APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANGEL MEZA MADUENO, Defendant and Appellant.	F074422 (Stanislaus Super. Ct. No. 1484515) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Joseph R. Distaso and Shawn D. Bessey, Judges.[1]

Kieran D.C. Manjarrez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Keith P. Sager, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/Defendant Angel Meza Madueno was charged and convicted of count I, using false documents to conceal his true citizenship or resident alien status (Pen. Code,

[1] Judge Distaso ruled on the pretrial motion to suppress evidence and Judge Bessey presided over the jury trial and sentencing hearing.

§ 114);[2] and count II, failing to annually update his registration as a convicted sex offender (§ 290.012, subd. (a)). The court found he had three prior strike convictions: two convictions for murder in 1980 (§ 187, subd. (a)); and a conviction in 2002 for commission of a forcible lewd act on a child (§ 288, subd. (b)(1)), which had resulted in the lifetime registration order. He was sentenced to the third strike term of 25 years to life for count I and a concurrent third strike term for count II.

On appeal, defendant contends the court erroneously denied his pretrial motion to suppress evidence and asserts he was subject to an illegal search and seizure. Defendant was charged in this case after he was contacted in the backyard of someone else's residence by a deputy sheriff. The deputy had responded to a dispatch about a suspicious car parked in front of that residence. The deputy determined no one was home, entered the backyard through an open gate, and found defendant in the backyard. In response to the deputy's questions, defendant said he was working there. He did not live at the residence and the homeowner was not present. The deputy asked for identification, and defendant presented photographic identifications that had someone else's pictures and were not in his true name. The deputy eventually determined defendant's true name and birthdate, that he was required to register as a sex offender, and that he had not registered.

Defendant asserts the deputy improperly entered the backyard without a warrant or exigent circumstances, and illegally detained him when he asked for his identification.

Defendant further argues there is insufficient evidence to support his conviction in count II for failing to register as a sex offender. Defendant asserts the trial evidence showed that he did not speak English, the prosecution failed to prove that he was notified in Spanish about the steps required to register, and his conviction in count II must be reversed since the statute requires that he had actual knowledge of the registration requirement and willfully failed to register.

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[2] All further statutory citations are to the Penal Code unless otherwise indicated.

Finally, defendant contends the court abused its discretion when it denied his request to dismiss his three prior strike convictions pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*), and the imposition of concurrent third strike terms for the two offenses in this case constituted cruel and/or unusual punishment.[3]

We find that the court properly denied defendant's suppression motion. While defendant was lawfully working in the backyard, he lacked a legitimate expectation of privacy in the backyard of another person's residence and cannot challenge the validity of the deputy's entry. We also find the deputy did not illegally detain defendant by initially asking for his identification, and defendant's presentation of obviously false photographic identification cards raised a reasonable suspicion for his temporary detention. Defendant's conviction for failing to register is supported by substantial evidence, and his third strike term is not unconstitutional.

PART I

TRIAL EVIDENCE[4]

Around 12:22 p.m. on September 11, 2012, Deputy Jesus Sigala of the Stanislaus County Sheriff's Department received a dispatch to investigate a suspicious person in a vehicle that was parked in a residential neighborhood on Sawgrass Court in Riverbank.

When Deputy Sigala arrived, he found the vehicle that had been described in the dispatch. No one was in the car. It was parked in front of a house. Sigala's partner knocked on the front door of the house and there was no answer.

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[3] Defendant's two current convictions in this case are for offenses that are not serious or violent felonies. However, he was ineligible for the ameliorative sentencing provisions of Proposition 36, the Three Strikes Reform Act and still subject to a third strike term because his prior strike convictions were for murder (§ 187, subd. (a)) and commission of a lewd and lascivious act with force upon a child under the age of 14 years (§ 288, subd. (b)(1)). (See *People v. Estrada* (2017) 3 Cal.5th 661, 667; § 1170.12, subds. (c)(2)(C)(iv)(I)–(IV).)

[4] The following facts are from the trial evidence. In part II, we discuss the evidence introduced at the hearing on defendant's motion to suppress.

Deputy Sigala testified that the side gate leading into the backyard was unlocked. He entered the backyard to conduct a "security check" and found defendant there. No one else was present.[5]

Defendant presents multiple identification cards

Deputy Sigala spoke to defendant in the backyard and asked what he was doing. Defendant appeared confused and Sigala believed he did not speak English. Sigala repeated his question in Spanish. Defendant replied in Spanish that he was fixing a fountain. Sigala saw a fountain in the backyard that had been disassembled and tools were near it. Sigala believed defendant was rebuilding the fountain.

Deputy Sigala asked defendant for his name. Defendant said he was "Luis Duarte Cendejas" and he was born on February 2, 1970. Sigala asked for an identification card. Defendant pulled out his wallet and produced a photocopy of a California driver's license for "Luis Duarte Cendejas." Sigala testified the photograph did not match defendant.

Deputy Sigala asked defendant about the photograph. Defendant said it was taken when he was younger. Sigala did not believe defendant because the date on the card indicated it had been taken in February 2011.

Deputy Sigala asked defendant for another form of identification. Defendant again reached into his wallet and produced a photocopy of a social security card for "Luis Duarte Cendejas" that did not have a photograph.

Deputy Sigala asked if he had another identification with a photograph. Defendant produced a photocopy of a resident alien card, again for "Luis Duarte Cendejas," born February 2, 1970. The photograph did not look like defendant. Sigala told defendant that the picture did not look like him, and defendant repeated that it was taken when he was younger.

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[5] As we will discuss below, at the evidentiary hearing on defendant's motion to suppress, Deputy Sigala gave additional details about the incident and explained the side gate to the backyard was "ajar or slightly open," and he walked through it and entered the backyard.

Deputy Sigala asked defendant if he had any other photographic identification. Defendant said no. Sigala asked defendant if he was willing to go to the police department to have his fingerprints taken to verify his identity.

Defendant then told Deputy Sigala that his name was "Angel Martinez." Defendant produced an employer identification card from Salinas Farm Labor Contractor's Incorporated for "Angel Martinez Silva," with a photograph that appeared to be him.

Deputy Sigala testified that defendant acted "slightly nervous" when he asked him for additional identification. Sigala decided to detain defendant to investigate his true identity since he had repeatedly given false names.

Deputy Sigala escorted defendant from the backyard to his patrol car. At that point, defendant said he was "Angel Madueno" and he was born on May 30, 1952. Sigala determined this was defendant's true name and birthdate. Defendant did not have any identification with his true name and birthdate.

Defendant's statements about his prior conviction and registration

While still at the scene, Deputy Sigala determined defendant had been convicted of a sex offense and he was required to register as a sex offender.

Deputy Sigala advised defendant in Spanish of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and defendant said he understood his rights. Sigala asked defendant about his prior conviction.

> "[THE PROSECUTOR]: [D]id you learn from him whether he knew he had the prior conviction?
>
> "A. Yes.
>
> "Q. Did he acknowledge to you that he had been previously convicted of a sex offense?
>
> "A. Yes.
>
> "Q. And did you ask him whether he registered as a sex offender?

"A. I did.

"Q. What did he tell you?

"A. He responded he didn't. He had not.

"Q. Did you explain to him what it meant to register?

"A. Yes."[6]

On cross-examination, defense counsel also asked Deputy Sigala about defendant's statements regarding his prior conviction:

"[Defense counsel]. You said you explained to him what it meant to register; correct?

"A. Yes.

"Q. Did he have – seem to have any problems with understanding what it meant to register?

"A. He wouldn't categorize it or say that. He – let me explain. He didn't remember whether or not he had to register."

Sigala testified that defendant said he had been living at 1117 Rouse in Modesto.

"Q. Did he tell you how long he'd lived there?

"A. Yes.

"Q. How long?

"A. Four months prior to my arrest.

"Q. Prior to September 11th, [defendant] had been – told you that he had been living at a Modesto address for four months?

"A. Yes."

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[6] As we will discuss below, the parties' sentencing statements stated that in 2002, defendant pleaded no contest to a felony violation of violating section 288, subdivision (b)(1), commission of a forcible lewd act upon a child under the age of 14 years, and he was ordered to register as a sex offender.

Deputy Sigala testified he asked defendant why he lied about his name. Defendant said he lied "because he had previously been deported" to Mexico in 2008. Defendant said he walked back into the United States in 2008, one week after he was deported.

Trial stipulations about defendant's registration status

At the trial in this case, the People introduced into evidence certified copies of defendant's prior sexual assault conviction, and the certified registration package for defendant from the California Sex and Arson Registry (CSAR).

Based on these exhibits, the parties entered into the following stipulations relevant to the elements of count II, failing to annually update his registration as a convicted sex offender on his birthday (§ 290.012, subd. (a)). (CSAR documents))

First, it was stipulated that a violation of section 288, subdivision (b)(1) requires the person to register as a sex offender pursuant to section 290.

Next, it was stipulated that the photograph and fingerprints in the prosecution's documentary exhibits belonged to defendant.[7]

Finally, it stipulated was that "on January 3rd, 2002, [defendant] appeared in Stanislaus County Superior Court in case 1027759. He was assisted by an attorney and a court certified Spanish-speaking interpreter," and he was convicted of a violation of "section 288(b)(1)." It was further stipulated that the following exchange occurred on that date in case No. 1027759:

> " ' "The Court: Do you understand that the result of this conviction you will be required to register as a convicted sex offender with the police or sheriff of any city or county in which you reside, and you will be required to update your registration annually within five days of your birthday? Do you understand that?
>
> " ' "The Defendant: Yes." ' "

[7] A fingerprint technician with the Stanislaus County Sheriff's Department also testified defendant's fingerprints matched the sets of fingerprints under his name in the certified documents and the CSAR database.

