IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. BRYAN M. PENNINGTON, Defendant and Appellant.	No. S222227

Second District Court of Appeal, Division Six, Case No. B249482
Santa Barbara County Superior Court No. 1423213
Honorable Brian E. Hill, Presiding Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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By Appointment of The
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APPELLANT'S REPLY BRIEF ON THE MERITS

Appellant's Reply Brief on the Merits is limited to the rebuttal of certain points in Respondent's Answering Brief on the Merits. This limitation does not constitute a waiver of any issues raised in Appellant's Opening Brief on the Merits. Appellant submits that the points in Respondent's Answering Brief to which partial or no reply has been made herein have been fully covered in Appellant's Opening Brief on the Merits, and that only those points requiring additional comments will be addressed herein.

ARGUMENT

I. APPELLANT'S CONVICTION FOR VIOLATING PENAL CODE SECTION 243, SUBDIVISION (b) MUST BE REVERSED.

As set forth in Appellant's Opening Brief on the Merits, this Court should reverse appellant's conviction for Battery on a Peace Officer (Pen. Code, § 243, subd. (b).)[1] Section 243, subdivision (b) requires proof, inter

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

alia, that a battery was committed against certain enumerated "peace officers." Here, the prosecution alleged that appellant assaulted a member of the Santa Barbara Harbor Patrol, Rick Hubbard ("Hubbard"). Pursuant to section 830.33, subdivision (b), harbor or port police are not "peace officers" unless "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." Hubbard did not testify that law enforcement was his "primary duty," and described numerous duties unrelated to law enforcement. As a result, there was insufficient evidence that Hubbard was a "peace officer." The trial court also prejudicially erred by instructing the jury that Hubbard was a "peace officer" as a matter of law, and precluding any argument to the contrary.

According to Respondent, however, substantial evidence supports appellant's conviction, because section 830.33, subdivision (b) should be interpreted to create two alternative bases for a harbor patrol officer to qualify as a "peace officer." Under this interpretation, which was adopted by the Court of Appeal, a harbor patrol officer is a "peace officer" by virtue of *either*: 1) having primary duties of law enforcement; *or* 2) when they are performing necessary duties related to the harbor. Respondent further argues that even if a harbor patrol officer's primary duty must be law enforcement, there was substantial evidence to support that finding. Finally, Respondent argues that this Court should decline to consider appellant's related claims with regard to whether appellant was prejudiced by instructional error and limitation on argument. Respondent's contentions are without merit.

A. Section 830.33, Subdivision (b) Should Be Interpreted To Confer "Peace Officer" Status On A Harbor Patrol Officer Only Where Enforcement Of The Law Is A Primary Duty.

i. Respondent's Interpretation Renders The "Primary Duty" Language Superfluous, And Undermines the Legislative Scheme Regarding Peace Officer Status.

Respondent asserts that section 830.33, subdivision (b) should be interpreted to confer "peace officer" status on a harbor patrol officer where, either: 1) "the primary duty of the peace officer is the enforcement of the law in or about the" the harbor; or 2) "when performing necessary duties with respect to patrons, employees, and properties of the harbor." (Respondent's Answer Brief on the Merits ("RABM") 9-26) This interpretation, however, renders the "primary duty" clause of section 830.33, subdivision (b) superfluous. (Appellant's Opening Brief on the Merits ("AOBM") 18.) Every harbor or port police officer performs necessary duties with respect to the harbor, and thus would qualify as a "peace officer" regardless of whether law enforcement is a "primary duty." (*People v. Miller* (2008) 164 Cal.App.4th 653, 667, fn. 9 [rejecting interpretation asserted in the instant case because it would "bestow peace officer status on a broad category of employees who perform no law enforcement functions."]; see 68 Ops. Cal. Atty. Gen. 42, 45 (1985)[2] ["Harbor or port police regularly employed and paid as such are not necessarily peace officers."].) If the Legislature intended that all harbor patrol officers would be peace officers simply by virtue of their job title, it

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[2] While not binding, Attorney General Opinions "'are entitled to considerable weight.' [Citation.]" (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 717, fn. 14.)

would have said so. (See *Gauthier v. City of Red Bluff* (1995) 34 Cal.App.4th 1441, 1446 ["If the Legislature had meant that all firefighters were to be peace officers it would have said so."].)

