



VANGUARD

OFFICIAL PUBLICATION OF THE SAN JOSE POLICE OFFICERS' ASSOCIATION

Volume 43 : No.7 • July 2015

A large, vibrant firework exploding in the night sky, with a mix of purple, blue, and yellow colors.

Settlement **FIRST**, Vacations Should **WAIT!**

By Paul Kelly—page 06



VANGUARD

Official Monthly Publication Of The
San Jose Police Officers' Association



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- Unsolicited articles and letters may not exceed 500 words.
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- Please keep letters and/or articles legible.
- The editor reserves the right to add editor's notes to any letters submitted if necessary.
- Deadline: 15th of each month.

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Meeting Dates For 2015:

July 7, Tuesday 0730 hrs. August 4, Tuesday 0730 hrs.
September 1, Tuesday 0730 hrs. October 6, Tuesday 0730 hrs.
November 3, Tuesday 0730 hrs. December 1, Tuesday 0730 hrs.

POA Christmas Open House, Thursday, December 17.
Santa at the POA, Tuesday, December 8 and Friday 11.

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

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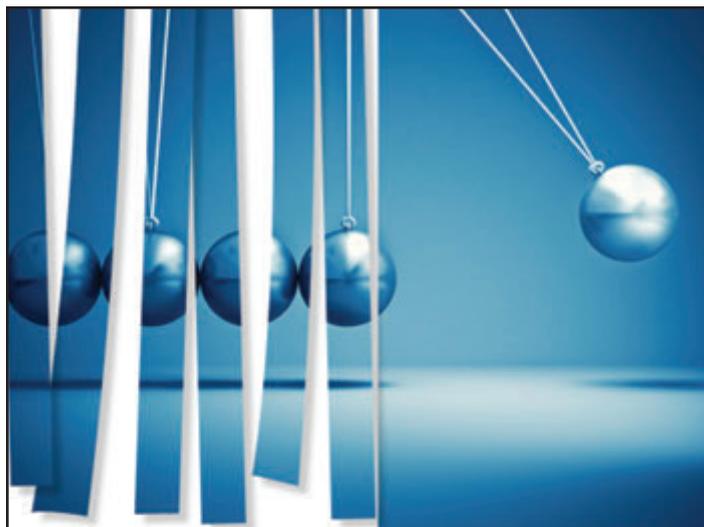


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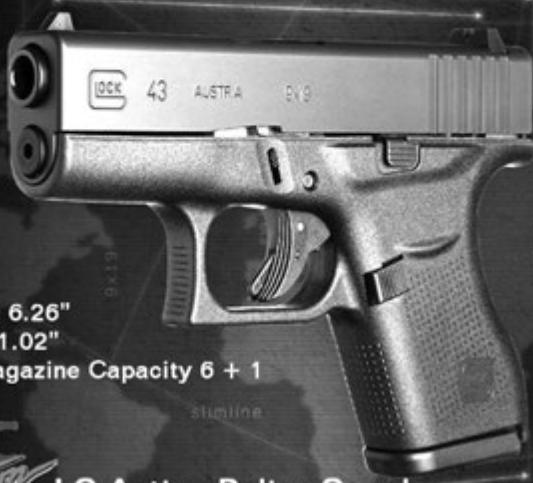
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Legal Defense Fund Report

Franco Vado, LDF Administrator

Requests: 19

Approved: 19

Denied: 0

Board Representative: 19

Attorney Request: 0

THIS IS A SYNOPSIS OF LDF TRUSTEE ACTIONS FOR the month of May 2015. 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.

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Paul Kelly



President's Message

Settlement FIRST, Vacations Should WAIT!

As the Fourth of July approaches, most people are thinking about where to spend this patriotic holiday with family and friends, but that isn't so for everyone here at the San Jose Police Department. Many of us are thinking of yet another holiday weekend missed because of mandatory overtime, filling pay cars, and wondering when the city will take action to fix our department.

OUR POLICE ADMINISTRATION IS THINKING OF HOW to keep up with the hours and mandatory overtime. Our members are hoping that this continued battle with the city ends soon so they can actually use their bank of vacation time.

The mayor has stated publicly that he, the city council, and city administration will be available to work some dates in July, if need be, on keeping his promise to pay us a competitive wage. If need be? As the department shrinks, the

“Every single day, San Jose police officers are required to work overtime to fill basic patrol shifts because of understaffing. The city council and city administration should be required to work overtime to resolve the ‘Measure B Fiasco’ and rebuild the department that this measure has destroyed.”

911 calls stack up in the police computer and our response time slows down.

Every single day, San Jose police officers are required to work overtime to fill basic patrol shifts because of understaffing. The city council and city administration should be required to work overtime to resolve the “Measure B Fiasco” and rebuild the department that this measure has destroyed. What a message it will send, if city leaders take a vacation.

On the following page is a reprint of a June 19, 2015 Mercury News article that really says it all... □

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

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San Jose Police Union Urges City Leaders To Act Before July Recess

SAN JOSE – With the mending economy bringing more revenue for raises, city officials have reached agreements with employee unions representing most of San Jose's 5,200 workers that will restore some of the pay that was cut during the recession.

BUT ONE BIG DEAL REMAINS ELUSIVE: A LABOR agreement with the city's 1,000 police officers. Though talks continue, and the officers, unlike other workers, have six months before their contract expires, San Jose's police union said more resignations will come from the depleted force that once numbered 1,400 cops if city leaders don't reach a deal on pay and benefits before the City Council's July break.

"If they leave without addressing the wage agreements," said Tom Saggau, a spokesman for the San Jose Police Officers' Association, "it will be a catastrophe. They will be sending a message that sun-tanning and water sports are more important than fixing the mess that many of them created."

Police and other city unions agreed to 10 percent pay cuts in 2010 as revenues sagged during the recession and the costs of retirement benefits that were boosted during the last decade soared. Even with the pay cuts, the city had to eliminate hundreds of jobs, including its first-ever police layoffs, to close record budget shortfalls. And in 2012, city leaders won voter approval of Measure B to scale back pensions.

City unions have fought the pension measure in court, though provisions eliminating bonus pension checks for retirees and offering smaller pensions to new hires remain in place. Mayor Sam Liccardo early this year offered to seek a legal settlement, but he said this week that any settlement on pensions could be "weeks or months" away.

Since the 10 percent pay cuts, the police officers have received about 7 percent pay increases, with another 3 percent coming next month. Other city unions got increases totaling 5.5 percent.

The other labor agreements signed this month offer 3 percent raises over the next two or three years.

James Gonzales, the police union's vice president, said they are waiting for the city to make a wage proposal before making any counter-offer. But Gonzales said departures indicate the city's current compensation isn't competitive: 75 officers have left or retired since January, including 10 in the last two weeks. It puts a strain on current officers, he said, who are forced to work overtime, cancel vacations and

“If they leave without addressing the wage agreements,” said Tom Saggau, a spokesman for the San Jose Police Officers' Association, “it will be a catastrophe. They will be sending a message that sun-tanning and water sports are more important than fixing the mess that many of them created.”

cover shifts on their days off.

"It sends the wrong message for an exhausted workforce to have to forgo their vacations to see council members go on vacation when a resolution is possible if they stay," Gonzales said, adding that last weekend's shift was short by 30 officers.