Sex offender registration requirements and procedures

As part of the evidence in this case to prove count II, failing to register as a sex offender, the prosecution called Detective Adam Messer of the Modesto Police Department to testify at defendant's current trial. Messer was responsible for registering sex offenders in Modesto. Messer did not have any personal interaction with defendant and testified generally about the registration procedures.

Detective Messer testified that when a law enforcement officer notifies a convicted sex offender of his or her requirement to register, the officer advises the registrant of the registration requirements on an "8047 form" from the Department of Justice known. The form requires the registrant's personal identifying information and lists the requirements for registration. The law enforcement personnel responsible for the registration process are trained to review the form and each requirement with the registrant. After the official explains the requirements to the registrant, the registrant is directed to initial, sign, and place their thumbprints on the form.

Detective Messer testified that the law enforcement agency must send the completed "8047 form" to the Department of Justice within three days. The department enters the information into the CSAR computerized database, a website used to track sex and arson offenders.

Detective Messer testified the registrant is required to annually update his or her registration. If the registrant lives in Modesto, he or she is required to go to the police department's investigative services division to fill complete and sign the "8102 form" to annually update his or her registration. If the registrant does not live in Modesto, he or she may go to any law enforcement agency in the county where the registrant is living.

Detective Messer testified about the annual update requirement:

> "A registrant is required to come in within five working days before or after their birthday each year to complete a registration update making sure that all of the information we have is up to date as far as, you know, vehicle information, phone numbers, that kind of thing."

The local law enforcement agency is required to input another form into the CJAR system within three business days to update the registrant's information.

Defendant's registration records

Detective Messer testified that he did not personally process defendant's registration documents but testified about the certified registration documents in defendant's name from the CSAR database, introduced as Exhibit No. 6.

Detective Messer testified that defendant signed a preregistration card on July 22, 2003, which was "essentially a fingerprint card" with defendant's personal information and status as a sex offender.

Detective Messer determined that on November 16, 2007, defendant completed the "8047 form" that notified him of the requirements to register as a sex offender. Defendant's form contained his identifying information and listed an address on Cavel Court in Modesto as where he expected to reside upon release.[8]

Defendant's "8047 form" had separate paragraphs in English that explained each requirement that defendant had to follow to register as a sex offender. There was a space next to each paragraph for defendant to initial. Detective Messer testified that law enforcement officials are trained to review the form with the registrant.

Detective Messer testified one of the requirements in defendant's "8047 form" stated:

> "I must annually update my registration information within five working days of my birth date starting on my first birthday following registrations or change of address by going to the law enforcement agency having jurisdiction over my residence or where I am currently registered as a transient and updating my registration information."

Defendant placed his initials next to this statement and all the paragraphs. Defendant signed the bottom of the form, and it was dated November 16, 2007. The

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[8] Based on the trial stipulations and Detective Messer's testimony about defendant's record, defendant would have been in prison for the sexual assault conviction when he signed the forms in 2003 and 2007.

document also contained the signature of "S. Luna," identified as defendant's case manager, who certified that, "I notified the individual described above of his or her duty to register under provisions of the applicable statute," on the same date.[9]

Detective Messer testified that defendant's records indicated he was released from custody on May 25, 2008, and he was deported on September 12, 2008.

Detective Messer testified defendant did not register within five days of his May 30 birthdate in 2012. The CSAR database would have the information from the law enforcement agency if defendant had registered in any county in California. There was no record that defendant had ever completed the form to annually register within five days of his birthday, updated his registration, or registered in another county.

Convictions and sentence

As we will discuss below, defendant filed a pretrial motion to suppress all evidence obtained by Deputy Sigala when he entered the backyard and spoke to defendant. Defendant argued he had a legitimate expectation of privacy in the backyard and Sigala illegally entered the area and detained him. The court denied the motion.

After a jury trial, defendant was convicted as charged of count I, using false documents to conceal his true citizenship or resident alien status, and count II, failing to annually update his registration as a convicted sex offender.

The court found true the special allegations that defendant had three prior strike convictions: two convictions for murder in 1980 (§ 187, subd. (a)), and his conviction in 2002 for commission of a forcible lewd act on a child under the age of 14 years, that resulted in the lifetime registration order (§ 288, subd. (b)(1)).

At the sentencing hearing, the court denied defendant's request to dismiss the prior strike convictions pursuant to section 1385 and *Romero, supra*, 13 Cal.4th 497.

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[9] "S. Luna" was not further identified.

Defendant was sentenced to the third strike term of 25 years to life for count I, with a concurrent third strike term for count II.[10]

PART II

DEFENDANT'S MOTION TO SUPPRESS

We now turn to the pretrial proceedings for defendant's motion to suppress evidence.

Defendant's suppression motion

Prior to the preliminary hearing, defendant filed a motion to suppress all evidence obtained by Deputy Sigala as a result of his alleged unlawful entry and detention of defendant in the backyard of the residence. Defendant compared his status to that of a babysitter and argued that he was lawfully in the backyard with the permission of the homeowner to perform his job, and he had a reasonable expectation of privacy at his job site. He claimed that he had exclusive control of the premises because he could enter and leave the backyard as he needed to complete his work, he could exclude any trespassers, and the backyard was not open to the public.

Defendant further argued the backyard was part of the curtilage of the residence, Deputy Sigala illegally entered the area without probable cause, a warrant, or exigent circumstances, and defendant did not consent to his entry. Sigala also lacked reasonable suspicion to detain defendant and ask for his identification.

Defendant's motion was supported by a report from a defense investigator about an interview with Matthew Occhicone. According to the report, Occhicone stated that he hired defendant to work that day. Occhicone told the investigator that he did not know defendant "other than to hire him that day to provide manual labor on a construction job

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[10] In part III, *post*, we review the parties' sentencing statements and the court's decision to impose concurrent third strike terms; and in parts IV and V, *post*, we address defendant's contentions that the court abused its discretion when it denied his request to dismiss the prior strike convictions, and the imposition of a third strike term violated the Eighth Amendment.

he had contracted for" at the residence.[11] Occhicone said he had previously talked to the homeowner about work on the backyard fountain, and it was arranged that Occhicone "could access the backyard through a side gate." Occhicone arrived at the house in the morning and met defendant there, and he left defendant in the backyard while he went to pick up materials for a job. Occhicone returned when defendant was being arrested.

The People's opposition

The People's opposition argued defendant lacked any reasonable expectation of privacy in the backyard because he was a casual, temporary visitor. He did not live in the residence, he was hired by a contractor, he did not have any connection with the homeowner, he was only at the residence for a short time, and there was no evidence he was given the right to exclude others.

The People also argued that Deputy Sigala had reasonable suspicion to enter the backyard based on the nature of the dispatch, there was no one at home, the car in front of the house corresponded with the vehicle identified by the dispatch, and the gate was open. Defendant was not seized or detained when Sigala approached him in the backyard, he lawfully contacted defendant, he took steps to identify him, and defendant freely spoke to Sigala. Sigala then had probable cause to arrest defendant after he presented several false identification cards.

The evidentiary hearing on defendant's suppression motion

On November 16, 2016, the court conducted both the preliminary hearing and an evidentiary hearing on defendant's motion to suppress.

Deputy Sigala was the only witness who testified at the hearing as to the issues raised by defendant's suppression motion. His hearing testimony was consistent with his

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[11] In the probation report prepared for this case, defendant told the probation officer that he was a seasonal farm worker and also solicited work as a day laborer in the Home Depot parking lot.

subsequent trial testimony as set forth above, but with additional details about the incident.

Deputy Sigala testified that he received a dispatch about a suspicious person who had been sitting in a vehicle parked in a residential neighborhood for an extended period of time. The dispatch identified the person who called in the report, who said that "a Hispanic male [was] parked in a tan Saturn" and gave the car's license plate number. The caller thought it was suspicious and asked for someone to look into it. Deputy Sigala did not personally contact the individual who placed the call but explained the importance of receiving the dispatch.

> "[T]he simple fact that someone's sitting in a vehicle itself is not against the law, but many times in my line of work, a suspicious activity such as someone sitting in a vehicle for an extended period of time where the resident or the people, in this case the reporting party, does not recognize them may be an indication of a criminal act afoot, whether it's a residential burglary, vehicle burglary, or other crimes in the immediate area. So I was actually out there investigating potentially even a residential burglary."

Deputy Sigala testified he arrived in his patrol car with his partner. He did not have on the emergency lights or siren when he arrived. A car was parked on the street in front of a house. The car matched the description and license plate provided by the caller, and no one was in it. Sigala's partner knocked on the house's front door and no one responded.

Deputy Sigala testified there was a wooden gate on the side of that same house that was "ajar or slightly open." After no one answered the front door, Sigala walked into the backyard through the open wooden gate. Defendant was sitting on a chair or bench that was next to a sliding glass door at the rear of the house.

Deputy Sigala testified he did not rush toward defendant or draw his Taser or service weapon. Sigala asked defendant what he was doing. Sigala realized defendant did not speak English and repeated his question in Spanish. Sigala testified he did not question defendant in an aggressive manner.

Defendant answered Deputy Sigala's questions in Spanish and did not attempt to flee. Defendant pointed to a dismantled fountain in the backyard and said he had been hired to fix it. Defendant did not say that he owned the property. Sigala explained why he was at the house and asked defendant for identification so Sigala could document who he spoke with.

