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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. VANCE LARCELL RIDER, Defendant and Appellant.	A097996 (San Mateo County Super. Ct. No. SC047362)

A jury found that defendant Vance Larcell Rider had failed to register as a convicted sex offender as required by Penal Code section 290.[1] After finding true allegations in the information that defendant had five prior felony convictions, the trial court sentenced him to a term of twenty-five years to life. On this timely appeal by defendant, we affirm.

BACKGROUND

The pertinent circumstances are easily recounted and largely without dispute.

Defendant stipulated that he "has been previously convicted of a felony sexual offense that requires him to register as a sex offender, pursuant to Penal Code section 290." People's exhibit No. 6—which was admitted in evidence and a copy of which is in the record on appeal—consists of a number of defendant's registrations with various law enforcement agencies dating from 1994. On several of the forms for change of address defendant put down "transient" for his new address. The last registration from defendant

[1] Statutory references are to the Penal Code unless otherwise indicated.

was in January of 1999, giving an address in Oakland. In March of 2000, police discovered defendant in a National Guard armory in San Mateo, which was used as a shelter for the homeless. Only allowed to stay in the armory at nights, defendant had begun sleeping there in November of 1999.

The forms comprising People's exhibit No. 6 show defendant's birthday as January 4. The January 1999 registration contains defendant's certification under penalty of perjury as follows: "I have been notified of my duty to register as a convicted sex offender under PC §290 . . . . I have read, understood, and initialed each requirement listed below: [¶] . . . [¶] Upon coming into, or when changing my residence or location within, any city, county, or city and county in which I am residing or located, I must register with the law enforcement agency having jurisdiction over my residence or location . . . as a sex offender, within five (5) working days. [¶] . . . [¶] Every year within five (5) working days of my birthday, I must update my address, name, and vehicle information with the registering agency."

One of the two officers who met defendant at the armory testified that a radio check returned the information that defendant "may not be in compliance" with his registration requirements. When asked when he had last registered, defendant replied "[O]n my birthday" in "January of 1999." Defendant told the officer he had last registered in Oakland, but he was "no longer living there." When asked for the card all sex offender registrants are required to carry,[2] defendant told the officers it had been mailed to his mother's house; upon checking his wallet defendant produced an expired registration card. Records of the Oakland Police Department showed that defendant had not registered in that city since January of 1999. The San Mateo Police Department had no record of defendant registering between November of 1999 and March of 2000.

Defendant did not testify or call witnesses on his behalf. At the start of trial he indicated that he would call Dr. William Lynch to testify for him. The prosecution asked

[2] During his closing argument the prosecutor described the card as follows: "[O]n the back of this card are the sex registration requirements, within five days of moving into the city, five days of your birthday. There it is in black and white . . . . [D]efendant is carrying this with him on a daily basis."

for an offer of proof in order to establish the scope of Lynch's testimony "because issues related to mental defect, mental illness, . . . under Penal Code Section 28, are not admissible. There are very significant confines on how that sort of testimony can be used in cases such as this, a general intent crime, and I believe [defense counsel] may be trying to use a psychologist to introduce evidence that is not admissible pursuant to Penal Code Section 28 . . . ." Defense counsel responded: "I've given [the] people a 13-page report which indicates my client's I.Q., his memory problems, and brain damage. That's what I would have Dr. Lynch testify about. It goes to whether there was a willful violation of Penal Code section 290. [¶] The California Supreme Court's most recent case of Garcia [*People v. Garcia* (2001) 25 Cal.4th 744] states the word 'willfully' implies purpose . . . and a person's intention, I think their ability for memory and recall, and brain damage that they have suffered, can go directly to that issue."