Councilman Raul Perez, a former police officer, said the council shouldn't take its July recess until labor negotiations with police are finished. Perez worried that delaying discussions for another month could lead to more officers leaving San Jose.

"We are bleeding employees right now, so every day we take to come to an agreement, we're going to lose more officers," Perez said. "A lot of officers are holding their breath, waiting for us to make them an offer. They can only hold their breath for so long."

While union officials couldn't say with certainty how many officers might leave if an agreement isn't reached by June 30, Gonzales said dozens are testing with other law enforcement agencies, which typically ramp up hiring during the summer.

"We could lose another 50 to 60 people by the end of the year," he said.

Vice Mayor Rose Herrera said she's open to continuing labor discussions in July, especially given how close the city is to reaching a resolution with the police union. The City Council also will schedule more closed-session meetings this month, she said.

"Everyone is committed to working on this to get it done," Herrera said. "We all have our cellphones (in July) and we can call meetings, if needed." □



James Gonzales



Second Chair's View

Second Chair's View Will Return Next Month.

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C.F.O.'s Report

San Jose Police Officers' Association Meeting Notes

Membership Meeting

Vice President James Gonzales gave an update on body worn cameras.

THERE HAS BEEN A LOT OF NEWS COVERAGE ON body worn cameras. The POA has been negotiating with the City since January and repeatedly criticized for slowing the process down. Our primary concern has been to develop a policy that protects all parties involved, and allows us to adapt to the constantly evolving scenarios related to body worn cameras. The policy we agreed to will be a good policy.

President Kelly advised the membership that there is no allusion that things need to change and had hoped that he could bring some good news. There is nothing to report other than we are close on concepts for fixing Tier 2 and Disability. There has been no talk of money on the City's side. Additionally, the Mayor released his June budget message and there are monies for recruiting but not one mention of retention. The POA views this as a big problem.

We have met numerous times with the City on Measure B and the MOA. We have no more scheduled meetings and the City has not wanted to talk about money for the POA. We are close to getting a fix for Tier 2, Disability, and have some good concepts on retiree healthcare. There are only a few weeks left before council goes on their July break. As of right now, the City has been silent with only one week left; we will see if the phone rings. □

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

“Our primary concern has been to develop a policy that protects all parties involved, and allows us to adapt to the constantly evolving scenarios related to body worn cameras.”

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P&F Retiree Association <i>Mike Alford</i>	\$25 Gift Card Rock Bottom	<i>Justin Holliday</i>
Premier One Credit Union <i>Gina Skylas</i>	\$25 Gift Card Starbucks	<i>Jonathan Anderson</i>
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PRESIDENT	PAUL KELLY		7:00	11:30							
VP	JAMES GONZALES		7:00	11:30							
CFD	FRANCO VADO		7:00	11:30							
DIRECTOR	KEVIN ALLAN		7:00	11:30							
DIRECTOR	GLENN BALDWIN		7:00	11:30							
DIRECTOR	JOAQUIN BARRETO		7:00	11:30							
DIRECTOR	DAMIAN BORTOLOTTI	Excused									
DIRECTOR	EDWARD CHAN		7:00	11:30							
DIRECTOR	RICK DELISSER		7:00	11:30							
DIRECTOR	ROB IMBERSTEG		7:00	11:30							
DIRECTOR	HOWARD JOHNSON		7:00	11:30							
DIRECTOR	JOHN MOUTZOURIDIS		9:30	11:30							
DIRECTOR	DAVE WILSON		7:00	11:30							
DIRECTOR	DAVID WOOLSEY		7:00	11:30							
ISSUES		NOTES									
V-1:											
V-2:											
V-3:											
V-4:											
V-5:											
V-6:											
KEY:	M-MOTION	S-SECOND	Y-YES	N-NO							

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Long-Term Investing

Employer 401(k) Matching Contributions: *Employees Get A True Financial Benefit*

A liberal is a man who is willing to spend somebody else's money.

– Carter Glass, 1938

Life is a jig saw puzzle with most of the pieces missing.

– Anonymous

Will employees who have employers that match their 401(k) contributions in the company sponsored retirement plan be encouraged to save money, tax-deferred, for their future?

Answer: Absolutely.

Understanding A 401(k) Retirement Plan

THE 2015 401(K) MAXIMUM CONTRIBUTION IS \$18,000. In a 401(k) plan, the contributions are funded by the employee and are often matched by contributions from the employer. It is not mandatory for a company to offer a contribution to their 401(k) plans.

As of 2013, the most common matching program increased to 100% of the first 6%. This program states that once the employee contributes 6% of their gross pay, the employer's contributions stop until the following year. If the employee contributes less than 6% of their gross income, the employee foregoes additional compensation from the employer available to them had they contributed up to the 6% limit. For example, an employee whose annual gross pay is \$50,000 contributes \$3,000 (6% of gross pay) would receive a \$3,000 employer contribution. If the employee contributed more

than \$3,000 the employee would not receive additional employer contributions. If the employee only contributed \$2,000 (4% of gross pay), they would only receive a \$2,000 employer contribution leaving \$1,000 of potential employer contribution on the table.

In a 401(k) plan, the contributions are funded by the employee and are often matched by contributions from the employer. The contributions to an employee's 401(k) plan are made from the employee's salary before taxes. These funds grow tax-free until they are withdrawn; at that point the contributions can be converted into an Individual Retirement Account. The funds may also be switched if one changes employers. An employer's matching program is situational and depends on if a workplace offers one. According to the Profit Sharing/401(k) Council of America, an industry trade group, about 78% of 401(k) plans include some kind of employer match for employee contributions.

In an employer matching program, an employee will typically only receive a contribution from an employer if an employee makes a contribution of their own (e.g., an employer will only match contributions if the employee makes some contribution). Employer matches vary from company to company. The general contribution from an employer is usually 3% to 6% of an employee's pay.

For employees to receive a contribution from their employer, the employee must contribute a specified percentage into a 401(k) plan. The employer will then match that contribution to the retirement plan being offered. The money that is put into the retirement plan is free. Investing in a 401(k) plan is a great way to increase retirement savings and increase the money earned.

In a traditional retirement account, the amount one contributes is taken before taxes. On the other hand, a Roth retirement account allows employees to contribute after taxes, with the benefits being withdrawn tax-free in retirement. Usually, employers will specify a vesting period, which is the minimum amount of time an employee must work to



“Employer matching programs would not exist without 401(k) plans. The Revenue Act of 1978 included a provision that became Internal Revenue Code 401(k). Under this act the employees are not taxed on the portion of income they agree to receive as deferred compensation rather than direct cash payment. A 401(k) plan is a long-term money management plan.”

claim the employer-matched contributions.

Regardless of how or when an employee stops employment, the money that an employee invests in their 401(k) plan is retained by the employee. The contributions made by an employer may or may not be retained based on the vesting program. To understand this better, a vested employee is one that has worked in a company for a specified amount of time. The employer determines the length of time required to become vested; this is usually a one-to-five year span. A vested employee then becomes eligible to retain all retirement contributions made by an employer. After an employee is fully vested, the employee is eligible to retain the entire amount contributed by their employer, even if they leave the company before retirement. Under federal law an employer can take back all or part of the matching money they put into an employer's account if the worker fails to stay on the job for the vesting period.