Deputy Sigala testified that defendant said he was "Luis Duarte Cendejas," born February 2, 1970. Sigala asked defendant for an identification card. Defendant produced a photocopy of a driver's license with that name, but the photograph did not match him. Sigala asked defendant about the photograph. Defendant said it was taken when he was younger. Sigala testified defendant acted nervous when he answered the question. Sigala noticed the driver's license stated the photograph had been taken in 2011.

Deputy Sigala asked for another form of identification. Defendant produced a photocopy of a social security card in the same name. Sigala asked for a photographic identification. Defendant gave him a resident alien card in that same name, but the photograph again showed another person. Sigala asked about the picture and defendant repeated that it was taken when he was younger.

Deputy Sigala testified that he kept asking defendant for other forms of identification because he was trying to establish who he really was. Defendant did not present any additional identification at that time.

Deputy Sigala then asked defendant if he would be willing to go to the police department to check his fingerprints. In response, defendant said his name was "Angel Martinez." Sigala asked if he had an identification to prove it. Defendant produced a work employee identification card for "Angel Martinez Silva" that had his own photograph.

Deputy Sigala testified he decided to detain defendant "[b]ecause he provided a fake name or a false name pending further investigation." He placed defendant in

handcuffs, escorted him from the backyard to his patrol car, and advised defendant of the *Miranda*[12] warnings in Spanish.

As they walked to the patrol car, a pickup truck arrived at the scene; a man got out and asked what was going on. The man identified himself as Matthew Occhicone and said defendant worked for him. Deputy Sigala asked Occhicone for defendant's name. Occhicone said defendant was "Angel Madueno." Sigala asked defendant if that was true, and defendant admitted his true name and birthdate.

Deputy Sigala conducted a records check using that name and birthdate and determined defendant had failed to register as a sex offender.

Deputy Sigala spoke to defendant about his record. Defendant said he had been convicted of murder and went to prison. He had also been convicted for touching a "neighbor girl" and went to prison.[13] Defendant said he was deported as a felon in 2008 and walked back into the country one week later. He had been allowed to keep his immigration card when he was deported, he showed that card to immigration agent, and he was allowed into the country.[14]

There were no other witnesses at the evidentiary hearing regarding defendant's suppression motion, such as Matthew Occhicone, who arrived at the house and said defendant worked for him, or the owner of the house where defendant was located.[15]

The court's denial of the suppression motion

The court denied defendant's motion to suppress.

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[12] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[13] Deputy Sigala did not testify before the jury about defendant's statements regarding the specific nature of his prior convictions.

[14] This evidence was not introduced at trial.

[15] There was one additional witness at the joint preliminary/evidentiary hearing, an officer from the sheriff's department who testified about defendant's registration status in support of count II – that the Department of Justice's database showed he had been notified of his duty to register, but he had never registered.

"It comes down to the person – is society willing to accept a reasonable expectation of privacy in whatever location is being claimed? I just don't think that there's a societal issue here where a subcontractor, in effect, who is working on someone's backyard pond has a reasonable expectation of privacy in that location. I don't find it akin to a personal work space; for example, a desk at the District Attorney's Office where an attorney works or a private work space [referring to the defense attorney], like you have. I don't find it akin to that. And the other cases ... other issues were all things inside the home like a babysitter or guest, overnight guest, but that's – we don't have that here. This is outside the home, so it's even a lesser expectation of privacy. It's outside the home, and I just don't see reasonable expectation of privacy under these facts."[16]

DISCUSSION

I. Defendant Did Not Have a Legitimate Expectation of Privacy in the Backyard

Defendant asserts that the court improperly denied his motion to suppress because he had a reasonable expectation of privacy in the backyard of the house, even though it was owned by another person. Defendant argues Deputy Sigala illegally entered the backyard without a warrant or any exigent circumstances. Defendant was legally present and within the curtilage of the residence, and the court improperly relied on his "non-ownership of the premises" and the fact that the gate was left open when it denied his motion.

As we will explain, defendant lacked a reasonable expectation of privacy in the backyard of another person's home and cannot challenge the validity of Deputy Sigala's entry. In issue II, *post*, we find that Sigala did not illegally detain defendant, and his motion to suppress was properly denied.

A. Standard of Review

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied,

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[16] After the information was filed, defendant filed a motion to set aside under section 995 and renewed his challenge to the validity of the search. The court denied the motion and found that defendant was not at his own house, the backyard gate was open, and that showed the area was not a private place.

where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.)

B. The Curtilage

We begin with defendant's assertion that Deputy Sigala illegally entered the curtilage of the residence when he walked into the backyard without a warrant.

"A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. [Citation.]" (*People v. Redd* (2010) 48 Cal.4th 691, 719.) "[A] private home is a place in which an individual has a reasonable expectation of privacy. [Citation.] Land or structures immediately adjacent to and intimately associated with one's home, referred to as 'curtilage,' are ordinarily considered part of the home itself for Fourth Amendment purposes. [Citation.]" (*People v. Williams* (2017) 15 Cal.App.5th 111, 120.) A fenced backyard may be part of the curtilage of a residence and within the scope of Fourth Amendment protections. (*People v. Thompson* (1990) 221 Cal.App.3d 923, 941–942.)

C. Legitimate Expectation of Privacy

While the backyard was within the curtilage of the residence, it is undisputed that defendant did not own, rent, or live at the home in question. "In order to challenge a search or seizure, a defendant must allege not only that the police action was unreasonable, but also that the defendant's personal interests were violated. 'The "capacity to claim the protection of the Fourth Amendment depends ... upon whether the person ... has a legitimate expectation of privacy in the invaded place." [Citations.]' [Citation.]" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 365.)

"Fourth Amendment rights are personal and may not be vicariously asserted. [Citation.] '[A] court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional

rights. [Citations.] And the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* expectation of privacy rather than that of a third party. [Citations.]' [Citation.]" (*People v. Rios* (2011) 193 Cal.App.4th 584, 591, italics in original.)

It is thus well-settled that "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. [Citations.]" (*Rakas v. Illinois* (1978) 439 U.S. 128, 132, fn. 1 (*Rakas*).) "A defendant has the burden to establish a legitimate expectation of privacy in the place searched. [Citations.]" (*People v. Rivera* (2007) 41 Cal.4th 304, 308, fn. 1; *People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at p. 365; *People v. Roybal* (1998) 19 Cal.4th 481, 507.)

" '[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." ' [Citation.] 'In other words, the defendant must show that he or she had a subjective expectation of privacy that was objectively reasonable.' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

"In considering this question, courts look to the totality of the circumstances. Appropriate factors include ' " ' "whether the defendant has a [property or] possessory interest in the thing seized or the place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises." ' " [Citation.]' [Citation.] Essentially, a legitimate expectation of privacy is one 'society is prepared to recognize as

reasonable.' [Citation.]" (*People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at p. 365.)

D. Overnight Guests, Babysitters, and Casual Visitors

Defendant argues he had a legitimate expectation of privacy in the backyard because he was legally present. A series of cases illustrates the United States Supreme Court's holding that "a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. [Citation.]" (*Rakas, supra,* 439 U.S. at p. 142.)

For example, an overnight guest in a home may claim the protection of the Fourth Amendment. (*Minnesota v. Olson* (1990) 495 U.S. 91, 98–99 (*Olson*).) "To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home." (*Id.* at p. 98.)

In *People v. Moreno* (1992) 2 Cal.App.4th 577 (*Moreno*), this court held a babysitter had a legitimate expectation of privacy in the premises. The defendant's brother asked him to stay at the brother's apartment and baby sit his young child while he went to the store. The defendant was not an overnight visitor and intended to leave as soon as his brother returned. The police arrived and searched the apartment while the brother was gone. (*Id.* at pp. 579–581.)

Moreno held the defendant, as the child's babysitter, could challenge the search because he had a legitimate expectation of privacy in his brother's apartment under the circumstances, even though he was not an overnight visitor:

> "[A]s a general rule, the baby-sitter is in exclusive charge of the child and the premises. [¶] This exclusive control distinguishes the baby-sitter from the overnight guest. By definition[,] the baby-sitter and the parent or guardian will not be present in the same house at the same time, other than at the time of the 'changing of the guard.' The normal purpose of baby-sitting is to free the parent from the child and the house. Thus, the baby-sitter who comes to the child's home will likely have, unlike the overnight guest, the exclusive right to 'determine who may or may not enter the household.' [Citation.] [¶] Control alone brings the baby-sitter within the *Rakas* principle that '[o]ne of the main rights attaching to property is the right to exclude others, ... and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.' [Citation.]" (*Moreno*, *supra*, 2 Cal.App.4th at p. 584, fns. omitted.)

In *People v. Cowan* (1994) 31 Cal.App.4th 795 (*Cowan*), the defendant went into an apartment with the resident, he had the resident's permission to be there as a visitor, but he was not staying overnight. The police arrived while the defendant was there, searched the premises, and the defendant was arrested for narcotics activities. (*Id.* at p. 798.)

Cowan held the defendant did not have a legitimate expectation of privacy in the apartment to challenge the search. (*Cowan*, *supra*, 31 Cal.App.4th at p. 800.) "Defendant did not demonstrate that he had authority to be in the apartment alone, to enter without permission, to store anything there, to invite anyone (with or without the host's approval), or to visit without advance notice." (*Ibid.*, fn. omitted.)