At the hearing conducted pursuant to Evidence Code section 402 at the prosecution's request, psychologist Dr. William Lynch testified that he is chief of the brain injury rehabilitation unit at a Veterans Administration hospital. He examined defendant and determined that he has an I.Q. of 69, "which is designated extremely low, . . . the lowest rating of an I.Q. score. . . . [¶] . . . his score was lower than 98 percent of the population." For a person with such a score "there will be difficulty with memory, planning, problem-solving, the kinds of things that generally require more sophisticated brain functioning and overall intellectual sophistication. A person can carry on their everyday life, but what they tend not to do is project very far into the future in terms of planning, they tend not to anticipate multiple consequences of their actions . . . ." Such a person can follow simple instructions "if . . . stated very clearly" and remember dates "if the date is extremely significant, possibly, but I think there's a tendency to be casual about the specificity of dates and to possibly confuse them, because one of the problems you have as the I.Q. score dips that low is in keeping things in proper sequence as you may remember some details but you might remember them out of the actual order." The passage of time would result in "loss . . . or distortion" of an instruction to do some act in

the future. Lynch tested defendant's memory and found it to be "on the same scale," that is "he tended to lose information over time."

On cross-examination, Dr. Lynch testified that defendant had no trouble recalling his birthday, but was not otherwise "a good historian" of events in his life. Asked about the registration requirements recited on the forms in People's exhibit No. 6, Dr. Lynch testified that defendant could follow such instructions "If the information was given to him in writing, somebody sat down with him, went over it, under the circumstance[s] of that, but I think an instruction that's given to him once and verbally would be at great risk of being forgotten or distorted or misunderstood, based on what I found."

After hearing argument from the parties, the court granted the prosecution's "motion in limine to exclude the testimony of Dr. Lynch" because "it appears that his testimony relates to an alleged mental defect," a subject prohibited by section 28.

At the close of the prosecution's case-in-chief, defendant's counsel asked the court to reconsider its ruling precluding Dr. Lynch from testifying. The court declined to change its ruling. The defense rested without calling any witnesses or presenting any evidence.

The jury was instructed on section 290 as follows: "In the crime charged in this case, namely, a violation of Section 290(g)(2) of the Penal Code, there must exist a union or joint operation of act or conduct and general criminal intent. General intent doesn't require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful. [¶] Every person who's required to register as a sex offender based on a felony conviction shall, for the rest of his life, register with the chief of police in the city in which he resides, within five working days of coming into that city. A registrant is also required to register annually within five days of his birthday. A willful failure to register is a violation of Penal Code section 290(g)(2). [¶] . . . [¶] In order to prove the crime of violating Section 290(g)(2) of the Penal Code, each of the following elements must be proved: one, the defendant was required to register as a sex offender pursuant to Penal Code Section 290 due to a prior felony

conviction for a sexual offense; two, the defendant had actual knowledge of his duty to register; three, the defendant was residing in the City of San Mateo; four, the defendant willfully failed to register with the San Mateo Police Department within five working days of moving into San Mateo; or willfully failed to register with the San Mateo Police Department within five working days of his birthday."

The jury was also instructed with CALJIC Nos. 1.20 and 1.21 which defined "willfully" and "knowingly" as follows: "The word 'willfully' when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question. The word 'willfully' does not require any intent to violate the law, or to injure another, or to acquire any advantage." "The word 'knowingly' means with knowledge of the existence of the facts in question. Knowledge of the unlawfulness of any act or omission is not required. A requirement of knowledge does not mean that the act must be done with any specific intent."

After less than two hours of deliberations, the jury requested written copies of the instructions. Less than an hour later, the jury requested "can we get a clearer definition" of the word "intentionally"; the court responded that "I am unable to do so." About 90 minutes later the jury requested—and received—a "read back" of the testimony by the officer who arrested defendant. Deliberations were adjourned for the day about an hour later. The following day, after about an hour of deliberating, the jury sent the court a note asking "Can a person do something willfully but not consciously?" After consulting with counsel in an unreported discussion, the trial court replied: "The question cannot be answered in that context, but I do invite your attention to the definition of 'willfully' in the pertinent instruction and, if it aids you, to the definition of 'knowingly' in that pertinent instruction."