Employer matching programs would not exist without 401(k) plans. The Revenue Act of 1978 included a provision that became Internal Revenue Code 401(k). Under this act the employees are not taxed on the portion of income they agree to receive as deferred compensation rather than direct cash payment. A 401(k) plan is a long-term money management plan.

US Supreme Court Rules On 401(k) Retirement Plans

ON 5/18/15, THE UNITED STATES SUPREME COURT IN the case of *Tibble v. Edison International*, 13-550 ruled unan-

imously in favor of participants in employee retirement plans who object to companies' investment decisions that eat into their retirement savings.

The Associated Press noted that the employees argued that the company chose mutual funds with excessive fees. Edison offers employees roughly 40 mutual funds to choose from in deciding how to invest. The case involved a few higher-cost funds open to the general public instead of identical investments with lower costs that are open only to institutional investors. The Edison employees contend that the company did not act in their best interests by choosing the higher-cost funds.

Even a modest jump in fees can have a significant effect on earnings. According to a study last year by the Center for American Progress, a liberal think tank, higher fees of just 1 percent a year would erase \$70,000 from an average worker's account over a four-decade career compared with lower-cost options.

A federal appeals court dismissed the Edison employees' claims under the federal Employee Retirement Income Security Act, known as ERISA. The appeals court said the employees' lawsuit was filed too late to contest the original choice of funds and that executives who make those decisions only have to reconsider them if circumstances change dramatically.

The Supreme Court disagreed with the appellate decision in an opinion by Justice Stephen Breyer. Justice Breyer noted that people in charge of investment options have an ongoing responsibility to monitor the situation. He further added, "The continuing duty to review investments includes a duty to remove imprudent investments."

The Supreme Court's consideration of the case came amid heightened scrutiny of the management of Americans' retirement investments. According to the Investment Company Institute, an industry group, 401(k) accounts in particular, have increasingly supplanted traditional pension plans. Fifty-three million people held about \$4.5 trillion in 401(k) accounts as of September 30, 2014.

Saving And Investing For The Future

IT IS CLEAR THAT THE LAW IS IN FAVOR OF ORDINARY workers having the opportunity to save money in 401(k) investment accounts with the hope to have a secure future. And, prudent employers are aware that matching employees contributions in a company sponsored 401(k) retirement account is not only a good business decision, but it is the right thing to do. □

Editor's Note: Please go to www.StephensGroupBayArea.com. For more investment advice visit Edwin Stephens's web site at www.policeone.com/columnists/Edwin-Stephens/. Securities transactions through McClurg Capital Corporation. Member FINRA and SIPC.



Third Degree Communications: Training Bulletin

Prolonged Detention

The U.S. Supreme Court last week addressed whether an otherwise completed traffic stop is unreasonable when prolonged for a dog sniff. Rodriguez v. U.S. (2015) 135 S.Ct. 1609, addressed whether a dog sniff conducted after completion of a routine traffic stop, without reasonable suspicion, violated the 4th Amendment and found that it did.

Facts

A K-9 OFFICER TESTIFIED THAT HE SAW RODRIGUEZ' car swerve onto the shoulder of the road briefly. The officer testified that he stopped defendant because this was a traffic violation. The officer approached the car. Defendant was driving and had a passenger. The officer got license, reg, and proof of insurance. He also collected the passenger's information. The officer returned to his car to run a records check on Rodriguez and the passenger. When he returned to the car, he asked Rodriguez to come back to his police car. When Rodriguez was told he didn't have to exit the vehicle and go to the officer's car, he didn't. The officer wrote a warning.

The officer again went to the car. He explained the warning to Rodriguez and returned both individual's documents. At that point, the officer testified that all of the business was taken care of. The officer testified that he did not consider Rodriguez free to leave. The officer requested consent to have his dog "walk around" the defendant's car. Rodriguez refused. The officer then ordered Rodriguez to turn off his car and get out.

A fill officer arrived and the officer walked his dog around the car. The dog alerted to the presence of narcotics. Seven to eight minutes passed from the time of the citation until the dog hit on the car.

“Running Raps, clearing up checks regarding the suspect, is lawful. The officer, however, may not extend the stop absent reasonable suspicion. The Court drew a distinction between the stop and the dog sniff. The dog sniff is not related to roadway safety and is not part of the car stop.”

Officers found methamphetamine in the vehicle. The defendant moved to suppress the evidence as the officer lacked reasonable suspicion to conduct the dog search.

Holding

THE SUPREME COURT TOOK THE CASE TO DECIDE whether police may extend a completed traffic stop, without reasonable suspicion, to conduct a dog search.

The Court Said No

THE COURT REITERATED THAT A CAR STOP IS ANALOGOUS to a pedestrian stop. The stop can last no longer than is necessary to address the traffic violation. Anything longer than that is a problem.

Running Raps, clearing up checks regarding the suspect, is lawful. The officer, however, may not extend the stop absent reasonable suspicion. The Court drew a distinction between the stop and the dog sniff. The dog sniff is not related to roadway safety and is not part of the car stop. The Court made clear that the inquiry is not when the dog sniff happen, but rather whether the investigation unlawfully extends the stop.

The court made clear that the officers may prolong a stop when they have reasonable suspicion to detain. The court

> continued on following page



Marc F. Derendinger



Insurance News

When Kids Leave School: *Two Actions To Find Affordable Health*

Time is of the essence in order to maintain or find affordable health insurance when adult children leave school. Take quick action or risk being "locked-out" of the health insurance market for several months, due to a little publicized defect in the Obamacare legislation. We suggest 2 actions to find affordable health coverage when leaving school:

FIRST, IF THE FAMILY MEMBER HAS NOT YET TURNED Age 26 and has been covered on a parent's health plan, the *Affordable Care Act* allows him to continue on through age of 25. Is this your best option? Maybe, but there are two reasons to look at other options available through the *Affordable Care Act*:

- The parent's health plan may have limited medical facilities, e.g. a nearby Kaiser in the town of residence, or
- The monthly insurance rate may be lower through Covered California with a subsidy, if eligible

If everything else checks out, then you're good (until the 26th birthday). If not, then consider the following two options made available through the *Affordable Care Act*:

1. *Covered California* provides access to most private health plans, e.g. Kaiser Permanente, Anthem Blue Cross, Blue Shield of California, HealthNet EPO and PPO plans and some regional providers as well (availability varies according to each of California's counties – (in my office, Fatima Webb can offer free assistance with this).

Extra caution is advised, however: You must complete and submit your application prior to the desired 1st of the month coverage start date to avoid a gap in coverage, plus the insurer must receive the completed application within a 60-Day time limit. Warning: failure to enroll within the special 60-day period will not only

“Covered California provides access to most private health plans, e.g. Kaiser Permanente, Anthem Blue Cross, Blue Shield of California, HealthNet EPO and PPO plans and some regional providers as well (availability varies according to each of California's counties – (in my office, Fatima Webb can offer free assistance with this).”

incur a possible IRS tax penalty, but will consequently lock you out of the U.S. health insurance market until the following open enrollment period, i.e. January 1st! (This is a lesser known problem with the *Affordable Care Act*) Contact our office if you have questions about special enrollments;

2. Apply Direct- to the insurance carrier (Kaiser Permanente, Anthem Blue Cross, Blue Shield of California, Cigna, HealthNet and others). This is easier than going through Covered California and the prices are virtually identical under California law.

