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7 **Superior Court of the State of California**
8 **San Francisco County**

9 **People of the State of**
10 **California,**

11 Plaintiff,

12 vs.

13 **Sean Moore,**

14 Defendant.
15

SCN: 227235

MCN: 17000423

16 **Motion to Set Aside the**
17 **Information (Pen. Code,**
18 **§995)**

19 Date:
20 Time: 9:00am
21 Dept: 23

22 Defendant Sean Moore moves to set aside Counts 1, 2, 4, 5, 6, 7, 8,
23 and 9 of the Information under Penal Code section 995. The issue is:

24 **1. Assault and resisting: requires officers act in lawful**
25 **performance of duties (Counts 1, 2, 4, 5, 6, 7, 8, and 9).**

26 The officer assault and resisting charges lie only if the officers
27 were lawfully performing duties at the time; but *not* if engaged in
28 an illegal seizure.¹ Here, what began as nocturnal “knock and
talk” at Moore’s front door became an unlawful seizure when the
officers—after Moore declined and repeatedly told them to leave—
persisted, refused to leave, and ordered him outside. Were police
lawfully performing their duties during the subsequent melee,
charged as assault and resistance?

¹ *Florida v. Bostick* (U.S. 1991) 501 U.S. 429, 437; *In re Chase C.* (2015)
243 Cal.App.4th 107, 113-14.

1 This motion is based on this Notice, the record in this case, the
2 attached Memorandum of Points and Authorities, and any additional
3 argument and authorities presented at the hearing on this motion.

4 **Memorandum of Points and Authorities**

5 **Statement of the Case**

6 Moore pleaded not guilty to an Information² charging:

- 7
- 8 • Assault on Officer Patino (Pen. Code,³ § 245(c)—Count 1)
 - 9 • Assault on Officer Cha (§ 245(c)—Count 2)
 - 10 • Battery with serious bodily injury on Patino (§ 243(d)—Count 3)
 - 11 • Battery with injury on Officer Patino (§ 243(c)(2)—Count 4)
 - 12 • Battery with injury on Officer Cha (§ 243(c)(2)—Count 5)
 - 13 • Deterrence by threats re Officer Patino (§ 69(a)—Count 6)
 - 14 • Deterrence by threats re Officer Cha (§ 69(a)—Count 7)
 - 15 • Felony resisting causing injury re Patino (§ 148.10(a)—Count 8)
 - 16 • Misdemeanor resisting re Officer Patino (§ 148(a)(1)—Count 9)
 - 17 • Misdemeanor contempt of court order (§ 166(a)(4)—Count 10)

18

19 This motion does not challenge the battery in Count 3 or the
20 misdemeanor violation of court orders. Trial is set for April 28, 2017.

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28 ² A copy of the Information is attached as Exhibit A.

³ Undesignated statutory references are to the Penal Code.

Statement of Facts

1 Moore challenges the claim that the officers were performing a lawful
2 duty at the time of alleged resistance, delay, assault, and battery. The
3 facts are reflected, primarily, in the officers' body worn camera videos.
4

A. Police respond to TRO violation: neighbor hitting common wall.

5 Christopher Choy had a temporary restraining order against Sean
6 Moore, his next door neighbor.⁴ Choy called the police at 3:51 a.m.⁵ after
7 he and his wife heard something hit their common wall.⁶ At 4:15 a.m.,
8 Officers Patino and Cha responded to the call.⁷ Patino went to Choy's
9 house where he looked at the restraining order.⁸ Patino was at Choy's
10 door for 30 seconds before he heard loud noises and left to join Cha at
11 Moore's doorstep.⁹ He did not gather any background or details, beyond
12 the wall being hit.¹⁰ Neither officer returned to Choy's house for follow up
13 questions, or to have him sign a citizen's arrest.¹¹
14
15

B. Police go to Moore's house and try to question him; Moore declines and repeatedly tells them to leave; officers persist.

16
17 Meanwhile, Cha had gone to Moore's house, up the flight of stairs to
18 his second-story front door, and rang the doorbell.¹² When Moore opened
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21 ⁴ Reporter's Transcript of Proceedings 19:14-18.