Respondent argues that the concern over conferring "peace officer" status on harbor patrol officers with little or no law enforcement duties is "unfounded." (RABM 15) This concern, however, is quite concrete. As both the instant case and *Miller* demonstrate, harbor patrol officers' duties are wide ranging and include numerous duties that are unrelated to law enforcement. (1RT 124-125, 253-254; *People v. Miller*, *supra*, 164 Cal.App.4th 653, 667.) The harbor patrol officers in the instant case performed both law enforcement and non-law enforcement duties. However, other harbor patrol officers with more specialized skills might be assigned solely or primarily to non-law enforcement duties. (See e.g., *People v. Miller*, *supra*, 164 Cal.App.4th 653, 667 [although harbor patrolman had authority to "detain individuals and issue citations," he testified that "he 'mostly' drove a rescue or harbor patrol boat."].) Harbor Patrol officers may also have purely managerial or administrative duties, and thus perform little or no law enforcement duties. (See *Gauthier v. City of Red Bluff*, *supra*, 34 Cal.App.4th 1441, 1446 [fire chief was not "peace officer" because his primary duty was managing the fire department, not enforcing the law.].) Under Respondent's interpretation, however, all harbor patrol officers are "peace officers" when they perform "necessary duties," and the "primary duty" requirement is thus irrelevant.

Respondent argues that because section 830.33, subdivision (b) refers to Harbor or port "police" who are "employed in that capacity," it could only apply to those who have law enforcement functions. (RABM 15) Respondent, however, fails to answer the critical question posed in Appellant's Opening Brief on the Merits: "Why would the legislature include a 'primary duty' requirement, if the word 'police' served a similar

but apparently less demanding function?" (AOBM 19) Are there harbor patrol officers who perform unnecessary duties related to the harbor, yet still have law enforcement as a primary duty? Is law enforcement itself not a necessary duty? Respondent never explains.

Moreover, other statutory provisions conferring "peace officer" status include identical "primary duty" of law enforcement and "necessary duties" clauses, but do not include the word "police." (See § 830.31, subd. (d) ["housing authority patrol officer"]; § 830.36, subs. (a) ["Sergeant-at-Arms of each house of the Legislature"], (b) ["Marshals of the Supreme Court and bailiffs of the courts of appeal, and coordinators of security for the judicial branch"], (c) ["Court service officer"]; § 830.37, subd. (d) ["Firefighter/security guards by the Military Department"].) This demonstrates that the Legislature did not use the words "Harbor or port police" as a check against conferring "peace officer" status on employees with little or no law enforcement duties. Rather, the Legislature used those words, as it used "Firefighter" or "Court service officer," to identify the category of public employees who might achieve "peace officer" status if their "primary duty" is law enforcement.

ii. Respondent's Criticism Of *People v. Miller* Is Without Merit.

Respondent criticizes the reasoning in *People v. Miller*, which rejected the interpretation of section 830.33, subdivision (b) that Respondent asserts in this case. (RABM 15-17)[3] Respondent argues that

[3] Respondent misstates the holding of *Miller*. (RABM 15) According to Respondent, the court held that a "harbor patrolman" and "rescue boat operator" was not a "peace officer" because "his primary duty was the operation of a rescue boat rather than law enforcement." (RABM 15) This is incorrect. The court actually found insufficient evidence for the jury to

the *Miller* court mistakenly relied on *People v. Gauthier*, which found the "primary duty" requirement under section 830.37, subdivision (b) to be a necessary prerequisite to "peace officer" status. (RABM 16) Respondent argues that any reliance on *Gauthier* was misplaced, because section 830.37, subdivision (b) lacks the "necessary duties" clause included in section 830.33, subdivision (b). (RABM 16) Respondent's criticism is misplaced.