The only reason you would choose the Covered California exchange (above) over this option is if you were to qualify for a subsidy or Advance Premium Tax Credit. Otherwise, CoveredCA is not worth the hassle of providing personal tax forms, proof of California residency, employment information etc.

- Deadlines: The same warning applies as above, i.e. you



must complete and submit your application prior to the desired 1st of the month coverage start date to avoid a gap in coverage; the 60 Day Limit also applies.

The easiest part of this process is choosing a plan, and the hardest is getting the triggering loss of coverage forms to the carrier (the required document and method vary by health plan). Don't risk losing your effective date on a technicality: Use a competent broker who is licensed and certified (such as Fatima) to help you compare all options, on or off the exchange. Especially valuable is the broker will help you submit a properly completed application forms to the health plan of your choice!

Finally, protect your family member's health insurance from lapsing: Explain to young adults the risks of letting coverage lapse, i.e. they may get locked-out of the market until the subsequent Open Enrollment.

Follow Us: <https://twitter.com/DerendingerIns>

Editor's Note: *Derendinger Insurance has served as SJPOA insurance broker since 1968. Marc offers free assistance to SJPOA members at 408.252.7300 x27 or by email at sjpoa@derendinger.com*

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PROMO CODE: VSP615



Members' Forum

By Nicole Decker

Community Outreach

Losing Michael Johnson brought a terrifying reality to the forefront of most of our minds. Times were made even tougher by this immense loss, but PD solidarity helped many get through the hours, days, and weeks that followed. The community brought the rest. Food, flowers, kind words and gestures made a huge impact in this vulnerable time and it encouraged many to keep going.

ONE PARTICULARLY MEMORABLE GESTURE CAME from a 7th grade teacher at Quimby Oak Middle School, and about 150 of her students. Ms. Sinwald took the time to explain to her students how this would change not only Mike's family and friends, but the Department, their city, and the nation as a whole. She encouraged her students to write letters to Mike's family.

Many students poured out their hearts with empathy. Some drew pictures depicting Mike as an eternal hero and someone they would never forget even though they never met.

“Many students poured out their hearts with empathy. Some drew pictures depicting Mike as an eternal hero and someone they would never forget even though they never met. Others gave their sympathy and well wishes for the Johnson and PD families.”

Others gave their sympathy and well wishes for the Johnson and PD families.

It's an incredible thing to know that kids are being taught to do the "right" thing by being reminded to be kind and go one step further than they need to. These students had no idea how much their letters meant to everyone who read them. Director John Moutzouridis took the time to go to Quimby Oak Middle School to thank the students in person and answer questions they may not have the opportunity to ask a police officer.

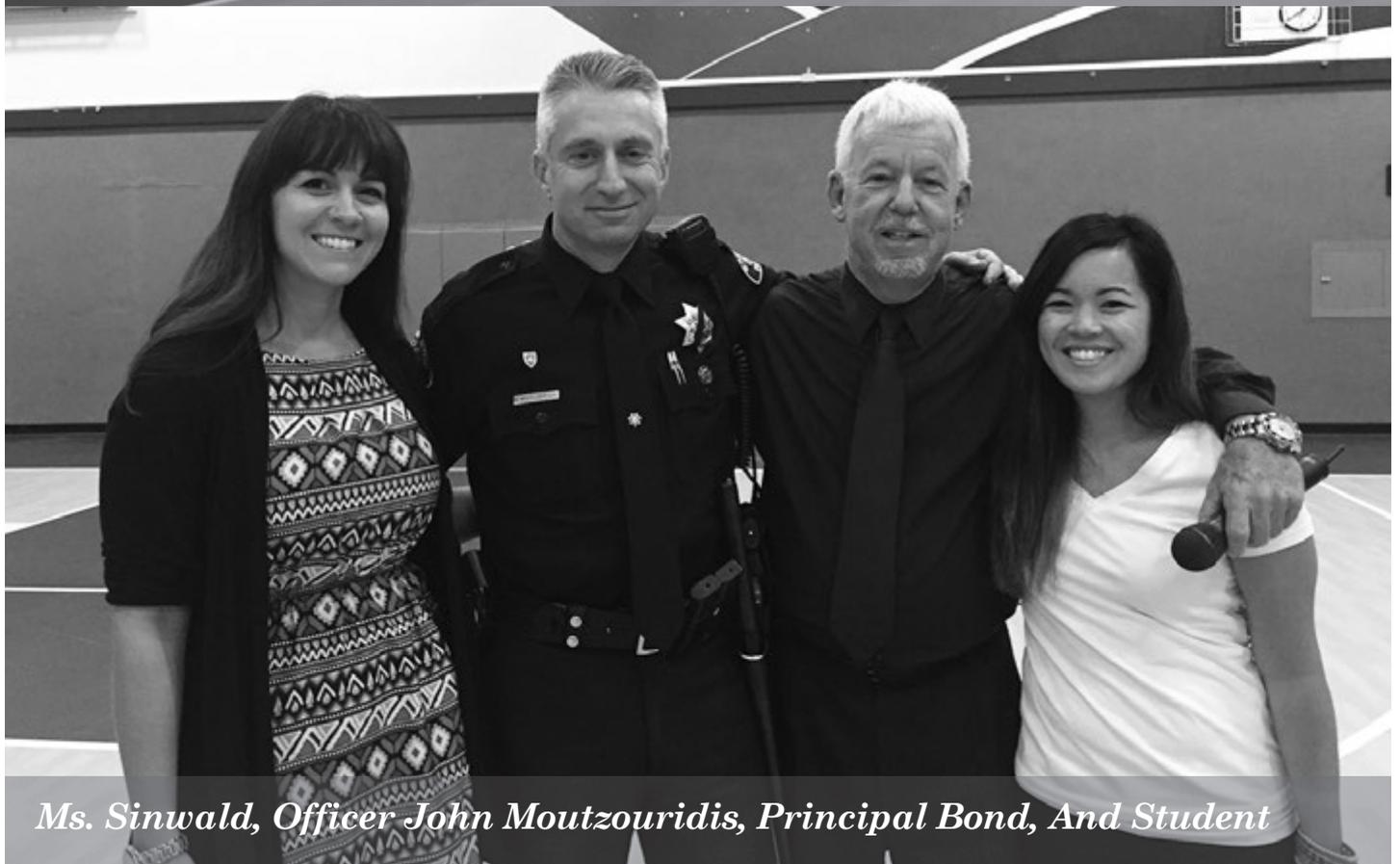
Many people have lost sight in the fact that police officers are regular people with feelings, who do things right, and do things wrong every day, just like everyone else. The time John spent with these students reminded them of that. It also strengthened the bond between the younger members of our community and the police department, something this city needs more of.