22 ⁵ RT 21:21-23.

23 ⁶ RT 22:4; 22:21-23.

24 ⁷ Transcripts of the body worn cameras of Cha and Patino and the
25 interviews of Cha and Patino by Sgt. Watts were submitted to the court
26 and stipulated to by both counsel, therefore references will be to all four
27 transcripts, the preliminary hearing transcript, as well as the body cam
28 videos themselves. See RT 183:23-28.

⁸ RT 24:2-9; 24:22-25:11; 46:17-47:27.

⁹ RT 26:1-15.

¹⁰ RT 26:16-21; 30:27-31:1.

¹¹ RT 31:2-12.

¹² RT 24:2-9; 46:17-47:27.

1 the door Cha asked what was going on, to which Moore responded,
2 “What’s going on? What the fuck you show up out here at this time of
3 morning.”¹³ Moore told Cha, “Get the fuck off my stair,” and said all he
4 had done was put his garbage out.¹⁴ When Patino joined Cha, shortly
5 after, Moore had told the police six times, “Get the fuck off my stair.”¹⁵

6 Moore repeated, “Get the fuck off my stair.”¹⁶ The *officers told Moore*
7 *they were not leaving.*¹⁷ After Moore had told the officers to get off of his
8 stairs a total of eleven times,¹⁸ he said “I’m through talking to you.”¹⁹

9 **C. Moore turns to reenter his house; officers order him to return.**

10 Moore turned to reenter his house, but Patino twice ordered him to
11 come back.²⁰ Patino continued to ask Moore about violating the TRO,²¹
12 which Moore denied.²² By this time, Moore had told the officers to leave
13 his stairs at least 18 times.²³

14
15 **D. Moore retreats into his home; officers descend the stairs, but**
16 **then shine a flashlight on Moore’s front door.**

17 Moore told the officers he was going to call and remove them, then
18 went inside and closed his door.²⁴ Patino replied, “Who are you going to

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20 ¹³ Statement of Body Cam of Officer Cha (Introduced as People 3 and 3A).
(Hereinafter Cha BC Stat Stat) 1:5-7.

21 ¹⁴ Cha BC Stat 1:12; 1:18-19.

22 ¹⁵ Cha BC Stat 1:12-2:6; Statement of Body Cam of Officer Patino
23 (“Patino BC Stat”) 1:5-10.

24 ¹⁶ Cha BC Stat 2:17-18.

25 ¹⁷ Cha BC Stat 2:19-21.

26 ¹⁸ Cha BC Stat 1:12-4:13.

27 ¹⁹ Cha BC Stat 4:13-14.

28 ²⁰ Cha BC Stat 4:13-19; Cha Body Cam Video Footage (“Cha BC Video”)
12:18:45-12:18:56.

²¹ Cha BC Stat 4:24-25; 4:28-5:12.

²² Cha BC Stat 4:28.

²³ Cha BC Stat 1:6-5:5.

²⁴ Cha BC Stat 5:28; Cha BC Video 12:19:44-12:19:47.

1 call?” and both officers laughed at Moore.²⁵ Patino and Cha walked down
2 the stairs, but Cha shone his flashlight on Moore’s door.²⁶

3 **E. Moore again tells them to leave, but officers come back up the**
4 **stairs to his front door and refuse to leave.**

5 Moore, from inside, again told the officers to leave,²⁷ but instead they
6 walked back up the stairs to Moore’s front door.²⁸ Moore continued to tell
7 them to leave, and *the officers continued to say they were not leaving.*²⁹
8 Now Moore had asked police to get off of his stairs 38 times.³⁰

9 **F. Magistrate finds that, at this point, Moore had committed no**
10 **crime and officers had no probable cause to arrest.**

11 The magistrate ruled, on the evidence up to this point, that Moore had
12 not said or done anything that constituted a crime for which he could be
13 arrested,³¹ and the officers had no authority to arrest Moore for a
14 violation of the temporary restraining order absent a warrant.³² The
15 magistrate also noted the absence of a citizen’s arrest form, and that
16 police had only started interviewing Choy before they went to Moore.³³

17 **G. Moore, repeatedly telling police to leave, opens his gate and**
18 **stands on his front door landing.**

19 After demanding 38 times that the officers cease trespassing on his
20 property, Moore opened the gate to his house and stated, “Get the fuck
21

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23 _____
24 ²⁵ Cha BC Stat 4:28-6:1; Cha BC Video 12:19:44-12:19:50.

