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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BRYAN M. PENNINGTON, Defendant and Appellant.	No. _____ 2d Crim. No. B249482 (Super. Ct. No. 1423213) (Santa Barbara County)

PETITION FOR REVIEW
AND
PETITION FOR REVIEW TO EXHAUST STATE REMEDIES

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PETITION FOR REVIEW

TO: THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rules of Court, rules 8.500 and 8.508, petitioner, Bryan M. Pennington, respectfully requests that this Court review the published decision of the Court of Appeal, Second Appellate District, Division Six, which affirmed petitioner's convictions and sentence. The Court of Appeal's opinion, filed September 22, 2014, is attached hereto as Exhibit A, and designated as "Opinion." No Petition for Rehearing was filed.

QUESTIONS PRESENTED FOR REVIEW

1. For a harbor patrol officer to be a "peace officer" within the meaning of Penal Code section 830.33, subdivision (b), must the officer's "primary duty" be the "enforcement of the law"?
2. Was the evidence insufficient to sustain petitioner's conviction for assault on a "peace officer" (Pen. Code, § 243, subd. (b)), in violation of his federal due process rights?
3. Was the evidence insufficient to sustain petitioner's conviction for trespassing (Pen. Code, § 602, subd. (k)), in violation of his federal due process rights?

STATEMENT OF CASE AND FACTS

For purposes of this petition, petitioner hereby adopts and incorporates the Court of Appeal's statements of the procedural and factual history of this case. (Opinion at Slip. Op. pp. 2-4.)

NECESSITY FOR REVIEW

The instant case involves an important question of statutory interpretation on which the courts of appeal have now divided. Specifically, under what circumstances is a harbor patrol officer a "peace officer" within the meaning of Penal Code section 830.33, subdivision (b)?[1] This provision defines a "peace officer" as:

> Harbor or port police regularly employed and paid in that capacity by a county, city, or district other than peace officers authorized under Section 830.1, *if the primary duty of the peace officer is the enforcement of the law* in or about the properties owned, operated, or administered by the harbor or port or when performing necessary duties with respect to patrons, employees, and properties of the harbor or port.

(§ 830.33, subd. (b) [Emphasis added].) In the instant case, the trial evidence failed to establish that a harbor patrol officer's primary duties were law enforcement. Accordingly, the issue presented in this appeal is whether "the primary duty" of a harbor patrol officer must be "the enforcement of the law" to qualify as a "peace officer."

The Second Appellate District first addressed this question in a published opinion *People v. Miller* (2008) 164 Cal.App.4th 653, 665-668. In *Miller*, a harbor patrol officer testified that he worked for "'the City of Long Beach Fire Department' and 'the lifeguards'; his job title was 'rescue boat operator' or 'harbor patrolman'; in that position, he had the authority to detain individuals and issue citations, but he 'mostly' drove a rescue or harbor patrol boat." (*Id.* at p. 667.) He was not asked, however, to specify

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[1] All further references are to the Penal Code unless otherwise noted.

whether his primary duties were enforcement of the law. (*Ibid.*)

On appeal, the court examined whether there was sufficient evidence that the "harbor patrolman" was a "peace officer" within the meaning of section 830.33, subdivision (b). (*People v. Miller*, *supra*, 164 Cal.App.4th 653, 665-668.) Concluding that the evidence was insufficient, the court held that:

> Penal Code section 830.33, subdivision (b) does not confer peace officer status on harbor or port police who engage in any "policing functions" or who perform any duty that might also be performed by a peace officer. Rather, it confers peace officer status on those whose "primary duty" is "the enforcement of the law."

(*Id.* at p. 667.) The court also rejected the argument that "employees of the harbor or port police should be considered peace officers as long as they are ... 'performing necessary duties with respect to patrons, employees, and properties of the harbor or port.'" (*Id.* at p. 667, fn. 9.)

> Under this interpretation, the final clause of Penal Code section 830.33, subdivision (b) would operate to create a wholly separate category of harbor and port police employees who may be deemed peace officers without regard to whether their primary duty is enforcement of the law. This definition would bestow peace officer status on a broad category of employees who perform no law enforcement functions, and cannot be reconciled with prior decisions' strict interpretation of the provisions of Chapter 4.5.

(*Ibid.*) Accordingly, section 830.33, subdivision (b) did not confer "peace officer" status on the harbor patrol officer absent evidence that his primary duty was law enforcement.

The instant case involves the identical issue of statutory interpretation, yet reaches the opposite conclusion. (Opinion at Slip. Op. p. 6.) According to the Court of Appeal in this case:

> The relevant definition of "peace officer" is found in section 830.33, subdivision (b), which provides that "[h]arbor or port police" are peace officers if they are "regularly employed and

> paid in that capacity by a county, city, or district" and [first clause] "if the primary duty of the peace officer is the enforcement of the law in or about the properties owned, operated, or administered by the harbor or port *or* [second clause] when [the officer is] performing necessary duties with respect to patrons, employees, and properties of the employing agency."

(Opinion at Slip. Op. pp. 4-5 [Italics and modifications in original.].) Accordingly, a "harbor or port police officer qualifies as a peace officer if the requirements of the first *or* second clause are met. The first clause does not prevail over and supersede the second clause." (Opinion at Slip. Op. p. 6.) The court also questioned "the basis for the *Miller* court's concern that the second clause 'would bestow peace officer status on a broad category of employees who perform no law enforcement functions.'" (*Id.* at pp. 6-7.)