Regardless of the presence of the "necessary duties" clause, both sections 830.33, subdivision (b), and 830.37, subdivision (b), include a "primary duty" requirement. Neither purports to assign "peace officer" status broadly based solely on the respective job title, as the legislature unambiguously intended with regard to other categories of "peace officers." (See e.g. § 830.1, subd. (a) ["Any sheriff, undersheriff, or deputy sheriff, employed in that capacity ... is a peace officer"].) Respondent's interpretation of section 830.33, subdivision (b), however, would broadly confer "peace officer" status on all harbor patrol officers who perform "necessary duties." The reasoning in *Gauthier* – that section 830.37, subdivision (b) should not be interpreted to effectively eliminate the "primary duty" requirement – applies with equal force to section 830.33, subdivision (b). (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."].)

Respondent claims that a "strict interpretation" of the statute in *Gauthier* makes "more sense," however, because "[u]nlike police officers, members of a fire department are not necessarily known for having law enforcement authority." (RABM 17, fn. 7.) Therefore, because section

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conclude beyond a reasonable doubt that "law enforcement" was a "primary duty." (*People v. Miller, supra*, 164 Cal.App.4th 653, 667.)

830.33 "describes various categories of 'police' and law enforcement officers, individuals who would be expected to have law enforcement functions," there "is no reason to strictly interpret section 830.33." (RABM 17, fn. 7.) This argument is flawed.

First, section 830.37, subdivision (d) confers "peace officer" status on certain firefighters using the identical "primary duty" and "necessary duties" clauses in section 830.33, subdivision (b). It makes little sense to interpret identical language differently depending on whether it applies to harbor patrol officers or firefighters. Second, Respondent's argument against a strict interpretation is refuted by the general legislative intent to confer "peace officer" status "subject to carefully prescribed limitations and conditions." (*Service Employees Internat. Union v. City of Redwood City* (1995) 32 Cal.App.4th 53, 60; § 830 ["no person other than those designated in this chapter is a peace officer."]; see *County of Santa Clara v. Deputy Sheriffs' Assn.* (1992) 3 Cal.4th 873, 879-883 [legislature intended to prohibit local authorities from conferring "peace officer" status on employees not otherwise designated by Chapter 4.5].) The inclusion of the "primary duty" requirement unambiguously demonstrates that the legislature did not intend that all "Harbor or port police" would be "peace officers." (See 68 Ops. Cal. Atty. Gen. 42, 45 (1985) ["Harbor or port police regularly employed and paid as such are not necessarily peace officers."].) Section 830.33, subdivision (b) must be interpreted strictly.

It is also worth noting that, despite the position taken by Respondent in this case, the Attorney General recently issued an Opinion that implicitly recognized that the "primary duty" of law enforcement requirement is a prerequisite for "peace officer" status, even where a statute also includes the "necessary duties" clause. Specifically, the Attorney General was asked to opine whether certain "firefighters" were covered under the Firefighters Procedural Bill of Rights ("FPBR"). (97 Ops. Cal. Atty. Gen. 34 (2014).)

The ("FPBR") excludes "certain public agency firefighters from its coverage--most notably 'public safety officers.'" (*Ibid.*) The Opinion concluded that under section 830.37, subdivision (d), a firefighter employed by the State's Military Department is a "public safety officer" if "their *primary duty* 'is the enforcement of the law in or about properties owned, operated, or administered by the employing agency or when performing necessary duties with respect to patrons, employees, and properties of the employing agency.'" (*Ibid.* [Emphasis in Original.].) Therefore, the FPBR is inapplicable to a firefighter whose "primary duty" is law enforcement. (*Ibid.*) The Opinion does not contemplate that the FPBR would be inapplicable if the firefighter simply performed "necessary duties." (See *ibid.*; 68 Ops. Cal. Atty. Gen. 42, 45 (1985) [emphasizing "primary duty" requirement, but not the "necessary duties" clause, to conclude that "Harbor or port police regularly employed and paid as such are not necessarily peace officers."].)

iii. Appellant's Interpretation Gives Meaning To Every Word Of The Statute By Imposing Both Temporal And Geographic Limitations On "Peace Officer" Authority And Status.