Less than an hour later the jury asked "If a person fails to perform an act they know they must do, is that a willful act?" The court replied: "Again, you must use the pertinent instruction for an answer to the question." It appears that after 20 minutes, the jury advised that it was deadlocked. After consulting with counsel, the court then sent the following to the jury: "In further response to the attached question, please be advised

as follows: [¶] The word 'willfully' implies a purpose or willingness to make the omission. One cannot purposefully fail to perform an act without knowing what act is required to be performed. The word 'willfully' imports a requirement that the person know what he is doing."

Approximately three hours later (following the noon recess), and still on the second day of deliberations, the jury asked the court "Is knowing what act is required to be performed sufficient to prove that the failure of the act was willful?" Over objection by the defense that this answer was covered by the court's most recent response, the court told the jury that "If a person knows what act is required to be performed when he fails to perform such act, a failure to perform such act is willful." Approximately 10 minutes later the jury determined that defendant was guilty.

The next day the issue of defendant's priors was tried by the court. The court found that, for purposes of the so-called three strikes law, defendant had prior felony convictions for oral copulation, attempted manslaughter, and three robberies. In light of these findings, defendant was sentenced to state prison for a term of 25 years to life.

Defendant filed a timely notice of appeal.

REVIEW

As a convicted sex offender, defendant was required by section 290 "for the rest of his . . . life while residing in, or . . . while located within California, . . . to register with the chief of police of the city in which he . . . is residing, or . . . located, . . . within five working days of coming into, or changing his . . . residence or location within, any city, county, or city and county . . . ." (§ 290, subd. (a)(1)(A).) "Beginning on his . . . first birthday following registration or change of address, the person shall be required to register annually, within five working days of his . . . birthday, to update his . . . registration with the entities described in subparagraph (A)." (*Id*., subd. (a)(1)(D).) The precise provision defendant was convicted of violating specifies that "any person who is required to register under this section based on a felony conviction . . . who willfully violates any requirement of this section . . . is guilty of a felony . . . ." (*Id*., subd. (g)(2).)

People v. Garcia, *supra*, 25 Cal.4th 744, was the subject of much discussion below and in the briefs on this appeal. The issue in *Garcia* was the correctness of instructions, which did not tell the jury that a willful failure to register required a finding that the defendant actually knew that he was obligated to register. The Attorney General argued that the actual notice of the registration requirement given to the defendant by parole authorities when he was released from prison, was sufficient, and actual knowledge was not an element of the offense. The Supreme Court disagreed: "In a case like this, involving a *failure* to act, we believe section 290 requires the defendant to actually know of the duty to act. . . . [A] sex offender is guilty of a felony only if he 'willfully violates' the registration or notification provisions of section 290. [Citations.] The word 'willfully' implies a 'purpose of willingness' to make the omission. [Citation.] Logically one cannot purposefully fail to perform an act without knowing what act is required to be performed. As stated in *People v. Honig* (1996) 48 Cal.App.4th 289, 334 . . . , 'the term "willfully" . . . imports a requirement that "the person knows what he is doing." [Citation.] Consistent with that requirement, and in appropriate cases, knowledge has been held to be a concomitant of willfulness. [Fn. omitted.]' Accordingly, a violation of section 290 requires actual knowledge of the duty to register." (*Garcia,* at pp. 751-752.) "In this case, the court instructed the jury (based on the definition in § 7) that 'The word "willfully" when applied to the intent with which an act is done or omitted means with a purpose or willingness . . . to make the omission in question. The word "willfully" does not require any intent to violate the law . . . . ' (CALJIC No. 1.20.) Thus this instruction correctly requires a showing of purpose or willingness to act, or (as in this case) fail to act. But, as we have explained, the instruction was incomplete in failing clearly to require actual knowledge of the registration requirement." (*Garcia,* at pp. 753-754.)