Follow the lead of Ms. Sinwald and her students; be kinder than necessary. □

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Ms. Sinwald's 7th Grade Quimby Oak Middle-School Students



Ms. Sinwald, Officer John Moutzouridis, Principal Bond, And Student



Healthy Living

Your Personal Cloud

The concept of cloud computing has become a buzzword in recent years. The notion of "the cloud" originally referred to data storage. You could backup your computer files or even an image of your hard drive to a server bank in some remote location. Now you can access fully featured software programs via the cloud, including well-known productivity and photo editing programs. Cloud computing enables you to save money you would have spent on costly software packages and frees up valuable space on your home or office networks. The only drawback involves security issues, but such issues exist on your local networks as well.

THE COMPUTING PARADIGM HAS TAKEN OVER MORE and more not only of our work day, but our recreational en-

“Your brain is staggeringly complex. It is estimated there are more connections among your brain cells than there are stars in the Milky Way galaxy. Specifically, there are more than 100 billion neurons in your brain, with several 100 trillion (10¹⁴) and possibly as many as 1 quadrillion (10¹⁵) connections.”

vironments as well. As a result, it has become increasingly easy to neglect and ultimately forget about the precious components of human physiology upon which all computing systems are based, that is, our very own brain and central nervous system.

There are serious downsides to such neglect and lack of care. Most of us are aware of the need to engage in regular vigorous exercise and eat a consistently nutritious diet. We do these things because we've learned the importance of a healthy lifestyle. Of course, these healthful activities support the functioning of your brain and central nervous system. But your brain requires more than mere physiological

Regular Chiropractic Care Supports A Healthy Brain

WHEN WE THINK ABOUT TAKING CARE OF our bodies, we usually don't specifically consider taking care of our brains. Oddly, the brain is an afterthought. But your brain's health and welfare is critically important to your overall well-being.

Regarding brain physiology, the primary concern is the status of arteries and arterioles, the blood vessels that supply your brain cells with oxygen and other nutrients. Arterioles clogged by cholesterol – and fat-

containing plaque may weaken over time and eventually burst, causing varying degrees of loss of neurologic function and even death.

The primary means of prevention of such arteriosclerotic disease is to engage in regular vigorous exercise and eat consistently nutritious food selected from all five food groups. Regular chiropractic care helps you get the most out your exercise program and nutritious diet. By keeping your spine aligned and your nerve system operating at full capacity, regular chiropractic care helps you achieve optimum levels of good health, including healthy brain function. □



sustenance. Your brain itself requires the performance of actual work so that it can continue to do what it was designed to do.¹ The critical function of your brain is to provide you with creative, innovative solutions to the challenges you face every day to the survival and welfare of you and your family.

Your brain is staggeringly complex. It is estimated there are more connections among your brain cells than there are stars in the Milky Way galaxy. Specifically, there are more than 100 billion neurons in your brain, with several 100 trillion (10¹⁴) and possibly as many as 1 quadrillion (10¹⁵) connections. This massive network is built for heavy lifting, but most of us now fritter away this priceless resource as we spend seemingly endless hours talking and texting on our cell phones and playing games on our phones, tablets, and laptops.

Now we may be developing eye-hand coordination when we lose an entire afternoon playing race car and other arcade-style games.^{2,3} But as the great philosophers have known for almost 3000 years, actual thinking is the best and most worthwhile use we can make of the free gift of self-awareness we receive as humans. Only thinking will provide us with the tools and techniques we require to grow, develop, and thrive in our increasingly complex and shrinkingly small global village. But the skill (or art) of thinking is based on training. Fortunately such training is available everywhere and the cost is frequently only that of time. Reading books is the primary training ground for developing the skill of crit-

ical thinking that will make a difference in our lives. Reading books that challenge you, followed by study and practice, will hone and refine your ability to actually think and make use of your brain, your own personal cloud. Surprisingly, and possibly shockingly, everything we need for such life-enhancing thinking is available right there "within" us. □

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2. *Moisala M, et al: Brain activity during divided and selective attention to auditory and visual sentence comprehension tasks. Front Hum Neurosci 2015 Feb 19;9:86. doi: 10.3389/fnhum.2015.00086*
3. *Banerjee S, et al: Interests shape how adolescents pay attention: the interaction of motivation and top-down attentional processes in biasing sensory activations to anticipated events. Eur J Neurosci 41(6):818-834, 2015*

Editor's Note: This article was provided by San Jose Chiropractic Center. They can be reached by phone at: 408.371.0260, fax: 408.371.2612. San Jose Chiropractic Center is located at: 3880 So. Bascom Ave., Suite 109, San Jose, CA.

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 **Henry BUNCH**,
Badge #2076

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

VANGUARD

If you read your issue of the *Vanguard* online and no longer wish to receive a copy in the mail, please let us know!



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Blue Grief

Life Changing Questions

A career in law enforcement requires a person to ask themselves, “am I ready to lay down my life to protect others?” This question implies, “Am I ready to bury a friend who pledges the same?”

ON MARCH 24, 2015 SAN JOSE POLICE DEPARTMENT was faced with those life-changing questions.

Context Of The Loss

THE DEATH OF AN EMPLOYEE BY SUICIDE OR NATURAL causes differs from a line of duty death. Some officers die in the line of duty from a car crash or a fall. In Officer Michael Johnson’s case it was murder. It may seem to some that the death of his killer, Scott Durnham, is satisfying. “At least we avoid a lengthy trial and the media circus which follows.”

Others may say, “Now that Durnham is dead we can’t have closure. He should be made to answer for this death and suffer the consequences. He got off easy.”

Officer Johnson’s death has happened in a time of low morale, declining staffing levels, and tension within San Jose Police Department. The current climate of anti-police words and actions both in the media and within certain communities may exacerbate, prolong and distract from the grieving process.

Every employee of a police agency in the bay area remembers 3/21/09 when officer John Raymond Hege and Sergeants Mark Thomas Dunakin, Ervin Julius Roans II, and Daniel Takashi Sakai were murdered in the line of duty. Another line of duty death on the heels of the six-year anniversary of this tragedy is unnerving and may highlight questions like, “When will it happen again?” People may begin to grieve those deaths all over again.

Address Rumors Immediately

THE PHRASE “TELL-A-COP-TELL-A-GRAM” HAS BEEN replaced by “tell-a-cop-tell-a-com but the gossip is just as destructive in this millennium.

“Officer Johnson’s death has happened in a time of low morale, declining staffing levels, and tension within San Jose Police Department. The current climate of anti-police words and actions both in the media and within certain communities may exacerbate, prolong and distract from the grieving process.”

Rumors can distract from the grieving process. They can damage relationships and reputations. Rumors can cause morale to plummet further down and poison the already toxic work environment.

Repeating, re-texting or reposting statements or stories, which cannot be verified, should be stopped immediately. It is easy to ask a colleague, “How do you know this information? Were you present when this occurred? Have you spoken to the person(s) involved?”

There Is No Timeline Or Agenda To Grief

THERE IS NO MOMENT IN TIME WHEN GRIEF OFFICIALLY begins or ends.

Some people may say, “It didn’t hit me until much later when I saw his empty locker or I found a specific object.” Others may say “I thought I was over this and now I feel I am back at square one”

There is no specific timeline for when a person can have fun, laugh again or experience intimacy.

Some people need to take one day at a time; others need to prepare for anniversary reactions during the first year. They may focus on the next torch run, police week, or Christmas.