25 ²⁶ Cha BC Stat 6:4-5; Cha BC Video 12:19:44-12:20:13.

26 ²⁷ Patino BC Stat 5:5.

27 ²⁸ Cha BC Video 12:20:13-12:20:24.

28 ²⁹ Cha BC Stat 6:11-16; 7:10-23; 8:10-14; Cha BC Video 12:21:38-41.

29 ³⁰ Cha BC Stat 1:12:8:15.

30 ³¹ RT 258:22-24.

31 ³² RT 259:17-21.

32 ³³ RT 194:15-19.

1 off my stair, Get off my stair.”³⁴ Moore remained on the landing in front
2 and continually demanded that the officers get off his stairs.³⁵

3 **H. Officers initiate force, pepper spraying Moore, who retreats into**
4 **his home.**

5 Officers threatened to pepper spray Moore.³⁶ Moore waved his hand
6 and continued to protest to the officers presence, saying, “Fuck your
7 spray, get off my stair.”³⁷ The officers then pepper sprayed him³⁸ and
8 Moore again retreated into his house.³⁹

9 **I. Officers order Moore to keep his gate open.**

10 Patino ordered Moore to keep his front gate open.⁴⁰ When Patino saw
11 Moore whimper and try to get the spray off him, they moved in to arrest
12 him.⁴¹ As officers rushed Moore, Moore put his foot up in front of them.⁴²
13 Moore again retreated into his house; Cha and Patino retreated down the
14 stairs a second time.⁴³

15
16 **J. Police ascend the stairs a third time, carrying on their demands**
17 **and battering Moore with batons; Moore continues to tell them to**
18 **leave, the encounter turns violent, and the incident ends with Cha**
19 **shooting Moore twice.**

20 The events that followed need not be described in detail. Suffice it to
21 say, the officers did not leave, but continued to demand that Moore come

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23 ³⁴ Cha BC Stat 8:15-20.

24 ³⁵ Cha BC Video 12:21:45-49.

25 ³⁶ Cha BC Stat 8:19-23.

26 ³⁷ Cha BC Video 12:21:45-49.

27 ³⁸ Cha BC Video 12:21:47-50.

28 ³⁹ Cha BC Video 12:21:47:50.

⁴⁰ Cha BC Video 12:21:49-51; Cha BC Stat 8:25.

⁴¹ Patino Int Stat 8:12-16.

⁴² Cha BC Video 12:21:50-52.

⁴³ Cha BC Video 12:21:52-12:22:00.

1 outside so they could arrest him.⁴⁴ Moore came to the gate to have Cha
2 shine a flashlight in his eyes, while both officers ordered him out,
3 threatening to break the lock and kick the gate open.⁴⁵ After continued
4 back and forth between Moore and the officers, Moore came onto the
5 steps, the officers hit him with batons, Moore allegedly kicked at and
6 punched Patino, causing him to fall down the stairs, and Cha fired two
7 gunshots at Moore, both hitting him, bringing the incident to an end.⁴⁶

8 **Argument**

9 **1. Standard of review.**

10 The court must grant a motion to set aside under section 995 if the
11 defendant was committed without reasonable or probable cause.⁴⁷
12 Reasonable or probable cause must be based on sufficient competent
13 evidence to believe that the defendant committed a crime.⁴⁸ It does not
14 exist when the prosecution fails to prove an essential element of the
15 crime charged.⁴⁹

16 Though the evidence need not be sufficient to support a conviction,⁵⁰
17 the state must produce some evidence as to each and every element of
18 the charged offenses.⁵¹ The magistrate may consider circumstantial
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23 ⁴⁴ Cha BC Stat 10:10-15; 0:22-23; Cha BC Video 12:23:51-56.

24 ⁴⁵ Cha BC Video 12:23:55-12:24:01.