> The second clause applies only to "[h]arbor or port *police* regularly employed and paid in that capacity," i.e., their official capacity as police officers. [Citation.] The People correctly observe that "the term 'police' necessarily connotes law enforcement functions." Thus, a person would not fall within the category of "harbor or port police" unless ... the person performed law enforcement functions pursuant to the second clause.

(*Id.* at p. 7.) Therefore, because the uniformed harbor patrol officer in the instant case was investigating a suspected trespass and theft in the harbor, the evidence was sufficient to establish that he was a "peace officer." (*Ibid.*)

As the instant case demonstrates, there is now a split of published authority with regard to when a harbor patrol officer qualifies as a "peace officer" under section 830.33, subdivision (b). As a coastal state, this is an important question of law with wide application. The definition of a "peace officer" is also implicated by numerous criminal offenses and invokes a broad range of statutory rights and duties. (See e.g., § 243, subd. (b) [assault on a peace officer]; *Service Employees Internat. Union v. City of Redwood City* (1995) 32 Cal.App.4th 53 [union sought declaratory relief

that fire prevention officers were "peace officers."]; *Gauthier v. City of Red Bluff* (1995) 34 Cal.App.4th 1441 [fire chief was not "peace officer" so as to invoke rights und the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.].) Accordingly, this Court should grant review to settle the split of authority that now exists between the Opinion and *Miller* on this important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

PETITION FOR REVIEW TO EXHAUST STATE REMEDIES

Petitioner separately seeks review to exhaust state remedies with regard to whether there was insufficient evidence, in violation of his federal due process rights, to sustain petitioner's convictions for: 1) assault on a peace officer (§ 243, subd. (b)); and 2) trespassing with intent to interfere (§ 602, subd. (k)). (Cal. Rules of Court, rule 8.508.)

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT PETITIONER'S CONVICTION FOR VIOLATING PENAL CODE SECTION 243, SUBDIVISION (b) ("COUNT 2").

In the instant case, petitioner was convicted, inter alia, of violating section 243, subdivision (b) (misdemeanor battery on a peace officer). (Opinion at Slip. Op. p. 1.) This conviction stemmed from an altercation with harbor patrol officer Richard Hubbard ("Hubbard") at the Santa Barbara Marina. (Opinion at Slip. Op. pp. 2-4.) Section 243, subdivision (b) requires proof that the defendant committed a battery against certain specified "peace officers." There is no dispute in this case, that section 830.33, subdivision (b) provides the relevant definition with regard to whether a harbor patrol officer is a "peace officer." (Opinion at Slip. Op. p. 4.) Pursuant to the plain meaning of this provision, harbor or port police are not "peace officers" unless their *primary duty* is "the enforcement of the law..." (§ 830.33, subd. (b); *People v. Miller*, *supra*, 164 Cal.App.4th 653, 665-668.) The evidence in this case failed to establish that Hubbard's

"primary duty" was the "enforcement of the law." Accordingly, petitioner's conviction should be reversed.

The Court of Appeal, however, interpreted section 830.33, subdivision (b) to provide a second, independent basis to confer "peace officer" status. Rejecting the *Miller* court's interpretation, the Court of Appeal found that section 830.33, subdivision (b) also confers peace officer status if the harbor patrol officer is performing necessary duties with regard to the marina. (Opinion at Slip. Op. pp. 1, 4-7.) Petitioner disagrees. The Court of Appeal's interpretation of section 830.33, subdivision (b) is contrary to the plain language of the statute, a statutory system that confers "peace officer" status only in carefully prescribed circumstances, and prior decisional law interpreting this same provision.

A. Standard of Review.

Where a defendant challenges the sufficiency of evidence to support a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Luna* (2009) 170 Cal.App.4th 535, 539.) "'[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*Ibid.*)

A reviewing court addresses questions of statutory interpretation under an "independent review standard," in order to "'ascertain the intent of the Legislature so as to effectuate the purpose of the law.'" (*People v. Jones* (2001) 25 Cal.4th 98, 103.) "Statutory construction begins with the plain, commonsense meaning of the words in the statute, ' "because it is generally the most reliable indicator of legislative intent and purpose." '"

(*People v. Manzo* (2012) 53 Cal.4th 880, 885.) "'When the language of a statute is clear, we need go no further.'" (*Ibid.*; *Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490.) Moreover, "it is well settled 'that in attempting to ascertain the legislative intention effect should be given, whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part of the provision useless or deprived of meaning.' [Citations.]" (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 18; *People v. Guzman* (2005) 35 Cal.4th 577.)

B. A Harbor Patrol Officer Is Not A "Peace Officer" Within The Meaning Of Section 830.33, Subdivision (b) Unless His Or Her Primary Duty Is Law Enforcement.

As relevant to the instant case, section 830.33, subdivision (b) defines a "peace officer" as:

> Harbor or port police regularly employed and paid in that capacity by a county, city, or district other than peace officers authorized under Section 830.1, *if the primary duty of the peace officer is the enforcement of the law* in or about the properties owned, operated, or administered by the harbor or port or when performing necessary duties with respect to patrons, employees, and properties of the harbor or port.