Cowan distinguished the defendant's presence from *Olson* and *Moreno* because there was no evidence that the defendant "was permitted to come and go on his own without [the residents] being present and because 'the many unique features of the baby-sitter role transcend the bare fact of simply being on the premises at a particular point in time.' [Citation.]" (*Cowan*, *supra*, 31 Cal.App.4th at pp. 800–801.) "At most, defendant

established his legitimate presence on the searched premises by invitation. Defendant did not have control over the premises in any sense ...." (*Id.* at p. 801; cf. *People v. Stewart* (2003) 113 Cal.App.4th 242, 252–255 [defendant had legitimate expectation of privacy at friend's residence where he was selling drugs, based on friend's testimony that defendant had a key and could come and go as he pleased, without permission or advance notice] (*Stewart*).)

In *Minnesota v. Carter* (1998) 525 U.S. 83 (*Carter*), the defendants were in Thompson's apartment with her permission for two and one-half hours for the sole purpose of packaging cocaine. The defendants had never been at the apartment before. In return for their use of the apartment, the defendants gave a percentage of the cocaine to Thompson. While they were inside, the police received a tip about narcotics sales at that apartment. An officer looked through a gap in the window blinds and observed Thompson and the defendants packaging the drugs. While the police were obtaining a warrant, the defendants drove away from the apartment, and the police stopped their car. The defendants were found in possession of cocaine. The apartment was later searched, and additional evidence of drug sales were found. The defendants moved to suppress the evidence from the car and apartment and argued the officer's initial observations through the blinds were an illegal search. (*Id.* at pp. 85–90.)

Carter held the defendants did not have a legitimate expectation of privacy in Thompson's apartment even though they were present with the resident's permission. In reaching this conclusion, the court focused on the defendants' failure to prove they had sufficient connections to the apartment and not on their illegal activities inside:

> "[Defendants] here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with Thompson, or that there was any other purpose to their visit. Nor was there anything similar to the overnight guest relationship in *Olson* to suggest a degree of acceptance into the household. While the apartment was a dwelling place for Thompson, it was for these [defendants] simply a place to do business.

"Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. 'An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home.' [Citation.] And while it was a 'home' in which [defendants] were present, it was not their home. Similarly, the Court has held that in some circumstances a worker can claim Fourth Amendment protection over his own workplace. [Citation.] But there is no indication that [defendants] in this case had nearly as significant a connection to Thompson's apartment as [a] worker ... had to his own private office. [Citation.]

"If we regard the overnight guest in *Minnesota v. Olson* as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely 'legitimately on the premises' as typifying those who may not do so, the present case is obviously somewhere in between. But the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between [defendants] and the householder, all lead us to conclude that defendants' situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights." (*Carter*, *supra*, 525 U.S. at pp. 90–91, fn. omitted.)

E. Defendant Did Not Have a Legitimate Expectation of Privacy in the Backyard

It is thus clear that a person's "mere legitimate presence [on the premises] by invitation or otherwise, without more, is insufficient" to establish a legitimate expectation of privacy. (*People v. Koury* (1989) 214 Cal.App.3d 676, 686; *Rakas*, *supra*, 439 U.S. at p. 148; *People v. Rios*, *supra*, 193 Cal.App.4th at p. 591.) " ' " '[O]ccasional presence on the premises as a mere guest or invitee' " ' is insufficient to confer such an expectation. [Citation.]" (*People v. Ayala*, *supra*, 23 Cal.4th at p. 255.)

Defendant failed to meet his burden to show he had a legitimate expectation of privacy in the backyard of an unnamed homeowner and cannot challenge the validity of Deputy Sigala's entry into the backyard.

Defendant claims he was entitled to the same expectation of privacy as found in *Olson* for the overnight guest, and in *Moreno* for the babysitter. As in *Cowan*, however, there was no evidence that defendant was permitted "to come and go on his own without

[the residents] being present ...." (*Cowan*, *supra*, 31 Cal.App.4th at pp. 800–801.) While defendant was lawfully on the premises and engaged in legal activities, his status in the backyard was similar to the defendants in *Carter* because he was "essentially present for a business transaction" for a few hours, there was "no suggestion" he had "a previous relationship" with the homeowner, or that there was any other purpose for his presence there except as "simply a place to do business." (*Carter*, *supra*, 525 U.S. at pp. 90–91.) Defendant may have been in the backyard of a "home," but "it was not [his] home" and there was no evidence he had "as significant a connection" to that residence as the defendants in *Stewart* and *Moreno*. (*Ibid.*; *Stewart*, *supra*, 113 Cal.App.4th at pp. 253–254.)

Defendant cites *Jones v. United States* (1960) 362 U.S. 257 (*Jones*) and asserts he had a legitimate expectation of privacy in the backyard because he was legitimately on the premises. In *Jones,* the court held that "anyone legitimately on premises where a search occurs may challenge its legality ...." (*Id.* at p. 267.) In *Rakas*, however, the court "expressly repudiated" this premise. (*Carter*, *supra*, 525 U.S. at p. 90.) *Rakas* held "the phrase 'legitimately on premises' coined in *Jones* creates too broad a gauge for measurement of Fourth Amendment rights." (*Rakas*, *supra*, 439 U.S. at p. 142, fn. omitted.) "We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. [Citation.]" (*Ibid.*) Thus, defendant's lawful presence on the property is not dispositive of whether he had a legitimate expectation of privacy in the backyard of someone else's home, and "[b]eing legitimately on the premises, without more, is insufficient. [Citation.]" (*People v. Rios*, *supra*, 193 Cal.App.4th at p. 591.)

Defendant further asserts that he had an expectation of privacy "even if he had been accosted by Deputy Sigala on the street. His legitimate presence and work on private premises, under privity of contract with the owner, only heightened his privacy

interests. Expectations of privacy are typically discussed in terms of connection to places and containers because the intrusion in question typically involves a *seizure* of evidence from places and containers. That is fine and well as far as it goes. But the more underling [*sic*] expectation of privacy runs to the *person* and to the expectation that he will be left alone from unwarranted or unreasonable interference, such as occurred here." (Original italics.)

Defendant's purely subjective expectation of privacy in another person's backyard is insufficient. The Fourth Amendment protects only a legitimate expectation of privacy, which "by definition means more than a subjective expectation of not being discovered." (*Rakas, supra,* 439 U.S. at p. 143, fn. 12.) "[S]ubjective expectations of privacy that society is not prepared to recognize as legitimate have no [Fourth Amendment] protection. [Citations.]" (*People v. Reyes* (1998) 19 Cal.4th 743, 751; *People v. Munoz* (2008) 167 Cal.App.4th 126, 131.)

In contrast to *Stewart*, *Olson*, and *Moreno*, there was no evidence to show the nature and circumstances of the homeowner's permission for defendant or anyone else to be in the backyard at that time. (*Stewart*, *supra*, 113 Cal.App.4th at pp. 253–255.) At the evidentiary hearing, Deputy Sigala testified to the hearsay statements made by Occhicone, who arrived at the house and said he had hired defendant to work on the fountain, and who identified defendant by his true name. Sigala did not testify as to any statements by Occhicone about who hired him, and the extent of the homeowner's permission for either of them to be on the premises.

As relevant to this issue, defendant cites to the report submitted in support of his suppression motion, where the defense investigator summarized his interview with Occhicone. According to the investigator's report, Occhicone said he did not know defendant, he had hired defendant that day to provide manual labor on the job at the house, Occhicone had previously talked to the homeowner about the work, and the homeowner arranged for Occhicone to "access the backyard through a side gate."

Defendant argues this report establishes his ability to exclude others from the backyard and his legitimate expectation of privacy in the curtilage.

As explained above, defendant had the burden to establish his legitimate expectation of privacy in the backyard. Neither Occhicone nor the homeowner testified at the evidentiary hearing, and the report with Occhicone's hearsay statements was attached to defendant's suppression motion but not introduced into evidence. (See, e.g., *People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at p. 366.) Indeed, the homeowner was never identified by name.

Nevertheless, even if Occhicone's hearsay statements in that report were considered, it only shows at most that defendant was a casual visitor who was lawfully on the premises for a limited period of time, as the defendants in Cowan and Carter. Contrary to defendant's arguments, there is no evidence that defendant or Occhicone had exclusive control over the backyard or could exclude others.

In addition, one of the factors to determine whether an individual has a reasonable expectation of privacy is whether that person, "by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that 'he [sought] to preserve [something] as private.' [Citation.]" (*Bond v. United States* (2000) 529 U.S. 334, 338.) While the homeowner may have arranged for Occhicone to "access the backyard through a side gate," there was no evidence as to who opened the backyard gate. Defendant left that gate open, thus negating his claim that he even had a subjective expectation of privacy and sought to exclude others from the area. " 'A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy in regard to observations made there.' ... [Citation.]" (*People v. Chavez* (2008) 161 Cal.App.4th 1493, 1500; *People v. Williams*, *supra*, 15 Cal.App.5th at p. 121.) "An open gate invites entry, ..." (*United States v. Tolar* (7th Cir. 2001) 268 F.3d 530, 532.)

Defendant did not live in the residence and was not an overnight guest. Even if the hearsay report about the contractor's statements was considered, the evidence established that, at most, defendant was legitimately in the backyard but only as a temporary invitee of a person who had been hired by the homeowner for a limited project. There was no evidence about the nature of the relationship and authority between the homeowner and the contractor. Defendant did not meet his burden to show a legitimate expectation of privacy in the backyard. He had permission to be there, but he did not have a key or any other way to exclude others and even left the back gate open.

F. Deputy Sigala Did Not Enter Defendant's "Workplace"

Defendant separately asserts the backyard constituted his "workplace," he had a legitimate expectation of privacy in that workplace, and he had the right to exclude others from the backyard.