According to Respondent, appellant "has not tendered any reading, let alone a grammatically plausible reading, of the statute which supports his position." (RABM 24) Respondent further claims that appellant "has not suggested any plausible meaning" to the phrase "when performing necessary duties." (RABM 24) Respondent is wrong as a matter of fact and logic.

Appellant explained in his opening brief how his interpretation gives meaning to every word of section 830.33, subdivision (b), while also aligning with the overall legislative intent to confer peace officer status

subject to carefully prescribed limitations. As Respondent observes, "status as a peace officer has broad significance beyond the application at issue here." (RABM 19) This includes, depending on the source of the "peace officer" status, making arrests, investigating crimes, or carrying weapons, which may extend beyond the specific jurisdiction of the employing agency. (RABM 19-20) Consistent with these broader implications, section 830.33, subdivision (b) confers "peace officer" status and authority based on the officer's "primary duty" in or about the harbor, and further defines the scope of that authority outside the harbor when performing "necessary duties." (AOBM 19-20)

Respondent, however, argues that interpreting section 830.33, subdivision (b) as designating two independent bases to confer "peace officer" status is "consistent with a logical purpose of bestowing more expansive law enforcement authority on those harbor patrol officers whose primary duty is the enforcement of the law." (RABM 20) This is because under the "primary duty" clause, a harbor patrol officer qualifies as a peace officer "without temporal limits." (RABM 21) Conversely, under the second clause, a harbor patrol officer whose primary duty is not law enforcement only qualifies as "peace officer" "when" performing "necessary duties" related to the harbor. (RABM 21) In support of this proposition, Respondent cites several cases and Attorney General Opinions, which address the scope of a "peace officer's" authority and status while outside the jurisdiction of the agency that employs them. (RABM 20-22) These authorities, however, only support appellant's interpretation of section 830.33, subdivision (b).

For example, Respondent cites *Baughman v. State of California* (1995) 38 Cal.App.4th 182, 187-189. (RABM 20) There, the court considered whether university police were acting in their official capacity when they served a search warrant more than a mile from campus. (*Ibid.*)

Pursuant to section 830.2, subdivision (d), members of the university police are "peace officers" provided "*that the primary duty of the peace officer shall be the enforcement of the law within the area specified.*" (*Id.* at p. 188 [Emphasis in original.].) Section 830.2 further provided "that the authority of such officers extends throughout the state, even though the primary duty of such officers is within one mile of campus." (*Id.* at p. 189.) Because the alleged crimes occurred on campus, the officers were authorized to continue their investigation off campus. (*Ibid.*; *Brierton v. Department of Motor Vehicles* (2005) 130 Cal.App.4th 499, 511-512 [same].) In other words, the university police achieved "peace officer" *status* based on their "primary duty" of enforcing the law on campus, but that *authority* extended beyond those boundaries when necessary to complete an investigation that began on campus. (*Ibid.*) The Opinions of the Attorney General, cited by Respondent, similarly demonstrate this distinction between authority and status. (RABM 21; see 72 Ops.Cal.Atty.Gen. 154, 156-157 (1989) ["the 'status' of peace officer and the 'authority' of a peace officer" need "not exist at the same point in time."]; 65 Ops.Cal.Atty.Gen. 527, 626 (1982) [same]; 65 Ops.Cal.Atty.Gen. 618 (1982) [same].)

Under appellant's interpretation, and consistent with the above authorities, a harbor patrol officer achieves "peace officer" status and authority if their "primary duty" is the enforcement of the law "in or about the properties owned, operated, or administered by the harbor." (AOB 19) The second clause, which is not geographically limited, defines the temporal limitations under which "peace officer" status and authority exists outside the harbor. (AOB 19) This interpretation gives meaning to every word of the statute. It does not create a wholly independent category of "peace officers" whose primary duty need not be law enforcement.

Under Respondent's interpretation, the second clause intermittently confers "peace officer" authority and status on a task by task basis,

depending on whether the duties are "necessary" or not. (RABM 23) Unlike the "primary duty" clause, the "necessary duties" clause does not contain any geographic limitation or requirement that the "necessary" duties be related to law enforcement. Accordingly, "peace officer" status and authority under the second clause would exist any time a harbor patrol officer performs "necessary duties," and regardless of whether those duties have anything to do with law enforcement. Such an interpretation cannot be squared with the introductory paragraph of section 830.33, which provides that "[t]he following persons are peace officers whose authority extends to any place in the state *for the purpose of performing their primary duty*..." (Emphasis added.)