25 ⁴⁶ See Cha BC Video 12:24:01-55; Cha BC Stat 11:16-19, 13:16, 15:8-12;
26 Patino Int Stat 4:15-16; 10:17-20; Cha Interview Statement 17:13-15.

27 ⁴⁷ Pen. Code, §995; *People v. Sup. Court (Mendella)* (1983) 33 Cal.3d 754.

28 ⁴⁸ *People v. Lopez* (1975) 52 Cal.App.3d 263.

⁴⁹ *Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1148.

⁵⁰ *Rayyis v. Superior Court* (2005) 133 Cal.App.4th 138, 150.

⁵¹ *People v. Chapple* (2006) 138 Cal.App.4th 540, 545; *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 148-149.

1 evidence, but all inferences must be reasonable,⁵² and inferences derived
2 from speculation, conjecture, or guesswork must be discarded.⁵³

3 **2. Without evidence that Officers Patino and Cha were**
4 **lawfully performing their duties, the officer assault and**
5 **resisting charges fail.**

6 Moore challenges the charges of assault and resisting officers, because
7 part of the corpus delicti of those crimes is the requirement that the
8 officers were engaged in lawful performance of their duties at the time.

9 Here, the officers had no reasonable suspicion, let alone probable
10 cause, that Moore had committed a crime. While they could lawfully seek
11 consensual contact—which they did initially—once Moore made it clear
12 (unmistakably so) that he wanted to terminate the encounter, the officers
13 could not do what they did—linger at his doorstep, order him to come out
14 of his house, or demand that he speak with them. This unlawful police
15 behavior continued until the acts underlying the charges here occurred
16 and the police shot Moore. Their unlawful conduct defeats the charges.

17 **A. Elements: officers engaged in lawful performance of duties.**

18 Moore is charged with violations of Penal Code sections 245(c), 243(d),
19 243(c)(2), 69(a), 148.10(a), and 148(a)(1). All of these crimes require as an
20 element that the officers were engaged in the performance of their duties
21 at the time of the alleged offense.⁵⁴

22 Specifically, when a statute makes it a crime to commit any act
23 against a peace officer engaged in the performance of his duties—as the
24 charges here do—part of the corpus delicti of the offense is that the

25 ⁵² *Williams, supra*, 71 Cal.2d at 1144.

26 ⁵³ *Birt v. Superior Court* (1973) 34 Cal.App.3d 934.

27 ⁵⁴ See: 1-800 CALCRIM 860 (2017)—§ 245(c); 1-800 CALCRIM 945
28 (2017)— § 243(c)(2); 2-2600 CALCRIM 2652 (2017)— § 69(a); 2-2600
CALCRIM 2655 (2017)— § 148.10(a); 2-2600 CALCRIM 2656 (2017)— §
148(a)(1).

1 officer was acting *lawfully* at the time of the offense.⁵⁵ This rule rests on
2 the premise that “because an officer has no duty to take illegal action, he
3 or she is not engaged in ‘duties,’ for purposes of an offense defined in
4 such terms, if the officer's conduct is unlawful... .”⁵⁶

5 Thus, a person may not be convicted of an offense when that crime
6 includes the element of an officer performing duties unless there is
7 sufficient proof that “the officer was acting lawfully at the time the
8 offense against him was committed.”⁵⁷ Here, as shown below, the officers
9 acted unlawfully when, after Moore made it clear he wanted to terminate
10 the middle-of-the night encounter with police, they refused to leave him
11 alone and repeatedly told him to come outside.

12 **B. The officers were not lawfully performing any duty at Moore’s**
13 **doorstep when the incident occurred, because they had quickly**
14 **turned a potentially legal knock and talk into an unlawful seizure.**

15 Moore was seized under the Fourth Amendment when the officers—
16 without a warrant or probable cause—continued to demand answers
17 from Moore after he had clearly communicated his wish to terminate any
18 consensual encounter. The officers’ conduct, in returning to Moore’s
19 front door and demanding contact, went far beyond what a lawful
20 consensual “knock and talk” would permit, resulting in a seizure.