Consistent with *Garcia*, the trial court here instructed the jury that defendant could not be convicted unless the jury determined that he "had actual knowledge of his duty to register." Defendant, however, argues that a number of evidentiary and instructional

errors relating to the mental state required for a violation of section 290 were committed and require reversal.

I

Defendant's primary contention is that the trial court committed prejudicial error of constitutional dimension when it excluded the proposed testimony of Dr. Lynch.

The basis for the trial court's ruling was that the testimony was not permitted by section 28, which provides in pertinent part: "(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged. [¶] (b) As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action . . . ." Also relevant is section 29, which provides: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." In operation these statutes mean that "Expert opinion on whether a defendant had the capacity to form a mental state that is an element of a charged offense or actually did form such intent is not admissible at the guilt phase of a trial." (*People v. Coddington* (2000) 23 Cal.4th 529, 582.)

Although the matter is not completely free from doubt, we cannot conclude that the trial court erred in treating Dr. Lynch's proposed testimony as proscribed by section 28. A proper appreciation of the context establishes that the subject of Dr. Lynch's testimony was defendant's "capacity to form any mental state," specifically "knowledge"

within the meaning of section 28. Dr. Lynch did not ask defendant about why he did not register; when asked by the prosecutor, "Did you talk with the defendant at all about his obligations to register as a sex offender?" Dr. Lynch replied, "No." Lynch tested defendant for his "overall intellectual ability." Dr. Lynch testified about the "parameter or functioning" possessed by persons with defendant's I.Q., with particular attention to their ability to remember what they have been told. He concluded that defendant's memory "was consistent I think with what you would have predicted from the I.Q. tests." He did, however, discover that defendant had no hesitation in remembering the date of his birth. There is no evidence that Dr. Lynch questioned defendant about why he did not register in either Alameda or San Mateo Counties for the 15-month period between January 1999 and March 2000, and no indication that defendant himself raised the issue. In other words, there was no evidence that defendant had in fact failed to register for more than a year due to his impaired memory functioning. It thus appears that the general subject of Dr. Lynch's testimony was, in the abstract, the memory *capacity* of persons with I.Q.'s comparable to defendant. The testimony was consequently within the prohibitions against "[e]vidence . . . to . . . negate the capacity to form any mental state, including . . . knowledge" (§ 28, subd. (a)) by an expert (§ 29)).

Although defendant views the ruling as denying him his right under the United States Constitution to present a defense, our Supreme Court has concluded otherwise: "Sections 28 and 29 do not preclude offering as a defense the absence of a mental state that is an element of a charged offense or presenting evidence in support of that defense. They preclude only expert opinion that the element was not present." (*People v. Coddington*, *supra*, 23 Cal.4th 529, 583.) These statutes did not preclude defendant from testifying himself, nor presenting corroborating testimony by nonexperts, detailing any previous incidents of forgetfulness, to attempt to establish that his failure to register was attributable to his inability to remember his obligation to register. That did not occur.

Thus we need not decide whether *People v. Cox* (2002) 94 Cal.App.4th 1371 correctly holds that forgetting to register constitutes a defense.[3]

II

The court in *Garcia* also concluded that the trial court there "erred in giving an 'ignorance of the law is no excuse' instruction (CALJIC No. 4.36), which on its face would allow the jury to convict defendant of failing to register even if he were unaware of his obligation to do so. . . . In the registration act context, the jury must find actual knowledge of the act's legal requirements." (*People v. Garcia*, *supra*, 25 Cal.4th 744, 754.) The trial court did not give CALJIC No. 4.36, but it did give CALJIC No. 3.30, which told the jury that "When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful." Defendant argues that CALJIC No. 3.30 is "a comparable 'ignorance of the law is no excuse' instruction" and subject to the same infirmities as the *Garcia* court found in CALJIC No. 4.36.