(Emphasis added.) Petitioner was convicted of assaulting harbor patrol officer Hubbard at the Santa Barbara Marina. (Opinion at Slip. Op. pp. 2-4.) At trial, Hubbard and his partner, Officer Kelly ("Kelly"), each testified with regard to their duties. (*Id.* at p. 3.)

> Hubbard performed duties "as a law enforcement officer, a boating safety officer, [an] emergency medical technician, [a] marine firefighter, and [an] ocean lifeguard." Hubbard "enforc[ed] the law in the harbor district" and patrolled "the marinas on foot, with vehicles and also on boat[s] . . . just like PD [police department officers] would patrol the city streets."

(*Ibid.*; Appellate Reporter's Transcript Vol. I ("1RT") 253-254 [Hubbard], 124-125 [Kelly].) Hubbard also testified that he was a sworn peace officer, wore a badge, had authority to make arrests, and was supervised by the

Chief of the Santa Barbara Police Department. (Opinion at Slip. Op. p. 3.) He also carried a sidearm, Taser, baton, handcuffs, and a pepper spray. (*Ibid.*) Neither Hubbard, nor Kelly, however, testified that their *primary duties* were law enforcement. Instead, Hubbard testified that "*part* of [his] duties as a Harbor Patrol officer [included] enforcing the law in the harbor district." (1RT 254 [Emphasis added.].) Kelly similarly described his duties as "a little bit of everything" (1RT 124-125)

This case, therefore, necessitates that this Court resolve whether section 830.33, subdivision (b) requires evidence that a harbor patrol officer's primary duty is law enforcement.[2] As noted, *supra*, this question was previously addressed in *People v. Miller*, *supra*, 164 Cal.App.4th 653. In *Miller*, the defendant was similarly convicted of an offense that required proof that a "peace officer" was involved. (*Id.* at p. 665 [Vehicle Code section 2800.3 (Evading a Peace Officer Causing Serious Bodily Injury)].) Moreover, the would-be "peace officer" in *Miller* was also a "harbor patrolman," who described numerous non-law enforcement duties, and did not testify that law enforcement was his primary duty. (*Id.* at pp. 665-668.)

Finding that the evidence was insufficient to demonstrate that the harbor patrol officer was a "peace officer," the court relied on the plain language of section 830.33, subdivision (b), finding:

> Penal Code section 830.33, subdivision (b) does not confer peace officer status on harbor or port police who engage in any "policing functions" or who perform any duty that might

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[2] Petitioner also appealed his conviction because the trial court prohibited him from arguing to the jury that Hubbard was not a "peace officer," and instructed the jury that Hubbard was a "peace officer." (See Opinion at Slip. Op. pp. 7-8.) The Court of Appeal found the trial court rulings with regard to the scope of argument and the jury instructions were error. (*Ibid.*) Nevertheless, the Court found the error to be harmless in light of its interpretation of section 830.33, subdivision (b). (*Ibid.*) As the resolution of the harmless error analysis turns on the interpretation of section 830.33, subdivision (b), these issues are not separately raised in this petition.

> also be performed by a peace officer. Rather, it confers peace officer status on those whose "primary duty" is "the enforcement of the law." [The harbor patrolman] testified that he "mostly" operated a rescue or patrol boat. From [his] description of his duties, the jury could not conclude beyond a reasonable doubt that he was primarily engaged in the enforcement of the law.

(*People v. Miller*, *supra*, 164 Cal.App.4th 653, 667.) The court further rejected the argument, adopted by the Court of Appeal in this case, that "employees of the harbor or port police should be considered peace officers as long as they are ... 'performing necessary duties with respect to patrons, employees, and properties of the harbor or port.'" (*Id.* at p. 667, fn. 9.)

> This definition would bestow peace officer status on a broad category of employees who perform no law enforcement functions, and cannot be reconciled with prior decisions' strict interpretation of the provisions of Chapter 4.5.

(*Ibid.*) Accordingly, the court reversed the defendant's conviction. (*Id.* at p. 670.)

The facts of petitioner's case are essentially identical to those in *Miller*. The Court of Appeal in this case, however, "disagree[d] with *Miller's* interpretation of section 830.33, subdivision (b)" and affirmed petitioner's conviction. (Opinion at Slip. Op. p. 6.) The Court found a harbor patrol officer is a "peace officer" if, either: 1) their primary duty is law enforcement (first clause); *or* 2) they are performing necessary duties with respect to the marina (second clause). (*Id.* at pp. 6-7.) The Court also questioned "the basis for the *Miller* court's concern that the second clause 'would bestow peace officer status on a broad category of employees who perform no law enforcement functions.' [Citation.]" (*Id.* at pp. 6-7.) The Court instead reasoned that the term "police," which is included in the statute, necessarily requires law enforcement functions. (*Id.* at p. 7.) Therefore, "a person would not fall within the category of "harbor or port police" unless, like Officer Hubbard, the person performed law

enforcement functions pursuant to the second clause." (*Id.* at p. 7.) The Court of Appeal's reasoning is misplaced in several respects.

First, the Court of Appeal's interpretation of section 830.33, subdivision (b) renders the "primary duty" clause unnecessary and superfluous. (*People v. Guzman*, *supra*, 35 Cal.4th 577, 588 [the courts must "'if possible, ... give effect and significance to every word and phrase of a statute.' [Citation.]"].) Why require a subset of harbor police to have primary duties of law enforcement, if every harbor patrol officer qualifies as a "peace officer" by performing duties related to the harbor? The Opinion does not explain. (See Opinion at Slip. Op. pp. 5-7.)