21 **(1) Police lacked probable cause to arrest when they knocked on**
22 **Moore’s door.**

23 Probable cause exists when the facts known to the arresting officer
24 would persuade someone of “reasonable caution” that the person to be

25 ⁵⁵ *People v. Cruz* (2008) 44 Cal.4th 636, 673; *In re Chase C.* (2015) 243
26 Cal.App.4th 107, 113-114; *Garcia v. Superior Court* (2009) 177
27 Cal.App.4th 803, 818-819; *In re Joseph F.* (2000) 85 Cal.App.4th 975,
28 982.

⁵⁶ *In re Manuel G.* (1997) 16 Cal.4th 805, 815.

⁵⁷ *In re Joseph F.* (2000) 85 Cal.App.4th 975, 982.

1 arrested has committed a crime.⁵⁸ In California, police may only arrest
2 for a misdemeanor if committed in their presence⁵⁹ or upon a citizen's
3 arrest.⁶⁰ The police lacked both here, as the magistrate noted.⁶¹ While the
4 magistrate found that Moore was loud, agitated, and verbally abusive,⁶²
5 his behavior constituted no crime,⁶³ and he was entirely within his rights
6 to protest their presence, curse at the officers, and refuse to answer their
7 questions.⁶⁴ So, what might have been merely a loud bump in the night
8 was leveraged into Moore's shooting based of what seems to be a
9 personal and escalatory embroilment.

10 **(2) A "knock and talk" encounter is lawful only so long as it is**
11 **consensual.**

12 The Fourth Amendment prohibits the warrantless seizure of a person
13 at home, absent consent or exigent circumstances.⁶⁵ The Supreme Court
14 continues to uphold the principle that the area around the home is
15 "intimately linked to the home, both physically and psychologically," and
16 is where "privacy expectations are most heightened."⁶⁶ A person's front
17 doorstep is part of that protected area.⁶⁷

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21 ⁵⁸ *People v. Celis* (2004) 33 Cal.4th 667, 673, citing *Dunaway v. New*
York (1979) 442 U.S. 200, 208, fn. 9.

22 ⁵⁹ Pen. Code, § 836(a)(1).

23 ⁶⁰ Pen. Code, § 834.

24 ⁶¹ RT 259:17-21; 194:15-19.

25 ⁶² RT 256:20-25.

26 ⁶³ RT 257:4-9.

27 ⁶⁴ RT 257:18-22.

28 ⁶⁵ *Payton v. New York* (1980) 445 US 573, 576; *People v. Ramey* (1976)
16 C3d 263, 276; see *People v. Bennett* (1998) 17 C4th 373, 384.

⁶⁶ *Florida v. Jardines* (2013) 133 S. Ct. 1409, 1415, quoting *California v.*
Ciraolo (1986) 476 U.S. 207, 213.

⁶⁷ *United States v. Lundin* (2016) 817 F.3d 1151, 1158.

1 Still, the police can go to a person’s front door and seek a voluntary
2 interview—known as a “knock and talk”—subject to firmly-rooted
3 constitutional limits.⁶⁸ One limitation is that officers may seek consent-
4 based encounters only if they are lawfully present in the place where the
5 consensual encounter occurs.⁶⁹ And when police without a warrant
6 knock on a door, they may do no more than a private citizen might do;
7 and whether the person knocking on the door and asking for a
8 conversation is a police officer or a private citizen, the occupant has no
9 obligation to open the door or to speak.⁷⁰

10 The 9th Circuit, in the 2000 *Cormier*⁷¹ case, discussed the settled
11 constitutional limits of a valid “knock and talk”: “*absent express orders*
12 *from the person in possession against any possible trespass*” it is not a
13 privacy violation for anyone, including police, to “openly and peaceably,
14 *at high noon*, to walk up the steps and knock on the front door” of a
15 citizen with the “honest intent of asking questions of the occupant.”⁷² If
16 the occupant chooses to open the door and talk to the officers, he need
17 not allow the officers to enter and he “may refuse to answer any
18 questions at any time.”⁷³ Only recently the 9th Circuit held that a late-
19 night “knock and talk” on a front porch was invalid.⁷⁴

20 Further, what may start as a valid “knock and talk” turns into an
21 illegal seizure when, taking into account all the circumstances
22 surrounding the encounter, the police conduct would communicate to a
23

24 ⁶⁸ *United States v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1109.