Respondent also claims that her interpretation is consistent with a logical goal of "granting more comprehensive law enforcement authority to an officer whose primary duty is law enforcement. (RABM 23) According to Respondent, this is because, "aside from the limited times in which that harbor patrol officer is performing necessary duties" with respect to the harbor, "such officer would not possess peace officer status or the attendant broader statewide authority conferred on a harbor patrol officer whose primary duty is law enforcement." (RABM 23) The statewide authority granted to "peace officers," however, does not depend on the particular clause granting that status. (See § 830.33.) Therefore, Respondent's interpretation would unquestionably grant broad statewide authority on those who do not have a primary duty of law enforcement.

Respondent attempts to minimize this possibility, claiming that there will only be "limited times in which the harbor patrol officer is performing necessary duties with respect to the patrons, employees, and properties of the harbor or port." (RABM 23) Respondent does not offer any examples of the "unnecessary" duties that apparently occupy the majority of a harbor patrol officer's time. The term "necessary duties" is also undefined,

creating a potentially unworkable standard that is completely opaque to the public, who would have no basis to determine whether an employee was performing a "necessary" or "unnecessary" duty.

iv. The "Last Antecedent" And "Nearest Reasonable Referent" Canons Of Statutory Construction Are Inapplicable.

Respondent also relies on the "last antecedent" and "nearest reasonable referent" canons of statutory construction to attack appellant's interpretation of section 830.33, subdivision (b). (RABM 25-26) Respondent argues that the "primary duty" language should be "construed to modify" only the phrase "in or about the properties owned, operated, or administered by the harbor or port," because it is the "nearest reasonable referent." (RABM 25) Respondent's reliance on these canons of statutory interpretation is misplaced. (See Posner, *Statutory Interpretation -- in the Classroom and in the Courtroom* (1983) 50 U. Chi. L. Rev. 800, 806 ["for every canon one might bring to bear on a point there is an equal and opposite canon"].)

The "'last antecedent rule' - provides that 'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.' [Citation.]" (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.) As this Court has observed, however, there are two exceptions to the "last antecedent rule." (*Id.* at pp. 680-681; *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743-744.) First, "' "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." '" (*White v. County of Sacramento*,

supra, 31 Cal.3d 676, 680-681.) Second, "'[w]here the sense of the entire act requires that a qualifying word or phrase apply to several preceding wo[r]ds ..., [its application] will not be restricted ....'" (*Id.* at p. 681 [Alterations in Original.].)

For example, in *White*, this Court examined, inter alia, the applicability of the "last antecedent rule" with regard to the term "punitive action" under the Bill of Rights Act (Govt. Code, § 3300-3311). (*White v. County of Sacramento*, *supra*, 31 Cal.3d 676, 678-681.) Government Code section 3303 defined "punitive action" as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." (*Id.* at p. 679.) The question of statutory interpretation was whether the phrase, "for purposes of punishment," qualified "each of the preceding terms, thereby precluding from the reach of the statute, 'demotions' or 'reductions in salary' not imposed 'for purposes of punishment.'" (*Ibid.*) Finding the first exception to the "last antecedent rule" inapplicable, this Court observed:

> Here, the phrase "for purposes of punishment" is *not* equally applicable to all the preceding terms. It would be redundant to provide for a "written reprimand" "for purposes of punishment." A reprimand, by definition, is a punishment, that is, a penalty. Accordingly, to read the statute as defendants suggest would violate the rule that "Interpretive constructions which render some words surplusage ... are to be avoided."