The Court similarly places too much faith on the inclusion of the word "police" in section 830.33, subdivision (b). Why would the legislature have included "the primary duty" requirement, if the word "police" serves a similar but less demanding function of excluding non-law enforcement employees? Section 830.33, subdivision (b) also excludes traditional "police officers" from its definition, as they are bestowed "peace officer" status under section 830.1. This demonstrates that the legislature did not intend to confer "peace officer" status on all "harbor police," and included the additional requirement that law enforcement be their primary duty. Moreover, if the legislature intended all harbor police to be "peace officers," it could have easily done so. (See *Gauthier v. City of Red Bluff*, *supra*, 34 Cal.App.4th 1441, 1446 ["If the Legislature had meant that all firefighters were to be peace officers it would have said so."].)

In contrast, *Miller's* interpretation of section 830.33, subdivision (b) gives meaning to every word and phrase in the statute. Without the second clause, section 830.33, subdivision (b) would only bestow "peace officer" status "if the primary duty of the peace officer is the enforcement of the law *in or about* the properties owned, operated, or administered by the harbor or port." (Emphasis added.) A harbor patrol officer would not be a "peace

officer" if they performed law enforcement duties outside the harbor. The second clause thus clarifies that a harbor patrol officer, whose "primary duty" is "the enforcement of the law," is a "peace officer": 1) if those duties are performed "in or about" the harbor; or 2) "when performing necessary duties with respect to patrons, employees, and property of the harbor." (See § 830.33, subd. (b).)

The larger context of the statutory system conferring "peace officer" status further supports the *Miller* court's interpretation.

> Chapter 4.5 specifies dozens of government employees as peace officers, sometimes simply by job title, but more often by reference both to a position and its primary duties. In general, chapter 4.5 names some classifications of employees as peace officers whose powers are either specified or limited, provides that other employees are not peace officers but may exercise some peace officer functions under certain circumstances, denies peace officer status to some classifications, and denies or restricts the right of some peace officers to carry firearms. [Citation.] *The plain import of this statutory system is that the Legislature intended to grant peace officer status, and the powers and authority conferred with that status in particular instances, subject to carefully prescribed limitations and conditions.*

(*Service Employees Internat. Union v. City of Redwood City*, *supra*, 32 Cal.App.4th 53, 60 [Emphasis added.]; see Pen. Code, § 830 ["no person other than those designated in this chapter is a peace officer."].) The Court of Appeal's interpretation contradicts this statutory scheme, potentially conferring "peace officer" status on every harbor patrol employee, without regard to his or her primary duties.

Accordingly, a harbor patrol officer is not a "peace officer" unless his or her primary duties are the enforcement of the law. There was no testimony or evidence to establish Hubbard's *primary duties* were law enforcement, and petitioner's conviction for assault on a peace officer should be reversed.

II. ISSUES PRESENTED TO EXHAUST STATE REMEDIES.

Petitioner also seeks review to exhaust state remedies with regard to the sufficiency of the evidence to support his convictions for assault on a peace officer (Count 2) and trespassing with intent to interfere (Count 3). The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*Jackson v. Virginia* (1979) 443 U.S. 307, 315-316, 99 S.Ct. 2781; U.S. Const. 14th Amend.) Accordingly, this portion of the petition is filed to exhaust state remedies for federal habeas corpus purposes pursuant to California Rules of Court, rule 8.508.

A. The Trial Court Deprived Petitioner Of His Federal Due Process Rights When It Allowed Him To Be Convicted Of Assault On A Peace Officer Based On Insufficient Evidence.

As described, *supra*, petitioner contends that the evidence was insufficient to establish that Hubbard was a "peace officer," as required to support his conviction for assault on a peace officer. (§ 243, subd. (b).) In the event that this Court does not grant review, this portion of the petition is filed to exhaust state remedies for federal habeas corpus purposes pursuant to California Rules of Court, rule 8.508.

B. The Trial Court Deprived Petitioner Of His Federal Due Process Rights When It Allowed Him To Be Convicted Of Trespassing With Intent To Interfere Based On Insufficient Evidence.

Petitioner was also convicted of violating section 602, subdivision (k) (trespassing with intent to interfere). (See Opinion at Slip. Op. p. 9.) This statute prohibits "[e]ntering any lands ... for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent, or by the person in lawful

possession." (§ 602, subd. (k).) This provision has been interpreted to require proof of both actual damage or obstruction, and an intent to cause the same. (*In re Wallace* (1970) 3 Cal.3d 289, 295 [interpreting former section 602, subd. (j), now subd. (k)]; CALCRIM No. 2930, Trespass: To Interfere With Business (Pen. Code, § 602(k)).) The intent to commit theft is also insufficient to demonstrate the requisite intent to injure or interfere with the property owner's business. (*People v. Harris* (1961) 191 Cal.App.2d 754, 758-759 [intent to commit theft not embraced by "any intent described in section 602, subdivision (j) [now subdivision (k)] ..."].)