It is well-settled that "[t]he Fourth Amendment protection against unreasonable searches and seizures applies to commercial premises. [Citation]." (*People v. Potter* (2005) 128 Cal.App.4th 611, 618.) In addition, "in the private employer context, employees retain at least some expectation of privacy in their offices. [Citation.]" (*United States v. Ziegler* (9th Cir. 2007) 474 F.3d 1184, 1189.)

In his suppression motion, defendant asserted that the backyard was his "workplace" and he had the right to exclude others, based on *Dow Chemical Co. v. United States* (1986) 476 U.S. 227 (*Dow Chemical*), but this case does not support defendant's arguments. *Dow Chemical* held that the exposed and outdoor areas between buildings on the company's manufacturing complex did not constitute an "industrial" curtilage, and the government's aerial photography of the open areas did not violate the Fourth Amendment. (*Id.* at pp. 229, 237–239.) In reaching this holding, *Dow Chemical* acknowledged that "a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment," and the company had "a

reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, ..." (*Id.* at pp. 235, 236.)

In this case, Deputy Sigala did not enter defendant's commercial premises or his "office," but instead found defendant in the backyard of a home owned by another person. *Carter* focused on the defendants' lack of relationship to the residence, and not their illegal activities inside it, when it rejected their claim to a legitimate expectation of privacy in that residence. As in *Carter*, defendant in this case was "essentially present for a business transaction," he was only going to be there for "a matter of hours," and there was no evidence "that there was any other purpose to [his] visit." (*Carter*, *supra*, 525 U.S. at pp. 90–91.) "[T]he Court has held that in some circumstances a worker can claim Fourth Amendment protection over his own workplace. [Citation.] But there is no indication that [defendant] in this case had nearly as significant a connection to [the homeowner's residence] as [a] worker ... had to his own private office. [Citation.]" (*Ibid.*) Again, as in *Carter*, "the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between [defendant] and the householder, all lead us to conclude that [defendant's] situation is closer to that of one simply permitted on the premises." (*Id.* at p. 91.)

II. Deputy Sigala Did not Illegally Detain Defendant

Defendant next argues that Deputy Sigala illegally detained and seized him without probable cause when Sigala spoke to him in the backyard and repeatedly asked for identification.[17] Defendant argues the dispatch about a suspicious person was insufficient to create any reasonable suspicion or probable cause to detain him and

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[17] While defendant cannot challenge the validity of Deputy Sigala's entry into the backyard, he can assert that Sigala illegally detained and/or seized his person once he was there. (See, e.g., *People v. Rios*, *supra*, 193 Cal.App.4th at p. 592.)

demand his identification, and Sigala acted on unsupported hunches and the unconfirmed dispatch about a suspicions person in the area.

As we will explain, Deputy Sigala did not seize or arrest defendant when he initially spoke to defendant in the backyard and asked for his identification. To the extent that he detained defendant, Sigala had reasonable suspicion to believe that criminal activity was afoot in the backyard, and defendant's presentation of an identification card with someone else's photograph justified Sigala's additional questions.

A. Arrests, Investigative Detentions, and Consensual Encounters

"Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. [Citations.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

1. Arrest

" 'A seizure occurs whenever a police officer "by means of physical force or show of authority" restrains the liberty of a person to walk away.' [Citations.] Whether a seizure has taken place is to be determined by an objective test, which asks 'not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.' [Citation.] Thus, when police engage in conduct that would 'communicate[] to a reasonable person that he was not at liberty to ignore the police presence and go about his business,' there has been a seizure. [Citations.]" (*People v. Celis* (2004) 33 Cal.4th 667, 673 (*Celis*).) Generally, probable cause is required to justify the seizure of a person. (*Ibid.*)

*2. Investigative Detentions/*Terry *Stops*

"But 'not all seizures of the person must be justified by probable cause to arrest for a crime.' [Citation.]" (*Celis, supra*, 33 Cal.4th at p. 674.) An officer who lacks

probable cause to arrest "can conduct a brief investigative detention when there is ' "some objective manifestation" that criminal activity is afoot and that the person to be stopped is engaged in that activity.' [Citations.]" (*Ibid.*; *Terry v. Ohio* (1968) 392 U.S. 1, 21 (*Terry*).)

> "Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to 'investigate the circumstances that provoke suspicion.' [Citation.] '[The] stop and inquiry must be "reasonably related in scope to the justification for their initiation." ' [Citations.] Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 439–440.)

Such a detention is "reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).)

This " 'reasonable suspicion' ... 'is dependent upon both the content of information possessed by police and its degree of reliability.' [Citation.] The standard takes into account 'the totality of the circumstances – the whole picture.' [Citation.] Although a mere ' "hunch" ' does not create reasonable suspicion, [citation], the level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause, [citation]." (*Navarette v. California* (2014) 572 U.S 393, 397.) Law enforcement officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well

elude an untrained person.' [Citations.]" (*United States v. Arvizu* (2002) 534 U.S. 266, 273; *People v. Hernandez* (2008) 45 Cal.4th 295, 299; *People v. Letner and Tobin*, *supra*, 50 Cal.4th at pp. 145–146.)

"[A] law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. [Citations.] To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer's action must be ' "justified at its inception, and ... reasonably related in scope to the circumstances which justified the interference in the first place." ' [Citations.] For example, the seizure cannot continue for an excessive period of time [citation], or resemble a traditional arrest, [citation]." (*Hiibel v. Sixth Judicial Dist. Court of Nevada* (2004) 542 U.S. 177, 185–186 (*Hiibel*).) However, circumstances may develop that "provide reasonable suspicion to prolong the detention. [Citation.]" (*People v. Russell* (2000) 81 Cal.App.4th 96, 102.)

"[T]he possibility of innocent explanations for the factors relied upon by a police officer does not necessarily preclude the possibility of a reasonable suspicion of criminal activity. [Citations.] In determining whether a search or seizure was supported by a reasonable suspicion of criminal activity, ' "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." ' [Citation.] Indeed, the United States Supreme Court has acknowledged that by allowing the police to act based upon conduct that was 'ambiguous and susceptible of an innocent explanation,' the court in *Terry* 'accept[ed] the risk that officers may stop innocent people.' [Citations.]" (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at pp. 146–147.)

3. Consensual Encounter

Finally, "[c]onsensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has

committed or is about to commit a crime. [Citation.]" (*In re Manuel G., supra,* 16 Cal.4th at p. 821.) As we will discuss below, "a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.]" (*Ibid.*)

"Consensual encounters may also take place at the doorway of a home.... 'Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof – whether the questioner be a pollster, a salesman, or an officer of the law.' [Citation.] This view ' "has now become a firmly-rooted notion in Fourth Amendment jurisprudence." ' [Citation.]" (*People v. Rivera, supra*, 41 Cal.4th at p. 309.)

B. Requests for Identification

"Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment. '[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.' [Citation.]" (*Hiibel, supra*, 542 U.S. at p. 185; *People v. Linn* (2015) 241 Cal.App.4th 46, 59 (*Linn*).)

"We have 'held repeatedly that mere police questioning does not constitute a seizure. [Citations.] '[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual ... [and] ask to examine

the individual's identification; ...' [Citation.]" (*Muehler v. Mena* (2005) 544 U.S. 93, 101.)

Thus, "[a]n officer may approach a person in a public place and ask if the person is willing to answer questions. If the person voluntarily answers, those responses, and the officer's observations, are admissible in a criminal prosecution. [Citations.] Such consensual encounters present no constitutional concerns and do not require justification. [Citation.]" (*People v. Brown* (2015) 61 Cal.4th 968, 974.) "However, 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen,' the officer effects a seizure of that person, which must be justified under the Fourth Amendment to the United States Constitution. [Citations.] In situations involving a show of authority, a person is seized 'if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," ' or ' "otherwise terminate the encounter," ' [citation], and if the person actually submits to the show of authority [citation]." (*Ibid.*)

In the context of an investigative detention, "[o]ur decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops. [Citations.]" (*Hiibel, supra*, 542 U.S. at p. 186.) "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." (*Immigration & Naturalization Service v. Delgado* (1984) 466 U.S. 210, 216.) "[T]he ability to briefly stop [a suspect], ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice." (*United States v. Hensley* (1985) 469 U.S. 221, 229.)

C. Identification Requests and Detentions

While an officer's request for identification does not necessarily implicate the Fourth Amendment, "there has been some confusion regarding whether an officer's *taking* of a voluntarily offered identification, such as a driver's license, transforms a

consensual encounter into a detention." (*Linn, supra*, 241 Cal.App.4th at p. 59, original italics.)

"The right to *ask* an individual for identification in the absence of probable cause is meaningless if the officer needs probable cause to *accept* the individual's proof of identification. [A]n individual's voluntary cooperation with an officer's request for identification does not convert the request into a detention because the individual is 'free at this point to request that his [identification] be returned and to leave the scene.' [Ciations.] [A] voluntary relinquishment of one's identification card does not constitute a seizure as long as the encounter is consensual under the totality of the circumstances." (*People v. Leath* (2013) 217 Cal.App.4th 344, 353, italics added; cf. *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1227–1229.)

In *People v. Terrell* (1999) 69 Cal.App.4th 1246 (*Terrell*), the court found the defendant was not detained in a situation where two officers observed the defendant and two other men sitting on a park bench. One man appeared to be under the influence of a controlled substance. An officer spoke briefly to the defendant and asked whether he had any identification. The defendant produced a driver's license. The officer checked the defendant's identification and determined he had an outstanding warrant. The defendant was arrested and searched and found in possession of a syringe that contained a small amount of heroin. (*Id.* at p. 1251.)