(*Id.* at p. 680 [Emphasis in Original.].) This Court also found the second exception to the "last antecedent rule" inapplicable, observing that the second exception was "but another way of stating the fundamental rule that a court is to construe a statute ' "so as to effectuate the purpose of the law".' [Citation.]" (*Id.* at p. 681.) This Court found support for the "view that the Legislature otherwise considered the other personnel actions listed in section 3303 as *per se* 'disciplinary' or 'punitive' in nature, without

regard to the reason for which they are imposed." (*Id.* at p. 682.) The "'sense'" of the Bill of Rights Act thus did not require "that the phrase 'for purposes of punishment' be applied to each of the preceding terms in section 3303." (*Id.* at p. 681.) Accordingly, the phrase "for purposes of punishment" was "intended to modify only the term 'transfer.'" (*Id.* at pp. 681-684.)

Unlike *White*, both exceptions are implicated here. First, Respondent's application of the "last antecedent rule" renders the "primary duty" language superfluous. There is no purpose to requiring some harbor police to have "primary duties" of law enforcement, because every harbor patrol employee at one time or another performs necessary duties related to the harbor. (AOBM 18) Second, "[t]he plain import" of the statutory system conferring "peace officer" status "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; AOBM 12-14) Conferring "peace officer" status on every harbor patrol officer who performs "necessary duties," regardless of whether law enforcement is a "primary duty," would entirely undermine this statutory scheme.

Respondent's reliance on the "nearest-reasonable referent" rule is similarly misplaced. (RABM 25-26) This Court has never invoked the "nearest-referent rule." In fact, only one California court has. (See *Davis v. Fresno Unified School District* (June 19, 2015, F068477) __ Cal.Rptr.3d __ [2015 WL 3814814] [p. 24].) Under the nearest referent rule, "'[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.'" (*Id.* at [p. 24], citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) pages 152-

153.) Reading Law, however, apparently cited *Carroll v. Sanders (In re Sanders)* (6th Cir. 2008) 551 F.3d 397, 399 as an example of the "nearest reasonable referent rule." (*Goldberg v. Companion Life Ins. Co.* (M.D.Fla. 2012) 910 F.Supp.2d 1350, 1353.) *Carroll* purported to apply the "last antecedent rule." (*Carroll v. Sanders, supra,* 551 F.3d 397, 399.) The "nearest reasonable referent rule" is little more than a minor variation on the "last antecedent rule," and is subject to the exceptions discussed above. Accordingly, the "nearest reasonable referent" rule is not applicable here.

B. The Evidence In This Case Does Not Demonstrate That Officer Hubbard's Primary Duty Was Law Enforcement.

Respondent argues that even under appellant's interpretation, and though "neither officer expressly stated that enforcement of the law in the harbor was his primary duty, a reasonable trier of fact could have drawn such a conclusion" in this case.[4] This argument fails for several reasons.

First, Respondent inaccurately claims "there was substantial evidence supporting *the jury's finding* that Officer Hubbard was a peace officer." (RABM 9 [Emphasis added.]) This statement is inaccurate because the trial court here instructed the jury that harbor patrol officers are "peace officers," and precluded appellant from arguing to the contrary. (AOBM 7, 21-25; RABM 37-40) Both Respondent and the Court of Appeal conceded that this was error. (RABM 40) It is therefore impossible to infer any fact finding by the jury with regard to this question. Hubbard and Kelly also described numerous duties in addition to law enforcement, and they conceded that law enforcement was only part of their job.

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[4] Appellant agrees that to the extent performing "necessary duties" confers "peace officer" status regardless of whether law enforcement is a "primary duty," there was sufficient evidence that Hubbard was a "peace officer."

(AOBM 7-9) Neither testified that law enforcement was a primary duty. Accordingly, there was no basis to conclude that law enforcement was "primary" compared to Hubbard's other duties. (AOBM 20-21)