In the instant case, the evidence at most demonstrated that petitioner entered the marina without authorization, and with an intent to steal a hose. (See Opinion at Slip. Op. at pp. 2-4.) Petitioner challenged his conviction on the basis that there was insufficient evidence of the requisite intent to interfere or obstruct the property owner's lawful business. (*Id.* at p. 9.) The Court of Appeal affirmed his conviction, finding that petitioner's "presence on the property interfered with the owner's and tenants' right to exclusive and undisturbed possession of the Marina." (*Ibid.*) Therefore, the jury could have reasonably found that petitioner entered the marina for the purpose of "'injuring property rights.'" (*Ibid.*) Given the fact specific nature of this claim, it presents no grounds for review under California Rules of Court, rule 8.500(b). Accordingly, this portion of the petition is filed solely to exhaust state remedies for federal habeas corpus pursuant to California Rules of Court, rule 8.508.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant review and reverse his conviction for Count 2, misdemeanor battery upon a peace officer (§ 243, subd. (b).).

DATED: October 27, 2014

Respectfully submitted,

MARK R. FEESER
MARK R. FEESER
Attorney for Petitioner

CERTIFICATE OF LENGTH

I, Mark R. Feeser, counsel for Bryan M. Pennington, certify pursuant to the California Rules of Court, that the word count for this document is 4,016 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Luis Obispo, California, on October 27, 2014.

MARK R. FEESER
MARK R. FEESER
Attorney for Petitioner

EXHIBIT A

Filed 9-22-2014

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BRYAN M. PENNINGTON, Defendant and Appellant.	2d Crim. No. B249482 (Super. Ct. No. 1423213) (Santa Barbara County)

As against a claim of insufficiency of the evidence, we hold that a harbor patrol officer who is (1) sworn as a peace officer, (2) supervised by a city police chief, (3) wears a badge, and (4) carries a police issued firearm, taser, baton, handcuffs, and pepper spray is a "peace officer" within the meaning of Penal Code section 830.33, subdivision (b) if he or she performs necessary duties with respect to patrons, employees, and properties of the harbor or port. [1]

Bryan M. Pennington appeals from the judgment entered after a jury convicted him of felony resisting an executive officer (§ 69); misdemeanor battery on a peace officer (§ 243, subd. (b)); misdemeanor trespass (§ 602, subd. (k)); and misdemeanor attempted petty theft. (§§ 664, 484, subd. (a).) The trial court found true an enhancement allegation that, when appellant committed the felony offense of resisting an executive officer, he was out on bail for an earlier offense. (§ 12022.1, subd. (b).) Probation was granted for five years on condition that he serve 365 days in county jail.

[1] All statutory references are to the Penal Code.

A Santa Barbara Harbor Patrol Officer was the named victim of the misdemeanor battery on a peace officer. Appellant contends that (1) the evidence is insufficient to show that the named victim was in fact a peace officer; (2) the trial court erroneously instructed the jury that a member of the Santa Barbara Harbor Patrol is a peace officer; (3) the trial court erroneously precluded appellant from arguing to the jury that the named victim was not a peace officer; (4) the evidence is insufficient to support his conviction of trespass; (5) the trial court erroneously failed to instruct sua sponte on the claim-of-right and mistake-of-fact defenses to attempted petty theft; and (6) the "out-on-bail" sentencing enhancement must be permanently stayed. We affirm.[2]

Facts

Patrick Henry worked as a manager for the City of Santa Barbara Waterfront Department. He issued keycards to persons who were authorized to enter waterfront private areas which are not open to the public. The keycards were used to unlock gates to these restricted areas, which were called "marinas." Only boat owners who rented boat slips and authorized guests were allowed to enter a marina. A visitor was not permitted to enter unless he was escorted by a keycard holder. The restrictions on entry to the marinas were set forth in a section of the Santa Barbara Municipal Code.

On the entry side of the locked gate to Marina 3 (the Marina), a sign read: "Unauthorized entry prohibited. Boat owners and authorized guests only." Henry saw custodial workers exit through the gate. Appellant, who was outside the Marina, ran to the gate, "caught it before it locked into place," and entered the Marina. Henry recognized appellant and knew his entry was unauthorized. Appellant was no stranger to the harbor personnel. On May 5, 2009, he got into a "wrestling match" with a harbor patrol officer. On July 7, 2012, he threatened to stab a harbor patrol officer. Henry telephoned the Harbor Patrol Office.

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[2] Appellant does not attack the felony resisting an executive officer conviction, and the order granting probation is reasonably predicated on this conviction alone. Nevertheless, he may lawfully advance the specified contentions on appeal. We simply observe that even if he were to prevail on all contentions, we would still affirm the order granting probation.

Richard Hubbard, the named victim of the misdemeanor battery on a peace officer, responded to Henry's call. He was employed by the City of Santa Barbara as a "Harbor Patrol officer." Hubbard performed duties "as a law enforcement officer, a boating safety officer, [an] emergency medical technician, [a] marine firefighter, and [an] ocean lifeguard." Hubbard "enforc[ed] the law in the harbor district" and patrolled "the marinas on foot, with vehicles and also on boat[s] . . . just like PD [police department officers] would patrol the city streets." One of his duties was to assure "that only people that are authorized to be in the marinas are in there." His supervisor was the Chief of the Santa Barbara Police Department. He was a sworn peace officer, wore a badge, and had the power to make arrests. He carried "a department-issued sidearm, taser, baton, handcuffs and OC [pepper] spray."