25 ⁶⁹ *Kentucky v. King* (2011) 563 U.S. 452, 463.

26 ⁷⁰ *Id.* at 469-470, citing *Florida v. Royer* (1983) 460 U.S. 491, 497-498;
People v Poole (1986) 182 Cal.App.3d 1004, 1012.

27 ⁷¹ *United States v. Cormier, supra*, 220 F.3d 1103.

28 ⁷² *Id.* at 1109, quoting *Davis v. U.S.* (9th Cir. 1964) 327 F.2d 301, 303.

⁷³ *Kentucky v. King, supra*, 563 U.S. at 470.

⁷⁴ *Lundin, supra*, 817 F.3d at 1158.

1 reasonable person that he was not at liberty to ignore the police presence
2 and go about his or her business.⁷⁵ And nocturnal encounters at a home
3 are particularly suspect, courts having “long recognized that police
4 encounters at a person’s dwelling in the middle of the night are especially
5 intrusive.”⁷⁶

6 One way to turn an ordinary consensual encounter into one requiring
7 objective suspicion is when police create coercive circumstances.⁷⁷ An
8 example of coercive circumstances is “unreasonable persistence by the
9 officers,” as seen in the federal 1997 *Jerez* case.⁷⁸ There, officers knocked
10 on a motel room in the middle of the night without a warrant or
11 reasonable suspicion, and they persistently knocked on the door for
12 “three full minutes” and commanded the occupants to open the door.⁷⁹
13 The court found that under the totality of the circumstances the officers’
14 “persistence, in the face of the refusal to admit, transformed what began
15 as an attempt to engage in a consensual encounter into an investigatory
16 stop.”⁸⁰ The 7th Circuit Court of Appeal explained that a reasonable
17 person in *Jerez*’s position would not have felt free to ignore the knocking
18 police and continue about his business, but rather could only have
19 concluded that the police would not leave unless the door was opened.
20 Thus, *Jerez* was seized within the meaning of the Fourth Amendment
21 and, lacking sufficient cause, the seizure was unlawful and the
22 conviction reversed.⁸¹

23 ⁷⁵ *Fla. v. Bostick, supra*, 501 U.S. at 437; *U.S. v. Cormier, supra*, 220 F.3d
24 at 1108-1111.

25 ⁷⁶ *United States v. Jerez* (7th Cir. 1997) 108 F.3d 684, 690.

26 ⁷⁷ *Cormier, supra*, 220 F.3d at 1109; *Davis, supra*, 327 F.2d at 303-04.

27 ⁷⁸ *Jerez, supra*, 108 F.3d at 691-92, cited as an example by the 9th
28 Circuit in *United States v. Cormier, supra*, 220 F.3d at 1109.

⁷⁹ *Jerez, supra*, 108 F.3d at 690-692.

⁸⁰ *Id.* at 692.

⁸¹ *Id.* at 696.

1 Here, as shown next, to the extent the officers initiated a *permissible*
2 “knock and talk” when they first knocked on Moore’s door, the encounter
3 quickly devolved into an unlawful seizure when the officers unreasonably
4 persisted in seeking an interview, despite Moore’s multiple, loud, and
5 explicitly clear messages that he wanted to be left alone.

6 **(3) Because the officers refused to leave and continued to demand**
7 **contact long after Moore had refused, police had unlawfully**
8 **seized Moore at the time of the charged assaults and resistance;**
9 **thus, those charges fail.**

10 Here, the officers arrived without a warrant, probable cause, or
11 reasonable suspicion. Under these circumstances, they could arguably
12 seek a *consensual* encounter—a “knock and talk”—but no more. Indeed,
13 the middle-of-the-night visit, by virtue of the timing alone, was
14 unreasonable.