Terrell held the defendant's arrest was not the product of an illegal detention. The defendant's initial encounter with the police was consensual, including his "spontaneous and voluntary action in handing [the officer] his driver's license." (*Terrell, supra*, 69 Cal.App.4th at p. 1254.) "At no time did he ask the officer for his driver's license back. During the entire encounter, which lasted about three minutes, neither [officer], by words or conduct, indicated that [the defendant] was not free to leave. No reasonable inference therefore could be drawn that the encounter was a detention rather than a consensual encounter." (*Ibid.*; cf. *People v. Linn, supra*, 241 Cal.App.4th at pp. 64–67.)

D. Analysis

As explained above, defendant lacked a legitimate expectation of privacy in the backyard and cannot challenge Deputy Sigala's entry. Defendant asserts that once Sigala was in the backyard, he illegally detained defendant and demanded his identification in the absence of probable cause or reasonable suspicion.

Deputy Sigala's initial exchange with defendant was extremely brief and limited to the reason he was there. Sigala responded to a dispatch about a suspicious vehicle in front of a house. When he arrived, he identified the car by its license plate and no one was in it. The car was parked in front of a house and no one answered the home's front door. Sigala noticed the backyard gate was ajar and walked through it. Sigala testified that he was trying to determine if a burglary or some other crime had occurred at the house.

Deputy Sigala did not arrive with the lights and siren on in his patrol car. He did not display or draw his weapon or Taser when he entered the backyard. When Sigala saw defendant, he was sitting near the back door to the residence. Sigala did not give any orders to defendant that would amount to taking him into custody. He did not search defendant. Instead, Sigala simply asked defendant why he was in the backyard. When defendant explained that he was working on the fountain, Sigala accepted his explanation and asked for his identification so he could record who he had talked to. Defendant voluntarily produced the first identification, and there is no evidence that encounter amounted to a custodial arrest or even a *Terry*-type detention. Indeed, Sigala's testimony strongly infers that if the first identification contained a matching photograph, he would have simply recorded defendant's name and ended the conversation.

Deputy Sigala's initial request for identification, and his brief review of the card that defendant presented, were appropriate under the totality of the circumstances. The conversation did not elevate or prolong a consensual encounter into an investigative detention or an illegal seizure.

However, the first identification that defendant presented to Deputy Sigala contained a photograph of someone else. When Sigala asked defendant about the picture, defendant claimed it was taken when he was younger, a claim belied by the date on the driver's license of 2011. At that point, the totality of the circumstances, including the reason for the initial dispatch, established reasonable suspicion for Sigala to continue the conversation and find out defendant's identity and what he was doing there. Sigala's request for another form of photographic identification was a limited inquiry and could have immediately cleared up any confusion. However, defendant presented a card in another name with someone else's photograph.

This was a situation where circumstances developed that "provide[d] reasonable suspicion to prolong the detention. [Citation.]" (*People v. Russell*, *supra*, 81 Cal.App.4th at p. 102.) In contrast to the other cases discussed above, the encounter between Deputy Sigala and defendant immediately changed upon Sigala's determination defendant was not the person in the photograph on the first identification he presented. While there was still the possibility of an innocent and legitimate explanation for his presence, defendant's presentation of an apparent false identification resulted in reasonable suspicion for Sigala to prolong the detention to determine defendant's identity, and the validity of his claim that he was lawfully in the backyard to repair the fountain.

Deputy Sigala did not unnecessarily prolong the detention by asking for another form of photographic identification. Defendant produced another identification card that had his own photograph, but in a name different from the first two cards he presented. Defendant's presentation of apparent false identification cards continued the reasonable suspicion to detain him and determine his identity and reason for his presence.

Defendant asserts there was "no governmental interest" that permitted Deputy Sigala even to respond to the dispatch and go to the house in the first instance because he merely responded to a dispatch based on an anonymous tip, he did not contact the person

who called in the tip, and Sigala's hunch about a possible burglary was insufficient to create reasonable suspicion. Defendant concedes that Sigala was entitled "to drive or walk down any public street" but argued Sigala had "no basis in law for proceeding to the address in question on an investigative mission because, by his own account, there was nothing to investigate" since no criminal behavior had been reported. Defendant thus concludes that Sigala's "stop" of him in the backyard and request for identification was "so utterly beneath the lowest level of reasonable suspicion that it was unlawful *even if it had occurred on a public street.*" (Original italics.)

Defendant's arguments are based on false premises. An anonymous and uncorroborated tip may be insufficient to support a *Terry* stop, a pat down search, or a detention under certain circumstances. (*People v. Rivera*, *supra*, 41 Cal.4th at p. 308.) However, a consensual encounter between a police officer and an individual does not implicate the Fourth Amendment, and it is "well established that law enforcement officers may approach someone on the street or in another public place and converse if the person is willing to do so. There is no Fourth Amendment violation as long as circumstances are such that a reasonable person would feel free to leave or end the encounter. [Citations.]" (*Ibid.*) In addition, a police officer is not required to corroborate an anonymous tip "before contacting the occupant of a residence and seeking consent to enter and search." (*Id.* at p. 306.) The Fourth Amendment did not prohibit Deputy Sigala from responding to the dispatch, driving to the house and having his partner knock on the front door. If Sigala had seen defendant in the front yard, or defendant had even answered the front door, Sigala could have validly asked him the same questions about his identification and the reason for his presence.

Defendant argues that Deputy Sigala was not lawfully present in the backyard when he "confronted" defendant and demanded his identification, and his demand for the identification occurred "on private property onto which Sigala had intruded without a

warrant." As explained in part I, however, defendant did not have a legitimate expectation of privacy in the backyard and cannot challenge Sigala's entry.

Defendant further asserts that Deputy Sigala's initial request for identification constituted an illegal detention because the police cannot request "identification at will and without any articulable reason for doing so." Defendant asserts that when he explained his presence by saying that he was working on the fountain, Sigala should have accepted "that innocent explanation at face value," but instead he improperly focused on defendant as "the *subject* of suspicious activity" so that defendant was illegally seized. (Original italics.) However, an officer's subjective and undisclosed "focus of suspicion" is irrelevant to determine whether a suspect is in custody. (*Stansbury v. California* (1994) 511 U.S. 318, 326.) In addition, the possibility of an innocent explanation does not preclude the existence of a reasonable suspicion of criminal activity. (*People v. Letner and Tobin, supra*, 50 Cal.4th at pp. 146–147.)

We thus conclude that Deputy Sigala did not illegally detain defendant when he initially spoke to him in the backyard and asked for his identification. When defendant presented an identification card with someone else's picture, there was reasonable suspicion to detain him to determine his identity and reason for his presence, given the totality of the circumstances. Defendant's presentation of another identification with another person's picture and in a different name required his continued detention to again determine his presence.

III. Defendant's Conviction for Failing to Register

Defendant contends his conviction in count II for violating section 290.012, subdivision (a), failing to annually update his registration as a convicted sex offender within five days of his birthday, must be reversed because there is insufficient evidence that defendant had actual knowledge of the registration requirement. Defendant argues the printed forms which contained the registration advisements were in English, but the

trial evidence established that he only spoke Spanish so that he did not have actual knowledge of what was required to register as a sex offender.

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

A. Section 290.012

Defendant was charged and convicted of violating section 290.012, subdivision (a), which states:

> "Beginning on his or her first birthday following registration or change of address, *the person shall be required to register annually, within five working days of his or her birthday*, to update his or her registration with the entities described in subdivision (b) of Section 290. At the annual update, the person shall provide current information as required on the Department of Justice annual update form, including the information described in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 290.015. The registering agency shall give the registrant a copy of the registration requirements from the Department of Justice form." (Italics added.)

Section 290.018, subdivision (b) states that, subject to exceptions not applicable in this case, "a person who is required to register under the act based on a felony conviction or juvenile adjudication *who willfully violates* any requirement of the act or who has a prior conviction or juvenile adjudication for the offense of failing to register under the act

and who subsequently and willfully violates any requirement of the act is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years." (Italics added.)

In *People v. Garcia* (2001) 25 Cal.4th 744 (*Garcia*), the court held the "willfully violates" element of failing to register requires proof of the registrant's "actual knowledge" of the duty to register. (*Id.* at p. 752.)

> "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 or willingness' to make the omission. [Citation.] Logically one cannot purposefully fail to perform an act without knowing what act is required to be performed. '[T]he 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. A jury may infer knowledge from notice, but notice alone does not necessarily satisfy the willfulness requirement." (*Id.* at p. 752, original italics.)

Garcia held the "actual knowledge" test satisfied constitutional requirements. (*Garcia*, *supra*, 25 Cal.4th at p. 752.) "This case involves a legally imposed duty to act. Defendant's guilt here turns not on anything he did, but on what he did not do. *Moreover, the registration statute establishes a method of providing notice of the registration requirement that can easily be documented*, as it was in this case. [Citation.] 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." (*Ibid.*, first italics added, second italics in original.)