Hubbard and his partner, Harbor Patrol Officer Kelly, entered the Marina. They were "in full Harbor Patrol uniform." They saw appellant with a coiled hose over his shoulder. Hubbard said to appellant: "You need to stop. We need to talk to you." Appellant did not reply and "tried to push . . . through where [Hubbard and Kelly] were standing." The officers stopped him, and appellant said he was there to get the hose for his friend, Carol, who had given him permission to take it. Hubbard told appellant "to put the hose back until [they] could verify his story." Appellant put the hose down and walked away. Hubbard and Kelly followed him. Hubbard said to appellant: "We're not done. I need to talk to you." Appellant "kept going," so Hubbard "put [his] hand out on [appellant's] chest to stop him." Appellant kicked Hubbard in the thigh. The blow hurt and "[l]eft a good-sized bruise." Appellant "took . . . an aggressive fighting stance," clenched his fists, and kicked Officer Kelly in the shin. Hubbard grabbed appellant, who "started throwing a bunch of . . . wild punches and kicks in the air." The kicks were directed toward Hubbard's face.

Officer Kelly fired his taser at appellant. The taser barb struck appellant's jacket but did not penetrate his skin. Appellant turned and ran away. Kelly chased appellant and wrestled him to the ground. Appellant said: "Motherfucker. You're dead. I'm going to kill

you." After he was handcuffed, appellant told the officers: "I'm going [to] find you where you live and kill you in your house. Just wait until I get out and you're dead."[3]

The hose belonged to Peter Crane, who owned a houseboat that was docked at the Marina. He did not authorize appellant to take the hose. Carol Holm had permission to use Crane's hose to clean her boat, which was near Crane's houseboat.

Carol Holm testified that she employed appellant as a worker on her boat. After appellant was arrested, she told the Harbor Patrol that appellant did not have permission to remove the hose because it belonged to her neighbor. But at trial Holm testified that she had given appellant permission to take the hose to another location in the Marina. On the date in question, appellant did not ask Holm for permission to go to her boat and use the hose. Holm opined that appellant could enter the Marina and work on her boat because he worked for her.

Sufficiency of the Evidence/Battery on a Peace Officer

Appellant contends that the evidence is insufficient to support his conviction of misdemeanor battery on a peace officer (§ 243, subd. (b)) because the People failed to prove that the named victim, Officer Hubbard, was in fact a peace officer. " 'The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] . . . A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict. [Citation.]' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The relevant definition of "peace officer" is found in section 830.33, subdivision (b), which provides that "[h]arbor or port police" are peace officers if they are "regularly employed and paid in that capacity by a county, city, or district" and [first clause] "if the

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[3] Appellant is fortunate not to have been charged with violating section 422, threatening to commit a crime that would result in death or great bodily injury.

primary duty of the peace officer is the enforcement of the law in or about the properties owned, operated, or administered by the harbor or port *or* [second clause] when [the officer is] performing necessary duties with respect to patrons, employees, and properties of the employing agency."[4] (Italics added.)

Based on *People v. Miller* (2008) 164 Cal.App.4th 653 (*Miller*), appellant argues that the second clause is of no force or effect and that harbor or port police are peace officers only if their primary duty is the enforcement of the law. Appellant asserts that, because the record contains no evidence that Officer Hubbard's primary duty was law enforcement, the conviction for battery on a peace officer must be reversed.

In *Miller* the defendant was convicted of attempting to elude a pursuing peace officer's vehicle and causing bodily injury. (Veh. Code, § 2800.3.) The officer testified that he was a " 'harbor patrolman' " employed by " 'the City of Long Beach Fire Department.' " (*Miller*, *supra*, 164 Cal.App.4th at p. 658.) He worked " 'mostly . . . [as] a rescue boat operator.' " (*Ibid.*) "He had the authority to issue citations, detain individuals and make arrests." (*Ibid.*)

The *Miller* court concluded that the defendant's conviction had to be reversed because "the jury could not conclude beyond a reasonable doubt that [the officer] was primarily engaged in the enforcement of the law" and was therefore a peace officer. (*Miller*, *supra*, 164 Cal.App.4th at p. 667.) The court noted: "In its brief, [the People did] not dispute that [the officer's] status as a peace officer depends on a finding as to his primary duties." (*Ibid.*) But "[a]t oral argument, [the People] contended for the first time that employees of the harbor or port police should be considered peace officers as long as they are 'regularly . . . paid in that capacity by a county, city or district' and 'performing necessary duties with respect to patrons, employees and properties of the harbor or

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[4] The verbatim text of the statute provides that peace officers include "[h]arbor or port police regularly employed and paid in that capacity by a county, city, or district other than peace officers authorized under Section 830.1, if the primary duty of the peace officer is the enforcement of the law in or about the properties owned, operated, or administered by the harbor or port or when performing necessary duties with respect to patrons, employees, and properties of the harbor or port." (§ 830.33, subd. (b).)

port.' " (*Id.*, at p. 667, fn. 9, quoting from the second clause of section 830.33, subd. (b).) The court rejected the People's contention. It reasoned: "Under this interpretation, the [second] clause of Penal Code section 830.33, subdivision (b) would operate to create a wholly separate category of harbor and port police employees who may be deemed peace officers without regard to whether their primary duty is enforcement of the law. This definition would bestow peace officer status on a broad category of employees who perform no law enforcement functions, and cannot be reconciled with prior decisions' strict interpretation of the provisions of Chapter 4.5 [of Title 3 of Part 2 of the Penal Code, which includes section 830.33]. [Citation.]" (*Ibid.*)

We disagree with *Miller's* interpretation of section 830.33, subdivision (b). "Our goal in construing a statute is 'to determine and give effect to the intent of the enacting legislative body.' [Citation.] ' "We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." [Citation.] If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.' [Citation.]" (*Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490.)