15 But, to the extent the officers’ *initial* attempt at a consensual
16 encounter could constitute a lawful “knock and talk” they far exceeded
17 constitutionally acceptable police conduct when Moore made it
18 exceedingly clear (with explicit language) that he did not consent to their
19 presence and had no desire to engage in conversation. At that point, the
20 only lawful course of action for the officers was to leave and, if they could
21 accumulate evidence of a crime, return with a warrant. They could not
22 persist and trespass with unreasonable demands that Moore answer
23 questions and come outside.

24 After Moore made clear his desire to be left alone, the officers had no
25 right to be there. Particularly egregious is that the officers used these
26 persistent and coercive tactics at the entryway to Moore’s home. The
27 physical trespass of a home is crucial to the violation. As the late Justice
28 Scalia explained in the 2013 *Florida v. Jardines*⁸² decision, “the home is

⁸² *Florida v. Jardines, supra*, 133 S.Ct. at 1414-1415.

1 first among equals. At the [Fourth] Amendment's 'very core' stands 'the
2 right of a man to retreat into his own home and there be free from
3 unreasonable governmental intrusion.' ”⁸³ Indeed, Justice Scalia might
4 have presciently described the case here: “*This right would be of little
5 practical value if the State's agents could stand in a home's porch or side
6 garden and trawl for evidence with impunity...*”⁸⁴

7 Here, officers far exceeded a permissible, consensual “knock and talk.”
8 As in *Jerez*⁸⁵ and *Lundin*,⁸⁶ they approached at night, were unreasonably
9 persistent and demanded that Moore talk to them and come out of his
10 home. Moreover, there were very “express orders from the person in
11 possession”—Moore—against trespass, negating any argument that the
12 police here were merely having a consensual knock and talk, or that they
13 could even lawfully be at his front door at that point.⁸⁷ No reasonable
14 person could view this as consensual encounter, with police conduct
15 plainly communicating to Moore that he was not free to ignore them and
16 go about his business.⁸⁸

17 Even if the officers’ attempted contact was initially valid, once Moore
18 refused to talk and told them to leave, the police moved into unlawful
19 territory and were no longer performing their lawful duties. Thus, Counts
20 1, 2, 4, 5, 6, 7, 8, and 9, all requiring lawful performance of duties as an
21 element, must be set aside.
22
23

24 ⁸³ *Jardines, supra*, 133 S.Ct. at 1414.

25 ⁸⁴ *Id.* at 1414, quoting *Silverman v. United States* (1961) 365 U.S. 505,
511.

26 ⁸⁵ *Jerez, supra*, 108 F.3d at 692.

27 ⁸⁶ *Lundin, supra*, 817 F.3d 1151.

28 ⁸⁷ *Davis, supra*, 327 F.2d at 303; *Cormier, supra*, 220 F.3d at 1109.

⁸⁸ *Fla. v. Bostick, supra*, 501 U.S. at 437; *U.S. v. Cormier, supra*, 220 F.3d
at 1108-1111.

1
2 **Conclusion**

3 The officers were not lawfully engaged in the performance of their
4 duties when—after dozens of explicit requests to leave and refusals to
5 engage—they returned to Moore’s doorstep and persisted in their efforts,
6 refusing to leave and ordering him to come out. Under the Fourth
7 Amendment to the United States Constitution, Moore was unlawfully
8 seized without a warrant, or sufficient cause.

9 Because the acts underlying Counts 1, 2, 4, 5, 6, 7, 8, and 9 all
10 require evidence of lawful police activity—absent here—insufficient
11 evidence supports the charges.

12 Dated: April 10, 2017

Respectfully submitted,

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15 _____
16 Brian Pearlman
17 Deputy Public Defender
18 Attorney for Sean Moore
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1 **Proof of Service**

2
3 I say:

4 I am over eighteen years of age and not a party to the above action.
5 My business address is 555 Seventh Street, San Francisco, California
6 94103.

7 I personally caused to be served, copies of the attached on the
8 following:

9
10 San Francisco District Attorney, 3rd Floor
11 850 Bryant Street
12 San Francisco, CA 94103
Attn: ADA

13 I declare under penalty of perjury that the foregoing is true and
14 correct.

15 Executed on _____ in San Francisco, California.

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Exhibit A: Information

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