The comparison between CALJIC Nos. 3.30 and 4.56 was first drawn by Division Two of this Court in *People v. Edgar* (2002) 104 Cal.App.4th 210. The court determined that the use of No. 3.30 constituted reversible error, but this conclusion was made in a far different context—unlike here, but like *Garcia*, the jury in *Edgar* had not been instructed that the defendant must be found to have had actual knowledge of the registration requirements. (*Edgar, supra,* at pp. 218-219.)

Defendant appears to read *Garcia* as standing for the proposition that the giving of either CALJIC No. 4.56, or by analogy, CALJIC No. 3.30 is a separate ground of instructional error. A close reading of *Garcia* and *Edgar* shows that both courts examined the issue of CALJIC No. 4.56 where the jury received no instruction on the requirement of actual knowledge of the registration requirements. There, the use of CALJIC Nos. 4.56 and 3.30 only aggravated that omission. In this case, however, the

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[3] That issue is presently before our Supreme Court. (*People v. Moss* (2003) 109 Cal.App.4th 56, review granted August 13, 2003, S117313; *People v. Barker* (2003) 107 Cal.App.4th 147, review granted June 11, 2003, S115438.)

jury *was* instructed on the actual knowledge requirement. The correctness of the instructions given the jury is to be determined by examining all of the instructions, not just CALJIC No. 3.30. (E.g., *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248 and decisions cited.) It is clear from the instruction enumerating the requirements for conviction under section 290 that the jury was unambiguously told that they could not find defendant guilty unless they concluded that he "had actual knowledge of his duty to register." The use of CALJIC No. 3.30 therefore does not qualify as reversible error.

Defendant also claims that giving CALJIC No. 1.20 defining "willfully" was, without modification, sufficiently erroneous as to require reversal. While it is true that, as noted in *Garcia* and *Edgar*, CALJIC No. 1.20 does not, by itself, advise the jury of the actual knowledge requirement in failure-to-register prosecutions, here the jury was expressly instructed that defendant could not be convicted unless the jury found that he "had actual knowledge of his duty to register."

III

Defendant contends that the trial court's instruction as to the "knowledge" element was inadequate in two ways.

He states the first in his brief as follows: "The court gave the jury one instruction as to both the offense of failing to 'register with the chief of police in the city in which he resides, within five working days of coming into that city' and the offense of failing to 'register annually, within 5 days of his birthday.' Here we are concerned with the first offense. The court also instructed the jury as to the meaning of 'residence'—that it 'means a temporary or permanent dwelling place, which one keeps and to which one intends to return, as opposed to a place where one rests or shelters during a trip or transient visit.' The court instructed the jury as to the 'knowledge' element of the offense simply that it must be proved that 'The defendant had actual knowledge of his duty to register.' [¶] The court did not instruct the jury that it had to be proved that appellant knew that he had a duty to register within five days of coming into a city in which he resided or, more importantly, that it had to be proved that he knew that this duty arose upon his coming into a city *and acquiring a temporary or permanent dwelling place*

which he kept and to which he intended to return, as opposed to a place where he rested or sheltered during a trip or transient visit. [¶] . . . Appellant cannot have willfully or purposefully have failed to register in San Mateo if he did not know that, legally, he was residing there." As to his second point, defendant contends that the jury was not told that he had to know that the annual update of his registration had to be done in San Mateo, not in Oakland.

Again, looking at the instructions as a whole, and how they would be reasonably construed by the jury (e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 963; *People v. Welch* (1999) 20 Cal.4th 701, 766), we discern no error. When the jury was told that conviction required that defendant had to have had "actual knowledge of his duty to register," that instruction would reasonably be construed as encompassing either his change of residence to San Mateo, his birthday in 2000, or both reasons giving rise to the "duty." "Residence" is not a technical term requiring definition. (See *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1216-1219.) There was no evidence that defendant was in effect maintaining dual residences in San Mateo and Oakland Counties. Moreover, because defendant did not register either in Oakland or in San Mateo, the issue is of no avail. (Cf. *People v. LeCorno* (2003) 109 Cal.App.4th 1058 [defendant had residence in San Francisco but often stayed at San Mateo work place].) It thus appears that the problems defendant now identifies are not intrinsic to the instructions, but assumed form only within the context of this case. Defendant is, therefore, challenging the instructions given as too general, incomplete, and lacking in clarity. That challenge has not been preserved for review because defendant did not request that the instructions be clarified. (E.g., *People v. Coddington*, *supra*, 23 Cal.4th 529, 603; *People v. Welch*, *supra*, at p. 757.)