Section 830.33, subdivision (b) is unambiguous. A harbor or port police officer qualifies as a peace officer if the requirements of the first *or* second clause are met. The first clause does not prevail over and supersede the second clause. *Miller's* interpretation "violate[s] the principle of statutory construction that 'requires us, if possible, to give effect and significance to every word and phrase of a statute. [Citation.]' [Citation.]" (*People v. Guzman* (2005) 35 Cal.4th 577, 588.) "[I]t is well settled 'that in attempting to ascertain the legislative intention effect should be given, whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part of the provision useless or deprived of meaning.' [Citations.]" (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 18.)

We respectfully question the basis for the *Miller* court's concern that the second clause "would bestow peace officer status on a broad category of employees who perform

no law enforcement functions." (*Miller, supra*, 164 Cal.App.4th at p. 667, fn. 9.) The second clause applies only to "[h]arbor or port *police* regularly employed and paid in that capacity," i.e., their official capacity as police officers. (§ 830.33, subd. (b), italics added.) The People correctly observe that "the term 'police' necessarily connotes law enforcement functions." Thus, a person would not fall within the category of "harbor or port police" unless, like Officer Hubbard, the person performed law enforcement functions pursuant to the second clause. This is a question for the trier of fact.

Appellant does not contend that the evidence is insufficient to show that Officer Hubbard was "performing necessary duties with respect to patrons, employees, and properties of the employing agency." (§ 830.33, subd. (b).) Nor could he so contend. Hubbard was in full uniform carrying peace officer accoutrement including a firearm, taser, and baton. He was investigating a suspected trespass and theft.

Instruction that a Harbor Patrol Officer Is a Peace Officer

The trial court instructed the jury that, to find appellant guilty of battery on a peace officer, the People must prove that "Hubbard was a peace officer performing the duties of a Harbor Patrol Officer." It further instructed that "[a] sworn member of the Santa Barbara Harbor Patrol is a *peace officer*." (Italics in original.) Appellant argues, and the People concede, that the latter instruction was erroneous. A Santa Barbara Harbor Patrol officer qualifies as a peace officer only if the People prove the requirements of either the first *or* second clause of section 830.33, subdivision (b). Moreover, "the constitutional right to a jury trial means that 'no matter how conclusive the evidence, a trial court cannot directly inform the jury that an element of the crime charged has been established. Absent a stipulation by the defendant that an element is established or is admitted, the trial court must submit that question to the jury.' [Citations.]" (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 315.)

"The error here is harmless beyond a reasonable doubt because the jury necessarily resolved [the peace officer] issue[] against appellant[] under other instructions. [Citation.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165.) For Hubbard to qualify as a peace officer under the second clause of section 830.33, subdivision (b), the People were

required to prove that he had been "performing necessary duties with respect to patrons, employees, and properties of the employing agency." (*Ibid.*) The jury instruction for battery on a peace officer stated that, to find appellant guilty of this crime, the People must prove that Hubbard was "performing the duties of a Harbor Patrol Officer" and that appellant "knew, or reasonably should have known, that Rick Hubbard was a peace officer who was performing his duties." Thus, by finding appellant guilty, the jury necessarily found that Hubbard had been performing his official duties and was therefore a peace officer within the meaning of the second clause of section 830.33, subdivision (b).

Limitation on Scope of Appellant's Closing Argument

Appellant contends that the trial court erred by granting the People's motion to preclude him from arguing to the jury that Hubbard was not a peace officer. The court stated: "[Y]ou can't argue that . . . Officer Rick Hubbard and the other folks who work for the Harbor Patrol are not peace officers within the meaning of the law, because under the law they are designated peace officers, as I understand it." "So it's not something the jury can decide, that they're not peace officers." For the reasons discussed in the preceding part of this opinion, the trial court's ruling was erroneous.

The error is harmless beyond a reasonable doubt. If appellant had been permitted to argue that Hubbard was not a peace officer, his argument would have been limited to whether the People had proved the requirements of the first or second clause of section 830.33, subdivision (b). The trial court permitted appellant to argue that he was not guilty of battery on a peace officer because Hubbard was not "performing his lawful duty." Thus, appellant was in effect allowed to argue that Hubbard was not a peace officer within the meaning of the second clause because he was not "performing necessary duties with respect to patrons, employees, and properties of the employing agency." (§ 830.33, subd. (b).) As we have previously explained, the jury could not have convicted appellant unless it had found that Hubbard had been performing his official duties within the meaning of the second clause.