Garcia further held the instructions that were given in that case were erroneous:

> "[T]he court's instructions on 'willfulness' should have required proof that, in addition to being formally notified by the appropriate officers as required by section 290, in order to willfully violate section 290 the defendant must actually know of his duty to register. We also conclude that the court erred

> in giving an 'ignorance of the law is no excuse' instruction [citation], 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. [A]lthough the 'no excuse' principle is 'deep in our law, ... due process places some limits on its exercise.' [Citations.] In the registration act context, the jury must find actual knowledge of the act's legal requirements." (*Garcia, supra*, 25 Cal.4th at p. 754.)[18]

The failure to register as a sex offender is a general intent crime. (*People v. Johnson* (1998) 67 Cal.App.4th 67, 72.) The existence and sufficiency of the evidence of the registrant's actual knowledge and willfulness are factual questions that must be decided by the jury. (*People v. Jackson* (2003) 109 Cal.App.4th 1625, 1635; *People v. Williams* (2009) 171 Cal.App.4th 1667, 1672–1673.) The willfulness element may not be negated by evidence the defendant "*just forgot*" to register because such an excuse " 'would effectively "eviscerate" the statute.' " (*People v. Barker* (2004) 34 Cal.4th 345, 358, original italics.)[19]

B. Actual Knowledge

A series of cases have discussed the "actual knowledge" and "willfulness" elements that are required to support a conviction for failing to register. In *People v.*

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[18] *Garcia* ultimately concluded the instructional error in that case was harmless because the jury was instructed that it had to find defendant was informed of the duty to register, and he read and signed the requisite form. *Garcia* held there was "strong evidence" the defendant knew about the registration requirements, and the only evidence "suggesting that defendant did not actually know of the requirement was defendant's testimony that nobody ever explained his duty to register to him and that he signed but did not read the notice that explained that duty." The jury's verdict showed that it rejected the defendant's testimony. (*Garcia, supra*, 25 Cal.4th at p. 755.)

[19] A defendant charged with failing to register "may present substantial evidence that, because of an involuntary condition – temporary or permanent, physical or mental – he lacked actual knowledge of his duty to register." (*People v. Sorden* (2005) 36 Cal.4th 65, 72.) "Only the most disabling of conditions" would negate the actual knowledge requirement, such as "[s]evere Alzheimer's disease" or "general amnesia induced by severe trauma." (*Id.* at p. 69.) A claim of depression is insufficient to satisfy this standard. (*Ibid.*) "It is simply not enough for a defendant to assert a selective impairment that conveniently affects his memory as to registering, but otherwise leaves him largely functional." (*Id.* at p. 72; *People v. Bejarano* (2009) 180 Cal.App.4th 583, 588–589.)

Edgar (2002) 104 Cal.App.4th 210, the court reversed the defendant's conviction for failing to register a second residence because the trial court "gave no instructions that required the jury to find that [the defendant] actually knew that staying at a transient hotel or homeless shelter, even on a temporary basis, while still maintaining his residence at the Clarinada Avenue address, required notification of law enforcement. On the contrary, the court's special instruction informing the jury that a person has 'changed' his residence pursuant to section 290 by adding a second residence address, in conjunction with the other instructions in this case, entirely removed from the jury the issue whether [the defendant] had knowledge that acquiring an additional residence required an additional registration." (*Id.* at pp. 220–221; see also *People v. Jackson, supra*, 109 Cal.App.4th at p. 1635.)

In *People v. LeCorno* (2003) 109 Cal.App.4th 1058 (*LeCorno*), the defendant registered his residence in San Francisco but regularly stayed at a friend's home in San Mateo while working there and did not register the second address. He was convicted of failing to register the San Mateo home as a second residence. (*Id.* at p. 1061.) *LeCorno* reversed his conviction because the trial court refused to instruct the jury that the defendant "must have known that he was required to register in San Mateo," and it erroneously instructed that "it was *not* necessary for defendant to have believed that he had established a legal residence in San Mateo and was required to register there." (*Id.* at p. 1068, original italics.) "It is nonsensical to say that in order to purposefully fail to register, defendant must have knowledge only of an abstract duty to register, but that he need not know what that means or how it applies to his circumstances. If defendant did not know that he had become a resident of San Mateo and therefore was required to register there, it hardly matters that he was aware that there was a duty to register under other circumstances. While defendant admittedly knew there was a duty to register – somewhere – he *did* register, in San Francisco. Defendant was convicted of failing to

register a second time, *in San Mateo*; what matters is whether he knew he was supposed to register *there*." (*Id.* at pp. 1068–1069, original italics.)

LeCorno reaffirmed that a violation of section 290 was a general intent crime:

> "While defendant need not intend to violate the law, i.e., he need not know the penal consequences of failing to register, he must have actual knowledge that he is required to register and willfully fail to do so. [Citation.] Because the intent required for a general intent offense 'is the purpose or willingness to do the act or omission' in question, the willfulness element of section 290 may be satisfied only 'by a purposeful or willing omission.' [Citation.] *An omission is neither purposeful nor willing if it is based upon ignorance of the requirements of the law.*" (*LeCorno*, *supra*, 109 Cal.App.4th at p. 1069, italics added.)

In *People v. Aragon* (2012) 207 Cal.App.4th 504 (*Aragon*), the defendant had met the monthly registration deadlines for a transient and "obviously knew, generally, of his duty to register as a sex offender." (*Id.* at p. 510.) However, he was convicted of failing to report that he had moved to a "residence," which was a travel trailer parked in front of his brother's duplex. *Aragon* found there was insufficient evidence to show his actual knowledge that the travel trailer was a residence for purposes of the registration act. (*Ibid.*)

> "Here, defendant had notice that he was required to register at a residence if he moved into a residence. That notice would suffice as substantial evidence of his actual knowledge if he had moved to what is commonly understood to be a residence, such as would have been the case if the defendant moved into his brother's duplex. But there is no such common understanding that living on the street in a travel trailer is a residence. While the travel trailer under these circumstances was a 'residence' under the legal definition of that term in the Act, the travel trailer was not a residence under at least one commonly-understood dictionary definition ('a building used as a home'). (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 1060, col. 1.)" (*Id.* at p. 511.)

Aragon held that while the defendant had signed forms several times, "none of those forms explained the "Act's definition of a 'residence.' None of them gave him notice that his living circumstances constituted a residence." (*Aragon*, *supra*, 207 Cal.App.4th 504 at p. 511.) *Aragon* also acknowledged defendant's possible motives for

not registering but held that "regardless of the strength of the posited motives, they do not lead to an inference that the defendant had actual knowledge of his duty to register his travel trailer as a residence. They simply suggest why he may not have registered, assuming he knew he had that duty." (*Ibid.*)

C. Analysis

Defendant's conviction for failing to register annually within five working days of his birthday in violation of section 290.012, subdivision (a), is supported by the evidence introduced at his jury trial that defendant did not contest.

First, we find the jury was properly instructed with CALCRIM No. 1170 on the elements required by *Garcia* The instruction stated that the People had to prove defendant was previously convicted of violating section 288, subdivision (b)(1); he resided in Modesto; he "actually knew he had a duty under ... section 290 to register as a sex offender and that he had to register within five working days of his birthday;" and he "willfully failed to annually update his registration as a sex offender with the police chief ... within five working days of his birthday." The jury was also instructed that "[s]omeone commits an act willfully when he or she does it willingly or on purpose," and if a person actually knows of his duty to register, " 'just forgetting' is not a defense."

Defendant asserts the jury instruction was erroneous because it was only stated that the People had to prove " 'actual' knowledge," whereas it should have said the jury had "to find 'actual and *probable*' knowledge of the registration requirement" to satisfy due process and convicted him of the offense. (Italics added.) Defendant's instructional claim is based on *Lambert v. California* (1957) 355 U.S. 225 (*Lambert*), that addressed the validity of a municipal ordinance that stated it was unlawful for felons to remain in Los Angeles for more than five days without registering with the police department. (*Id.* at p. 226.) *Lambert* held the registration ordinance violated due process when applied "to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge." (*Id.* at p. 227.)

> "We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand.... Where a person did not know of the duty to register, and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." (*Id.* at pp. 229–230.)

As explained above, *Garcia* addressed the due process concerns raised by convictions for failing to register as a sex offender and held the "actual knowledge test satisfies constitutional requirements." (*Garcia*, *supra*, 25 Cal.4th at p. 752.) In doing so, *Garcia* reviewed *Lambert* and found:

> "Assuming *Lambert* controls here (but see *U.S. v. Kafka* (9th Cir. 2000) 222 F.3d 1129, 1132–1133 [*Lambert* does not apply where the circumstances, including any notice expressly or impliedly provided by the criminal statute, should have alerted defendant to the registration requirement]; *U.S. v. Meade* (1st Cir. 1999) 175 F.3d 215, 226 [same]), it merely established that a defendant cannot be convicted of violating a registration act without at least 'proof of the probability of' knowledge of the duty to register. (*Lambert*, *supra*, 355 U.S. at p. 229 [78 S.Ct. at p. 243].) *By making actual knowledge of the duty to register an element of a section 290 violation, we undoubtedly meet any due process limitations imposed by Lambert.*" (*Garcia*, *supra*, at p. 753, italics added.)

Garcia thus adopted the "actual knowledge" requirement instead of the "actual and probable" element, and the jury in this case was properly instructed.

Next, we find there is substantial evidence that defendant knew of his prior conviction, that he resided in Modesto, and he failed to register at the time of his birthdate, based on defendant's statements to Deputy Sigala in the backyard of the residence on September 11, 2012. Sigala testified that the entirety of their conversation was in Spanish. Once Sigala learned defendant's true name and birthdate of May 30, he determined defendant had a prior sexual offense conviction and he was required to register as a sex offender. Sigala advised defendant of the *Miranda* warnings in Spanish and, in response to his questions, defendant acknowledged that he had previously been

convicted of a sex offense. Defendant also said that he had been living at a specific address in Modesto for "four months" prior to his conversation with Sigala.[20]

Section 290.012, subdivision (a) requires a sex offender to register within five working days of his birthdate. It was undisputed that defendant was born on May 30, and that he had never registered in California as a sex offender. On September 11, 2012, defendant told Deputy Sigala that he had been living at a specific address in Modesto for the previous four months. The period between May 30, 2012, and September 11, 2012, was 104 days, or 3 months and 12 days. Defendant's own statements established that he was living in Modesto within five working days of his birthdate and thus satisfied the residency and time period requirements for a violation of section 290.012, subdivision (a).