IV

Defendant discerns a number of difficulties with the trial court's responses to the inquiries sent out by the jury once it started deliberating.

As noted above, the court made four responses to inquiries from the jury. As to the first three, the record does not establish that defendant either objected to the court's

responses or proposed different answers to the jury's questions. In these circumstances, the issue of the propriety of the court's first three responses has not been preserved for appeal. (E.g., *People v. Boyette* (2002) 29 Cal.4th 381, 430; *People v. Medina* (1990) 51 Cal.3d 870, 902.)

The court's fourth and final response requires different treatment. When the jury asked "Is knowing what act is required to be performed sufficient to prove that the failure of the act was willful?", the court met with counsel and discussed the situation, off the record. The reporter's transcript resumes with the court stating: "All right, on the record. Plaintiff proposes language, defendant has proposed language, the Court proposes to and will respond with the following answer, to wit, if a person knows what act is required when he fails to perform such act, and failure to perform such act is willful, defendant objects to that response." Defense counsel then explained his objection: "I believe the Court has already—the last question the jury asked rather was basically the same question. To this question, the Court responded with language that was directly out of *People v. Garcia* . . . . [¶] . . . I believe that that language was appropriate. I believe to go further and give you further answers to what is basically the same question is not appropriate."

According to defendant, "This response was error. It was a misunderstanding and distortion of *Garcia*'s holding that willfulness presumes knowledge. It turned that holding around and erroneously informed the jury that knowledge entails willfulness." As defendant reasons, the trial court was conflating the elements of knowledge and willfulness and in effect directing a verdict on willfulness. In the abstract, defendant's argument might seem to have merit. The actual language of *Garcia*, however, demonstrates that the trial court was not misreading the decision, but faithfully following it. In *Garcia*, our Supreme Court held: "A violation of section 290 requires actual knowledge of the duty to register. A jury may infer knowledge from notice, but notice alone does not necessarily satisfy the willfulness requirement. [¶] . . . Although notice alone does not satisfy the willfulness requirement, a jury may infer from proof of notice that the defendant did have actual knowledge, which *would* satisfy the requirement."

(*People v. Garcia*, *supra*, 25 Cal.4th 744, 752.) This is precisely the import of the trial court's final response to the jury.

V

Defendant's final contention is that his sentence of 25 years to life constitutes cruel and unusual punishment prohibited by the United States Constitution. Since defendant filed his opening brief, the United States Supreme Court has found that California's three strikes law does not violate the Eighth Amendment, even when the latest offense is for a nonviolent, nonserious crime such as petty theft. (*Lockyer v. Andrade* (2003) ___ U.S. ___ [123 S.Ct. 1166]; *Ewing v. California* (2003) ___ U.S. ___ [123 S.Ct. 1179].) Defendant makes much of the fact that a violation of section 290 was a misdemeanor until 1995, when the Legislature elevated it to a felony. Section 290, and laws like it, have been found not to violate ex post facto prohibitions. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 531-533; see *Smith v. Doe* (2003) ___ U.S. ___ [123 S.Ct. 1140].) " 'The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]' " (*Wright v. Superior Court*, *supra*, at p. 527; accord, *McKune v. Lile* (2002) 536 U.S. 24, 32-34.) A violation of section 290 thus entails a substantial risk of future harm. Together with defendant's history of other serious and violent crimes, his sentence does not qualify as grossly disproportionate.

The judgment of conviction is affirmed.

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Kay, P.J.

We concur:

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Reardon, J.

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Sepulveda, J.