Second, Hubbard's and Kelly's testimony with regard to their training failed to establish that enforcement of the law was "primary" to their other duties of responding to medical calls, fighting fires, acting as a lifeguard, and search and rescue. It is true, as Respondent notes, that Hubbard and Kelly both described law enforcement training prior to listing their other non-law enforcement duties. (RABM 32-33) Training, however, is not a criterion for "peace officer" status, and cannot confer such status on employees who are not otherwise designated as such by Chapter 4.5. (See *Gauthier v. City of Red Bluff, supra*, 34 Cal.App.4th 1441, 1446, fn. 3 [rejecting argument that because fire chief must be a peace officer because he had completed "peace officer" training pursuant to section 832]; *County of Santa Clara v. Deputy Sheriffs' Assn., supra*, 3 Cal.4th 873, 880 [Legislature intended to prohibit local authorities from conferring "peace officer" status on employees not otherwise designated by Chapter 4.5].) Moreover, after listing the various aspects of his duties, Hubbard clarified that "any one of those things may come into effect at any time." (1RT 253) In any event, Hubbard and Kelly likely mentioned law enforcement training first because they were acting in that role when they arrested appellant.

Respondent also relies on evidence that Hubbard was in full uniform, carried a badge, gun, and Taser, and was thus "readily identifiable as a peace officer." (RABM 33) However, this evidence establishes only that Hubbard was performing law enforcement duties when he confronted appellant in this case. It seems unlikely that Hubbard would carry a firearm and Taser, or be in full uniform while performing an ocean rescue, demonstrating the fallacy of establishing a "primary duty" based on the

uniforms worn or equipment used in a particular incident. (See *Gauthier v. City of Red Bluff, supra*, 34 Cal.App.4th 1441, 1445-1446 [rejecting "circular" argument that "primary duty" refers to the capacity in which the employee is currently acting.].) By Respondent's logic, however, a harbor patrol officer's "primary duty" would constantly change, depending on the type of duty the officer is performing and the corresponding uniform and equipment used.

It is also important to clarify that appellant does not dispute that the harbor patrol enforces the law in the harbor, or that some of the harbor patrol officers have a "primary duty" of law enforcement. The issue here is whether there was sufficient evidence that *Hubbard's* primary duty was law enforcement. The fact that the harbor property manager contacted the harbor patrol, or that the harbor patrol was under the umbrella of the police department, is not specific to Hubbard, and thus fails to establish that his primary duty was law enforcement. (RABM 33) The Attorney General has also recognized that a harbor patrol officer's authority to issue citations and detain individuals is not contingent on "peace officer" status. (68 Ops. Cal. Atty. Gen. 42, 45 (1985).) The fact that Hubbard has such authority thus similarly fails to prove that his "primary duty" was law enforcement, or that he was a "peace officer."

Accordingly, the evidence in this case was insufficient to establish that Hubbard's "primary duty" was law enforcement, and appellant's conviction should be reversed.

C. Appellant's Claims Of Instructional Error and Improper Limitation On Argument Are "Fairly Included" Within The Issue For Which This Court Granted Review.

As Respondent acknowledges, the Court of Appeal found that the

trial court erred when it instructed the jury that Hubbard was a "peace officer" and precluded appellant from arguing to the contrary, but found both errors harmless in light of its interpretation of section 830.33, subdivision (b). (RABM 37-40) The interpretation of section 830.33, subdivision (b) was thus dispositive of the sufficiency issue for which this Court granted review, and with regard to whether there was prejudice resulting from the instructional error and limitation on argument. Accordingly, these issues are "fairly included" within the issue for which this Court granted review. (AOBM 21-25; Cal. Rules of Court, rules 8.516(a)(1) and 8.520, subd. (b)(3).)[5]

Respondent suggests, however, that the instructional error and limitation on argument issues are merely "complementary" or "related," and thus not "fairly included." (RABM 37, citing *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.* (1993) 510 U.S. 27, 31-32, 114 S.Ct. 425 ("*Izumi*").) *Izumi* was interpreting a federal rule of procedure, not the rules of court at issue in this case. (*Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, *supra*, 510 U.S. 27, 31-32.) Moreover, *Izumi* actually demonstrates, by way of contrast, why the instructional error and limitation on argument here are not merely "complimentary" or "related" to issue for which review was granted. (*Id.* at p. 32 [whether petitioner should have been granted leave to intervene was both "analytically and factually" distinct from the question of whether the Court of Appeal may vacate a judgment where the parties have so stipulated]; accord *Yee v. City of*