Each relationship is unique; therefore each grief experience is also unique. Officer Johnson’s death may bring up grief from 2001 when Officer Jeffrey Fontana died or other



losses since then.

Things Which May Help

ALLOW OTHER DEPARTMENTS TO ASSIST SJPD IN WAYS which seem appropriate.

The attitude “we can take care of our own” can be isolating for SJPD. Other nearby departments do experience a strong wish to help and support. When there is no opportunity to do so those people feel a sense of helplessness.

Reach out to retired law enforcement or those who have transferred to different departments. Former sworn or civilian members of the department who did not know officer still experience grief, anger and guilt which may not be as visible as current employees. Former employees may be of additional support, if invited.

Things To Keep In Mind

- Simple statements such as “I know I am not crazy, but it sure feels that way” can normalize the grieving process for others.
- Grief is a powerful force but healing will come.
- Give yourself permission to grieve.
- It is OK to be OK.
- It is OK not to know what to say.
- Everyone *experiences* and expresses grief differently.
- The line of duty death of any officer will affect other police families in ways the sworn officer will *never* know. You are going to have to trust me on this one!

With deepest sympathy on the loss of your fallen brother,
– Anne Bisek, *Psy.D.*

Recommended Reading:

LEADERSHIP IN MOURNING

Leading Personnel through a Line-of-Duty Death, Suicide or other Tragedy. The Police CHIEF Jan 2015 by: Michael J. Craw, Denise Jablonski-Kay, J. William Worden, Laguna Niguel and Michael A. Albanese.

<http://www.policechiefmagazine.org> □

Editor’s Note: *Dr. Anne Bisek is a psychologist who specializes in calls for service that involve the death of a child. She is located in Fremont California.*

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Karen Nelsen



Real Estate Perspective

Spring Home Buying Season Looks Promising

Despite a slow start in the first month of the year, sales continued to gain on a year-over-year basis for the second month in a row in March. The year-over-year growth in sales in March was the first back-to-back increase since December 2012 and it was also the largest increase observed since May 2012. The strong momentum in March elevated sales in the first quarter to 370,520 (seasonally adjusted and annualized), an increase of 2.3 percent when compared to the first quarter of last year. It was the first quarterly increase since the fourth quarter of 2012. Sales increase from the previous month was also much stronger than the long-run average of 0.5 percent increase from February to March recorded since 1979. In fact, it was the biggest February-to-March increase that we have seen since 2008.

SALES SURGED IN ALL REGIONS WHEN COMPARED to March 2014, with the Central Valley region increasing 14.7 percent year-over-year, the Bay Area increasing 9.9 percent, and Southern California increasing 9.7 percent. Improved economic conditions and more job availability throughout the state benefit the housing market and continue to push sales higher. With pending sales jumping at a double-digits rate from a year ago, the California housing market

“While housing supply has been improving in real terms in recent months, the demand for housing continued to grow at a faster pace than that of inventory.”

is picking up its momentum, and should continue to have a solid home buying season in the upcoming months.

The statewide median home price, meanwhile, increased 7.2 percent from last year to \$468,550, the highest level since August 2014. The yearly gain in price was the largest increase observed since September 2014. While the strong increase in high-end home sales in the Bay Area in March might have exerted upward pressure on the statewide median price, tight housing supply conditions probably contributed to the price appreciation as well. The statewide unsold inventory index declined in March to 3.8 months from 5 months in February, and from 4.0 months in March 2014.

While housing supply has been improving in real terms in recent months, the demand for housing continued to grow at a faster pace than that of inventory. The discrepancy between sales and active listings was most obvious in the Bay Area, where sales increased from the previous year by double-digits but active listings fell by more than 10 percent. Six of nine counties in the region, in fact, experienced an increase in sales and a decline in active listings in March. Sales and active listings in the region have been going in opposite directions since late last year. While it is a welcome sign to see the growth in the housing demand continues, the lack of supply is a definitely a concern. The imbalance between the two sides not only intensifies market competition and pushes home prices higher, but also leads to housing affordability issues that ultimately lowers homeownership rate if the problem persists. □

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



Real Estate News

Distressed Homeowners Rise In The Bay Area

Hot. Blistering. Scorching. The weather report for San Jose? Hardly, we're talking about the Bay Area real estate market.

AS OF LATE MAY 2015, FOR THE MOST PART SELLERS have been getting a sweet return on their home sales. The median sales price of a non-distressed home in San Francisco in February 2015 was \$1,050,000. Although most homeowners have made off like bandits in recent months, all homeowners do not find themselves in such a rosy position.

Consider the Pre-Foreclosure numbers in the Bay Area according to Realty Trac:

Oakland: 437 Single Family Homes and 32 condos fell into Pre-Foreclosure status.

In March, the number of properties that received a foreclosure filing in Oakland elevated 37% higher than the same time last year.

San Francisco: In SF, where the market continues to over-heat, 241 Single Family Homes and 59 condos dropped into Pre-Foreclosure. According to Realty Trac, in March 2015, the number of properties that received a foreclosure filing in San Francisco, CA ticked 36% higher than the previous month and 900% higher than the same time last year.

San Mateo: In the mid-Peninsula 41 single family homes and 10 condos plunged into Pre-Foreclosure.

Marin County: Even in posh Marin, 134 Single Family Homes and 22 condos slipped in Pre-Foreclosure.

Finally, in San Jose over 1,007 properties sank into some stage of foreclosure (default, auction or bank owned).

If you are one of the unlucky homeowners in Pre-Foreclosure category what's the best thing to do?

A few years ago when home values dropped, banks would often offer loan modifications and occasionally forbearance

“As of late May 2015, for the most part sellers have been getting a sweet return on their home sales. The median sales price of a non-distressed home in San Francisco in February 2015 was \$1,050,000.”

instead of foreclosing and if that didn't work then many homeowners would resort to a short sale. The good news is that The Federal Housing Finance Agency officially announced that the deadline for the Home Affordable Refinance Program (HARP) has been extended to the end of 2016, matching the deadline of the Home Affordable Modification Program (HAMP). The bad news for distressed homeowners in the Bay Area is that the banks will be less likely to work with homeowners to offer them a loan mod or forbearance because the prices have skyrocketed.

Many of these defaults occurred due to loan modification resets (see my article about loan mod resets in the April/May 2015 issue) where loan modification interest rates reset and homeowners can not afford the adjusted rate.

Unlike past years, most distressed homeowners no longer sit in underwater homes. Now that these homes have equity, the banks will tell most homeowners in distress to simply their sell the house. For income properties, the process the situation looms as even more challenging.

In most scenarios, the worst thing to do is play like an ostrich and let the bank foreclose. Create a strategy with a CPA, financial advisor or real estate agent who is familiar with distressed properties and is upfront and experienced. Some non-profits still offer distressed assistance for no cost but many non-profits have cut back services in recent years.

Anyone who would like assistance or referrals for any of the above situations can feel free to contact me. □

Editor's Note: Keith Rockmael is a POA and real estate advocate and agent. He can be reached by email at keith@resourcerock.com



Lance Bayer



Reliable Informer

In this month's issue of the Reliable Informer, I will cover two cases, one decided by the California Court of Appeal and one decided by the Appellate Division of the Los Angeles County Superior Court. These cases look at the law relating to the crimes of kidnapping and electronically distributing a harassing message.