Sufficiency of the Evidence/Trespass

Appellant contends that the evidence is insufficient to support his conviction of trespass in violation of section 602, subdivision (k). This statute prohibits "[e]ntering any lands . . . for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent, or by the person in lawful possession." (*Ibid.*)

The jury was instructed that, to find appellant guilty of trespass, the People must prove that he entered lands belonging to another "for the purpose of injuring property rights." Substantial evidence supports the jury's finding that appellant entered the Marina with the requisite purpose. The jury could have reasonably found that appellant had acted with the purpose of injuring the City of Santa Barbara's right to exclude unauthorized persons, i.e., people who were not keycard holders and were not escorted by a keycard holder. Appellant's presence on the property interfered with the owner's and tenants' right to exclusive and undisturbed possession of the Marina. "As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership. [Citation.]" (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390; see also *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 435 [102 S.Ct. 3164, 73 L.Ed.2d 868] ["The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"].)

Were we to credit appellant's theory, he could come and go to any portion of the Marina as long as he did not interfere with, obstruct, or injure the Marina or any of the boat slip tenants. This would be an unwarranted erosion of traditional real property rights.

Alleged Failure to Instruct on Relevant Defenses

For the offense of attempted petty theft (§§ 664, 484, subd. (a)), appellant argues that the trial court erroneously failed to instruct sua sponte on the defenses of claim of right and mistake of fact. "The claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." (*People v.*

Tufunga (1999) 21 Cal.4th 935, 938.) "The mistake-of-fact defense operates to negate the requisite criminal intent or mens rea element of the crime, but applies only in limited circumstances, specifically when the defendant holds a mistaken belief in a fact or set of circumstances which, if existent or true, would render the defendant's otherwise criminal conduct lawful. [Citations.]" (*People v. Lawson* (2013) 215 Cal.App.4th 108, 111.) Appellant asserts: "There was substantial evidence that when [he] entered the Harbor and removed the hose, he had a good faith belief that he had permission to do so. Specifically, Carol Holm . . . gave appellant permission to enter the Harbor to perform work on her boat and to utilize her hose for that purpose."

If substantial evidence supported the defenses of claim of right and mistake of fact, the trial court had no duty to instruct sua sponte on these defenses because their purpose was to negate the mental element of attempted petty theft. In *People v. Anderson* (2011) 51 Cal.4th 989, 992, our Supreme Court held that "a trial court has no obligation to provide a sua sponte instruction on accident where . . . the defendant's theory of accident is an attempt to negate the intent element of the charged crime." "[A]s explained in *Anderson,* the trial court's sua sponte instructional duties do not apply to defenses that serve only to negate the mental state element of the charged offense when the jury is properly instructed on the mental state element, even when substantial evidence supports the defense and it is consistent with the defendant's theory of the case. [Citation.] In these circumstances, the court's duty to instruct, 'extend[s] no further than to provide an appropriate pinpoint instruction upon request by the defense.' [Citation.]" (*People v. Lawson*, *supra*, 215 Cal.App.4th at p. 119, quoting from *People v. Anderson*, *supra*, 51 Cal.4th at p. 998.) "[T]he rationale of *Anderson* is applied with equal force to the defense of mistake of fact, or any other defense [e.g., claim of right] that operates only to negate the mental state element of the crime." (*Id.*, at p. 117.)

Out-on-Bail Enhancement

The trial court found true an enhancement allegation that, when appellant committed the felony offense of resisting an executive officer, he was out on bail for an earlier offense in another case. (§ 12022.1, subd. (b).) After suspending the imposition of sentence and

placing appellant on probation, the court dismissed the other case in furtherance of justice pursuant to section 1385. Appellant claims that, because of this dismissal, "[t]he sentencing enhancement should be permanently stayed." Appellant reasons that "a conviction for the criminal charge on the primary [earlier] offense is an essential prerequisite to the imposition of the 'on bail' enhancement." (*In re Ramey* (1999) 70 Cal.App.4th 508, 512.)

We agree with the People that appellant's claim "is not ripe for appellate review" because the trial court suspended the imposition of sentence and placed him on probation. Thus, appellant will not be sentenced if he successfully completes probation. If appellant's probation is revoked and the court imposes a sentence that includes a prison term for the out-on-bail enhancement, appellant may seek appellate review of the sentence. "[I]t is well settled that matters which are not ripe for adjudication should ordinarily be left to a future forum." (*People v. Ybarra* (1988) 206 Cal.App.3d 546, 550.)

Disposition

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Brian J. Hill, Judge

Superior Court County of Santa Barbara

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Theresa A. Patterson, Deputy Attorney General, for Plaintiff and Respondent.

PROOF OF SERVICE BY MAIL

Re: Bryan M. Pennington, Court Of Appeal Case: B249482, Superior Court Case: 1423213

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On October 27, 2014, I served a copy of the attached Petition for Review (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

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Bryan M. Pennington, Appellant
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 27th day of October, 2014.

Teresa C. Martinez
(Name of Declarant)

(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Bryan M. Pennington, Court Of Appeal Case: B249482, Superior Court Case: 1423213

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On October 27, 2014 a PDF version of the Petition for Review (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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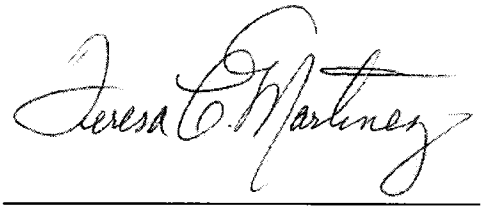
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 27th day of October, 2014 at 10:57 Pacific Time hour.

Teresa C. Martinez

(Name of Declarant)



(Signature of Declarant)