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[5] This Court may also "decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." (Cal. Rules of Court, rule 8.516(b)(2).) Respondent had both notice and the opportunity to brief the instructional error and limitation on argument issues in this case, which were also fully submitted to and addressed by the Court of Appeal. (See RB 34-42)

Escondido, Cal. (1992) 503 U.S. 519, 536-537, 112 S.Ct. 1522 [question of whether ordinance effected a physical taking did not include the related question of whether it effected a regulatory taking, because "[c]onsideration of whether a regulatory taking occurred would not assist in resolving whether a physical taking occurred as well."]; *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 447, fn. 3. [exhaustion was not "fairly included" within issue of public agency's discretion to choose future conditions baselines under the California Environmental Quality Act.]; *People v. Guzman* (2005) 35 Cal.4th 577, 593, fn. 5 [due process claim was not "fairly included" within equal protection claim for which review was granted]; *People v. Estrada* (1995) 11 Cal.4th 568, 580-581 [whether phrase "reckless indifference to life" was "too vague to comport with federal and state guarantees of due process" was not "fairly included" within issue of whether trial court had sua sponte duty to define the phrase].)

In contrast to the "complementary" or "related" issues in the above cases, the prejudice analysis with regard to the instructional error and limitation on argument in this case is neither analytically nor factually distinct from the sufficiency issue. Both turn on an identical question of statutory interpretation and require an examination of the same facts. As Respondent's argument demonstrates, they are also interrelated in that consideration of the instructional error assists in resolving the sufficiency issue. Specifically, and conceding that neither Hubbard nor Kelly testified that law enforcement was a "primary duty," Respondent argues that the jury reasonably inferred that it was. (RABM 9, 33) Because of the instructional error and limitation on argument, however, the jury made no such finding. Accordingly, these issues are "fairly included" within the issue for which this Court granted review.

As described in appellant's opening brief, appellant was prejudiced

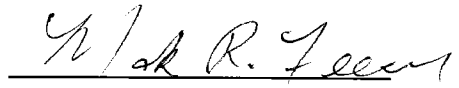
by the trial court's instructional error and limitation on argument and his conviction should be reversed. (AOBM 21-25)

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Court reverse his conviction for Battery on a Peace Officer (Count 2).

DATED: July 1, 2015

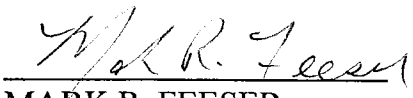
Respectfully submitted,



MARK R. FEESER
Attorney for Appellant

CERTIFICATE OF LENGTH

I, Mark R. Feeser, counsel for Bryan M. Pennington, certify pursuant to the California Rules of Court, rule 8.520(c), that the word count for this document is 5,511 words. 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 July 1, 2015.



MARK R. FEESER
Attorney for Appellant

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of San Luis Obispo, and not a party to the within action; my business address is 3940-7174 Broad Street, San Luis Obispo, CA 93401.

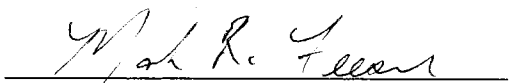
On July 1, 2015, I served the within

APPELLANT'S REPLY BRIEF ON THE MERITS

in said action, by placing a true copy thereof enclosed in a sealed envelope and placing the envelope for collection and mailing following my ordinary business practices. I am readily familiar with this businesses practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Kamala D. Harris, Attorney General Attn: Theresa A. Paterson, DAG 300 South Spring Street, Suite 1702 Los Angeles, CA 90013	Clerk of the Court of Appeal Second Appellate District Division Six 200 East Santa Clara Street Ventura, CA 93001
Joyce E. Dudley, District Attorney 1105 Santa Barbara Street Santa Barbara, CA 93101	Bryan M. Pennington, Appellant c/o Mark R. Feeser, Attorney at Law 3940-7174 Broad Street San Luis Obispo, CA 93401
Clerk of the Court for Santa Barbara County, delivery to: Honorable Brian E. Hill 1100 Anacapa Street PO Box 21107 Santa Barbara, CA 93121-1107	California Appellate Project 520 S. Grand Avenue, 4th Floor Los Angeles, CA 90071

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 1, 2015 at San Luis Obispo, California.



MARK R. FEESER