The Movement Of A Domestic Violence Battery Victim Does Not Constitute Kidnapping If The Movement Is Incidental To The Commission Of The Battery

When a suspect moves the victim during a violent crime, the offense may also constitute kidnapping unless the movement is incidental to the commission of the crime. Under what circumstances is the movement of a victim "incidental" to the commission of a crime?

RECENTLY, THE FOURTH DISTRICT OF THE CALIFORNIA Court of Appeal looked at this question in the case of *People v. Delacerda* (2015) 236 Cal.App.4th 282.

In the *Delacerda* case, the victim began dating Sean Delacerda one summer in Orange County. At first, the relationship was stable and the victim was happy. After awhile, however, Delacerda became very possessive. When the victim told Delacerda that she wanted to do something on her own, Delacerda became very depressed, told her that he could

“By the fall, the victim was ready to end the relationship. She went to Delacerda and told him that their relationship was over. Delacerda did not take the news well. He continued to call the victim and also sent her text messages threatening to kill himself. Even though she did not want to be in a relationship with Delacerda, the victim still cared about him.”

not live without her, and said he felt like committing suicide.

By the fall, the victim was ready to end the relationship. She went to Delacerda and told him that their relationship was over. Delacerda did not take the news well. He continued to call the victim and also sent her text messages threatening to kill himself. Even though she did not want to be in a relationship with Delacerda, the victim still cared about him. She worried about him and remained friends with him. On two occasions during the fall, she engaged in intimate relations with him.

Some time during the following spring, the victim stayed overnight with an old boyfriend. About 4:00 a.m. that next morning, the victim's cell phone began to vibrate. She looked at the phone and found several text messages and voicemail messages from Delacerda asking her where she was. The victim replied in a text message stating she was fine and would call him in the morning. Delacerda replied in a text message that she needed to call him right away.

The victim called Delacerda. He asked her where she was. She refused to tell him and said, “We are not together anymore. Doesn't matter where I am. It's none of your business. You need to stop this. You need to knock it off. You need to stop.”



The next day, in the afternoon, the victim returned to her apartment. She was worried Delacerda was going to be there, so she drove around looking for his car. She didn't see it, so she parked and walked into her apartment. As she opened the door, she saw Delacerda lying on the floor. He had a blood stain on his shirt. He was petting the victim's cat. The victim asked Delacerda what he was doing there. He said he wanted to talk.

The victim told Delacerda, "I don't want you here. You need to leave." Delacerda said he was depressed and upset and accused the victim of cheating on him. The victim reminded him that they were no longer dating and that her whereabouts were none of his business.

After the victim repeatedly told Delacerda to leave, he said, "Not yet," and said he wanted to show her something. He took a revolver from his pocket and put a bullet in it. He stood up between the victim and the front door. The victim walked towards the front door, but Delacerda blocked the door. The victim asked him what he was doing. Delacerda told the victim that he was not going to hurt her and said he just wanted to talk.

Delacerda removed the bullet from the gun, placed it on the table and told the victim that he wanted to read her emails. The victim said, "If I let you read my emails, will you leave me alone forever?" Delacerda promised to comply.

The victim locked herself in the bathroom. Delacerda banged on the door and asked her what she was doing. The victim came out. Delacerda was standing by the door. He said, "Let's read your emails. Let's do this."

The victim opened her laptop computer. Delacerda ordered the victim to show him her emails. The victim threw the laptop at him and tried to run away. She got halfway across the apartment before Delacerda tackled her and they both fell on the floor. The victim tried to scream. Delacerda put his hands over her mouth and nose.

Delacerda picked the victim up and marched her back into the bedroom. Delacerda placed the laptop on her lap and said, "Let's keep looking. I want to see." Delacerda showed the victim the emails he wanted her to open. As Delacerda began to read one of the emails, the victim threw the laptop at him and began to run towards the front door. Delacerda tackled the victim and put his hands over her mouth and nose, dragged her back to the bedroom, and put her back on the bed. Delacerda held onto the computer and told the victim to sit down and shut up.

As Delacerda was reading emails, the victim again began to run. She almost got to the door when Delacerda tackled her. He got on top of her, put his hands over her mouth and said, "Shut the f**k up," and "Okay, I've got to do this." Delacerda grabbed his gun with one hand while holding the victim down with the other. He opened the cylinder and put the bullet back in. He put the gun to his mouth and pulled the trigger. Nothing happened. The victim screamed.

Delacerda told the victim to shut up and pointed the gun at her. The victim pleaded with Delacerda to stop. She told him that the neighbors may have heard them and may have

called the police. Delacerda rolled the victim over, dragged her back into the bedroom, shoved her into the closet and blocked her from leaving. Delacerda then got into the closet and told the victim to shut up. He picked up the laptop and began going over emails.

With Delacerda focused on the laptop, the victim ran out of the closet into the living room. She grabbed her car keys, opened the front door and headed downstairs to her car. Delacerda pursued her, but before he could catch her, she got into her car and locked the doors. Delacerda pounded on the driver's side door and ordered her to get out of the car, but the victim started the car. Delacerda got on the hood. The victim backed up. Delacerda fell off, but then got up and got back on the hood. The victim sped up and Delacerda fell off the hood. The victim, without Delacerda, drove off and drove to a nearby police station.

As a result of the incident, the victim received bruises to her mouth and a large bruise on her buttocks. Her chest was red and she had scratch marks on her arm. The distance she had been moved from near the front door area to the closet was about 30 to 40 feet.

Delacerda was arrested and was charged with simple kidnapping, false imprisonment, assault with a firearm, and domestic violence battery. Delacerda took his case to a jury trial. He testified that he committed none of the offenses he was charged with and that the victim was not telling the truth. He was convicted of the charges and was sentenced to serve 13 years in state prison.

Delacerda appealed his conviction to the Court of Appeal. He argued that the jury should have been instructed in the kidnapping charge to consider whether the movement of the victim was incidental to his commission of false imprisonment, assault with a firearm, and domestic violence battery.

The Court of Appeal reviewed Delacerda's case and agreed with the defendant that the jury should have been instructed on whether the movement of the victim was merely incidental to the domestic violence battery. The kidnapping

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conviction was overturned and the case was sent back to the trial court for retrial on the kidnapping charge.

Penal Code section 207(a) states, "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping."

In its written decision, the Court first noted that the crime of simple kidnapping has an element of asportation. For the crime of simple kidnapping, an "associated crime" is any criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will. The crime of simple kidnapping is not committed if the movement of the victim is simply incidental to such a crime.

The Court looked at whether the crimes of false imprisonment and assault with a firearm were "associated crimes" of simple kidnapping in Delacerda's case.

The Court noted that the crime of false imprisonment is necessarily included in the crime of kidnapping and not an "associated crime." For that reason, the commission of the crime of false imprisonment does not negate the commission of the crime of kidnapping. In other words, kidnapping is not "merely incidental" to the commission of the crime of false imprisonment, because false imprisonment is necessarily included in the crime of kidnapping.

