm in a vehicle and with possession of counterfeiting equipment. In the trial court, Seo took his case to a jury trial. He requested the court instruct the jury that the crime of possession of counterfeiting equipment requires a fraudulent intent. The court disagreed. Seo was convicted of both charges. He was placed on probation for a period of three years with terms that included an order that he serve 240 days in county jail.

Seo appealed his case to the Court of Appeal. He argued, in part, that the trial court should have instructed the jury to acquit him of possession of counterfeiting equipment if the prosecution did not prove fraudulent intent. The Court reviewed Seo's case and upheld his conviction.

In its written decision, the Court first stated, "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence. To determine the intent required for the crime of possessing counterfeiting equipment, we begin by examining the statutory language describing the proscribed conduct, including any express or implied reference to a mental state." The Court quoted the statute and stated, "Simply stated, section 480(a), prohibits 'knowingly' possessing items 'made use of in counterfeiting currency.' The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of the Penal Code. It does not require any knowledge of the unlawfulness of such act or omission."

The Court continued, "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future

"During the search, officers located a loaded handgun that was registered to Seo in a computer bag. They also found evidence that Seo had been attempting to counterfeit $5 and $20 bills. They located some pieces of paper with $5 and $20 bill images printed on them."

consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. Because section 480(a) simply describes a particular act – possession of items made use of in counterfeiting – without reference to an intent to do a further act or achieve a future consequence, it is deemed a general intent crime. Thus, to be convicted of violating section 480(a), a defendant must knowingly possess an item (die, paper, machine or apparatus) that he or she knew was or will be used in the counterfeiting of currency. A defendant who does not know that he or she is in possession of equipment that was or will be used for counterfeiting currency is not guilty of violating section 480(a). Thus, section 480(a) does not require a specific intent to do a further act or achieve a future consequence such as defrauding another."

The Court further stated, "Even though the plain language of section 480(a) does not include a fraudulent intent requirement, defendant nonetheless urges us to graft one onto the statute, at least when the charge is based on possession of 'ordinary office equipment like paper and a printer.' We decline the invitation. Examination of the history of section 480(a) and a comparison with related statutes demonstrates that it is not necessary to impute a fraudulent intent requirement into the statute generally or under the circumstances identified by defendant."

The Court then noted that there was no standard instruction for the jury regarding the elements of the crime of possession of counterfeiting equipment, so the trial court fashioned its own instruction based on case law. The Court made a suggestion for future cases. The Court stated, "...[A] clear jury instruction would have told the jury that the prosecution must prove: (1) The defendant possessed any apparatus, paper, machine or other things that had been or will be used in counterfeiting currency; (2) the defendant knew of the presence of these items; and (3) the defendant knew that the items he or she possessed had been or will be used in counterfeiting currency. Such an instruction articulates both the criminal act of knowing possession and the mental state of knowing the wrongful purpose for which the items possessed had been or will be used. The knowing possession requirement prevents criminalizing the innocent possession of linen paper, inkjet printers, and other 'office supplies,' which defendant is concerned about."

The Court then looked at Seo's contention that section 480(a) is unconstitutionally vague. Seo claimed that the statute "provides no guidance whatsoever as to what it actually prohibits," since it "criminalizes possession of mere paper and computers when accompanied by the nebulous mental state of 'intent to commit a crime.'"

The Court stated, "A statute is not unconstitutionally vague if the accused can reasonably be held to understand by the terms of the statute that his conduct is prohibited. A statute must be definite enough to provide a standard of conduct for its citizens and guidance for the police to avoid arbitrary and discriminatory enforcement. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the due process requirement of adequate notice. But a statute is not vague if any reasonable and practical construction can be given to its language. Reasonable certainty is all that is required. There is a strong presumption that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears."

The Court continued, "A person of common intelligence can understand that section 480(a) prohibits only the knowing possession of items used in the process of counterfeiting currency. The statutory language is sufficiently definite to provide adequate notice of the conduct proscribed and to prevent arbitrary and discriminatory enforcement. Defendant's vagueness challenge fails as section 480(a) is not unconstitutionally vague."

The Court's decision in the *Seo* case is a helpful demonstration of the methodology that courts use to establish the mental state required to meet the elements of a particular crime. □

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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