The Court then looked at the crime of assault with a firearm. The Court noted that, under the facts of Delacerda's case, the only act of assault with a firearm occurred when Delacerda pointed the gun at the victim. Because this act involved no movement of the victim at all, and because the act was complete before the movement which comprised the kidnapping began, the assault with a firearm was not an "associated crime" of the kidnapping.

The Court then looked at whether the domestic violence battery offense could be considered an "associated crime" of kidnapping under the circumstances of the case. The Court noted that, in proving the domestic violence battery charge, the prosecutor was required to prove the defendant willfully touched the victim in a harmful or offensive manner. According to the Court, "A review of the evidence reveals multiple acts of harmful or offensive touching that occurred, before, during, and after the dragging movement which comprised the kidnapping. But none of these acts of touching involved movement of [the victim] by force or fear against her will, except the touching which occurred during the dragging movement itself."

The Court further stated, "These acts of harmful or offensive touching are criminal acts which the defendant intended to commit where, in the course of their commission, the defendant also moved a victim by force or fear against his or her will."



The Court looked at the facts of Delacerda's case and noted that the evidence supported a finding defendant willfully touched the victim in a harmful or offensive manner. The Court then noted that from the evidence, a jury *could have found* that in the course of that harmful or offensive touching, the victim was moved by force or fear against her will. The Court stated, "Under these facts, the court should have

instructed the jury that in determining whether defendant's movement of [the victim] was substantial, they could consider whether the movement was merely incidental to the crime of domestic violence battery."

The Court's decision in the *Delacerda* case is an important demonstration of how movement of a victim incidental to an associated crime can negate a charge of kidnapping. □

A Suspect Who Used Twitter To Send Provocative "Tweets" Was Guilty Of Electronically Distributing A Harassing Message

California Penal Code section 653.2(a) provides, "Every person who, with intent to place another person in reasonable fear for his or her safety, or the safety of the other person's immediate family, by means of an electronic communication device, and without consent of the other person, and for the purpose of imminently causing that other person unwanted physical contact, injury, or harassment, by a third party, electronically distributes, publishes, e-mails, hyperlinks, or makes available for downloading, personal identifying information, including, but not limited to, a digital image of another person, or an electronic message of a harassing nature about another person, which would be likely to incite or produce that unlawful action, is guilty of a misdemeanor." Under what circumstances does a suspect using Twitter to send a tweet violate section 653.2(a)?

RECENTLY, THE APPELLATE DIVISION OF THE LOS ANGELES County Superior Court looked at this question in the case of *People v. Shivers* (2015) 235 Cal.App.4th Supp. 8.

In the *Shivers* case, Francis Shivers and the victim had been divorced for many years. The victim had obtained a restrain-

“Shivers backed away, pointing the camera feature of the phone towards the victim’s fiancée. Shivers began shouting as he was leaving the restaurant that he was threatened and that he had a restraining order. The victim was extremely embarrassed and called 911 to report the violation of the restraining order she had against Shivers.”

ing order against Shivers, which prohibited him from being within 100 yards of her. On a winter day in Los Angeles, the victim and her fiancée went to a restaurant in Hollywood. They were seated at a table at the end of a row of tables along a wall that began at the entrance of the restaurant.

While the victim and her fiancée were dining, Shivers walked into the restaurant. The restaurant was crowded and the only available table was next to the victim's table. As Shivers was escorted to the table by the server, he told her, "I cannot sit over there."

Shivers got within a foot of the victim. He smirked and

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smiled. The victim became very upset. She shrunk into her chair and covered her face with her hands.

Shivers got out his cell phone and held it out towards the victim. He walked backwards while appearing to use the video feature of his phone. The victim's fiancée got up from his seat and stood in a position to block Shivers' view of the victim. He reminded Shivers that he was not allowed to "do that here."

Shivers backed away, pointing the camera feature of the phone towards the victim's fiancée. Shivers began shouting as he was leaving the restaurant that he was threatened and that he had a restraining order. The victim was extremely embarrassed and called 911 to report the violation of the restraining order she had against Shivers.

The incident in the restaurant was not the first incident against the victim involving Shivers. Shivers had been posting comments about the victim on his Twitter website. The victim was employed as a television actress and the Twitter comments referenced the television series and persons who randomly searched for the victim's name or for the program would find Shivers' posts. In these posts, Shivers repeatedly and falsely asserted that the victim stalked him and made death threats against him. Shivers also falsely stated in posts that he had restraining orders against the victim. Shivers knew where the victim lived and many of the posts referenced the area where the victim lived and said for people to be on the lookout for her. These posts, or "tweets," sometimes were reposted, or "retweeted," by third parties.

About three months after the incident at the restaurant, Shivers posted two tweets that the victim took very seriously. One of the tweets stated, "HAPPY FOURTH OF JULY EVERYONE. SEE YOU ON MY USUAL HANGOUT, CAHUENGA!! (If you see my stalker [naming the victim] follow me there call LAPD!!!" The other tweet stated, "Speakin of #Cahuenga I'll be there 2night as usual. If you see my stalker #[naming the victim's television program and naming the victim] follow me there report her to LAPD immediately!" The victim reported the tweets to the police department.

Shivers was arrested and was prosecuted for violating a restraining order and with electronically distributing a harassing message. Shivers took his case to a jury trial and was convicted of the charges. Shivers then appealed his conviction to the Appellate Division. He argued, in part, that the evidence was insufficient to support his conviction for distributing a harassing message. The Appellate Division reviewed Shivers' case and upheld his conviction.

In its written decision, the Court noted that section 653.2 defines "harassment" as "a knowing and willful course of conduct directed at a specific person that a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or seriously terrorizing the person and that serves no legitimate purpose." The section defines

"of a harassing nature" as "of a nature that a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or seriously terrorizing of the person and that serves no legitimate purpose."

The Court noted that the plain meaning of the statute reveals no requirement that *actual* incitement or *actual* production of the enumerated unlawful effects be caused by a person's electronic distribution of a message. According to the Court, "The only requirement is that a defendant's message is likely to incite or produce third party actions."

The Court then looked at the evidence of Shivers' intent and stated, "The circumstantial evidence was sufficient to permit a reasonable trier of fact to conclude defendant acted with intent to incite or produce unlawful action by a third party who read his messages. Defendant electronically distributed messages about [the victim] using Twitter, which, as shown by the evidence at trial, is a public social networking website on the Internet where users can write and respond to short messages. Twitter constituted an 'electronic communications device' within the meaning of the prohibited communications statute. The evidence showed a person's tweets posted on Twitter can be read by the public and spread to the websites of other Twitter users by being retweeted, so that a single tweet may be repeated and disseminated throughout numerous web pages accessible to the public."

The Court concluded, "It can be inferred defendant knew that persons who encountered [the victim] after reading his tweets could have been motivated to report her to the police for what they believed was her stalking him, or to otherwise harass her. Given the nature of Twitter and the provocative contents of defendant's tweets, a reasonable trier of fact could conclude defendant posted his tweets with the specific intent to incite or produce unwanted physical contact, injury, or harassment at the hands of a third party."

The Court's ruling in the *Shivers* case is a significant application of the electronic distribution of a harassing message statute to Twitter's tweets. □

Editor's Note: I look forward to hearing from you about ideas for future columns, as well as any other comments you might have. 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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