Defendant further contends there was no evidence of his "actual knowledge" because he was not advised of the registration requirements in Spanish. Deputy Sigala testified about his conversation with defendant in Spanish in the backyard:

> "[THE PROSECUTOR]: Did he acknowledge to you that he had been previously convicted of a sex offense?
>
> "A. Yes.
>
> "Q. And did you ask him whether he registered as a sex offender?
>
> "A. I did.
>
> "Q. What did he tell you?
>
> "A. He responded he didn't. He had not.

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[20] In closing argument, defense counsel argued defendant told Deputy Sigala that he had been living in Modesto for " '[a]bout four months,' " defendant could have been confused about how long he had been in Modesto, and he could have meant three or four months. Counsel argued that defendant's response required the jury to find the People had not met the burden of proving defendant had been in Modesto "on or about his birthday" in May 2012, and he was not guilty. In rebuttal, the prosecutor cited Sigala's trial testimony as set forth above, that defendant said he had been living in Modesto for "[f]our months prior to my arrest," not that he had been there for "about" four months.

"Q. Did you explain to him what it meant to register?

"A. Yes."

On cross-examination, defense counsel also asked Deputy Sigala about defendant's statements regarding his prior conviction:

"[Defense counsel]. You said you explained to him what it meant to register; correct?

"A. Yes.

"Q. Did he have – seem to have any problems with understanding what it meant to register?

"A. He wouldn't categorize it or say that. He – let me explain. He didn't remember whether or not he had to register."

To the extent that defendant's statements to Deputy Sigala were equivocal, defendant's "actual knowledge" was established by the evidence introduced by the People at the jury trial in this case, based on the joint impact of the stipulation from the court proceedings from his 2002 conviction, and the "8047" form that he initialed and signed when he was in prison in 2007.

As explained above, the parties stipulated that defendant had been convicted of a violation of section 288, subdivision (b) in 2002, and he was required to register as sex offender. They also stipulated that at the time of his 2002 conviction, the court advised him through a certified Spanish-speaking interpreter of the following:

" ' "The Court: Do you understand that the result of this conviction you will be required to register as a convicted sex offender with the police or sheriff of any city or county in which you reside, and you will be required to update your registration annually within five days of your birthday? Do you understand that?

" ' "The Defendant: Yes." ' "

Also, as set forth above, Detective Messer extensively testified about the contents of the printed "8047 form" that was in English. There were multiple paragraphs that explained each requirement that defendant had to follow in order to register as a sex

offender. Messer testified defendant had initialed each paragraph and signed the document in 2007; he was released from prison in 2008. Messer acknowledged that he did not have personal knowledge of how defendant was advised about the contents of the document but testified defendant's case manager signed the form and attested that defendant had been advised of the registration requirements.

Defendant argues that since the "8047 form" was printed in English, and there was no evidence he was advised of the contents of the form in Spanish, his actual knowledge cannot be implied "when English notice is given to a monolingual Spanish speaking person who does not understand English. [¶] At trial, there was no proof of [defendant's] competency in English."

At the jury trial in this case, however, defendant did not introduce any evidence to contradict the prosecution's evidence or challenge the meaning of his initials and signature on the printed "8047" form, that indicated he had been advised of and understood the registration requirements. Based on the record that was before the jury, we find defendant's conviction for failing to register is supported by substantial evidence.[21]

PART III

FACTUAL AND PROCEDURAL BASIS FOR THE COURT'S IMPOSITION OF THE THIRD STRIKE SENTENCE

In parts IV and V, *post*, we address defendant's arguments that the court abused its discretion when it denied his request to dismiss the prior strike convictions pursuant to section 1385 and *Romero*, and the imposition of the third strike term constituted cruel and/or unusual punishment in violation of the state and federal Constitutions.

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[21] As we will explain in part III, below, defendant raised the issue of his proficiency in English in his posttrial request to dismiss the prior strike convictions pursuant to section 1385. However, he did not raise this issue at his jury trial on the substantive offenses.

In order to address these issues, we will review the factual and procedural history of the court's sentencing decision in this case.

A. The Prior Strike Convictions and Proposition 36

Defendant was convicted of count I, using false documents to conceal his true citizenship or resident alien status (§ 114); and count II, failing to annually update his registration as a convicted sex offender (§ 290.012, subd. (a)).

The amended information alleged defendant had three prior strike convictions: two convictions for murder in 1980 (§ 187, subd. (a)), and a conviction in 2002 for commission of a forcible lewd act on a child under the age of 14 years (§ 288, subd. (b)(1)). The court found the allegations true.

Proposition 36, the Three Strikes Reform Act, provides that "[a] defendant with two prior strikes convicted of a nonserious, nonviolent felony cannot be sentenced to a third strike term unless the prosecution 'pleads and proves' that one of the Act's exceptions applies. (§ 1170.12, subd. (c)(2)(C).)" (*People v. Estrada*, *supra*, 3 Cal.5th at p. 667.)

Defendant's two convictions in this case were for offenses that were not serious and/or violent felonies. However, such an offender is excluded from the ameliorative provisions of Proposition 36, and still subject to a third strike term, if the prosecution pleads and proves that one of his prior convictions was for a serious and/or violent felony including "[a]ny homicide offense...." (§ 1170.12, subd. (c)(2)(C)(iv)(III).) An offender is also excluded from Proposition 36 if he has a prior conviction for "[a] 'sexually violent offense' as defined by subdivision (b) of Section 6600 of the Welfare and Institutions Code," or a prior conviction for "[a] lewd or lascivious act involving a child under 14 years of age, in violation of Section 288." (§ 1170.12, subd. (c)(2)(C)(iv)(I), (III).)

Defendant was not subject to the ameliorative provisions of Proposition 36 because he had two prior strike convictions for murder in 1980, and his third prior strike was for a violation of section 288, subdivision (b)(1) in 2002, commission of a lewd or

lascivious act on a child under the age of 14 years with force, which is also defined as "a sexually violent offense."

Thus, for defendant to obtain relief from the third strike term, the trial court had to dismiss at least two of the three prior strike convictions, notwithstanding Proposition 36.

B. Defendant's Request to Dismiss the Prior Strike Convictions

After defendant was convicted of both charges in this case, he filed a request the court to dismiss the prior strike convictions pursuant to section 1385 and *Romero*. Defendant's motion argued his prior offenses were "very old", he was released from prison on the murder charges after only five years,[22] which showed he was a "model inmate," he pleaded guilty to the sexual assault charge, and he had reformed his life and become "a sweet old man, with little to no contact with children."[23]

Defendant further argued the prior strikes should be dismissed because his current conviction was a passive, minor and technical violation of the registration requirement, and he was working and employed at the time. Defendant's motion argued:

> "[Defendant] was instructed about his obligation to register (with an interpreter) in court in 2002, as well in 2007 (seemingly without an interpreter). However, [defendant] is a simple and uneducated man, and as counsel for [him] I can attest that it does take him some time to comprehend the magnitude and obligations of his court requirements. As such, I truly believe that he was not intentionally failing his obligation, but rather ignorantly failing to understand his obligations. [¶] I believe if I were to instruct [defendant] of his obligations, he would have no further failures."

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[22] The appellate record states defendant was convicted of the murder charges in 1980. Defendant's motions state he was released from prison in 1986, so he served six years in prison.

[23] Deputy Sigala testified at trial that he determined defendant was born on May 30, 1952, which would make him 64 years old at the time of the June 2016 trial in this case.

At the hearing on the motion, defense counsel asserted that imposition of a third strike term for the current offense would be disproportional and violate the Eighth Amendment, and that defendant never understood the consequences of failing to register.

C. The People's Opposition

The People filed opposition to defendant's request to dismiss the prior strike convictions for murder and forcible commission of a lewd act on a child. The People submitted several documentary exhibits in support of the opposition, including transcripts and certified records from his prior convictions.

1. The Two Murder Convictions

According to the People's exhibits, defendant's two prior murder convictions were based on conduct that occurred in 1977 when two dead men were found in a car. They had been shot multiple times. A .22-caliber handgun was found in the car. Defendant's fingerprint was found on the car and his name was on papers in one victim's wallet. Defendant was found to have owned the same type of weapon and ammunition used to kill the victims, and tire treads found at the murder scene matched defendant's vehicle. Defendant admitted he knew the victims but denied any involvement in the crime. When the police decided to arrest defendant, he was already in custody for another offense but had given a false name. After he was convicted of two counts of second degree murder, defendant denied his guilt and told the probation officer in the murder case that he had traded the gun to someone, another person borrowed his vehicle, and he might have touched the victims' car at an earlier time. At the sentencing hearing, the court described the murders as particularly brutal and without provocation.

2. Prior Section 288 Conviction

The People's opposition also provided details about defendant's prior sexual assault conviction. In 2001, an eight-year-old girl reported to her neighbor that she went to defendant's home to get tomatoes. Defendant took her into the backyard, grabbed her hand, and placed it on his groin. Defendant told her to look at the tomato plants as he

rubbed her hand on his groin. She pulled away, he pulled her back, and he continued to rub her hand on his groin. When questioned by the police, defendant said it was not true. He later pleaded no contest to violating section 288, subdivision (b)(1) and was sentenced to the upper term of eight years.

The People argued the court would abuse its discretion if it dismissed defendant's prior strike convictions because his prior record was very serious. Defendant was released from prison in 2008, just four years before the current offenses. He was immediately deported but returned without authorization and in violation of the registration law. The People argued defendant's convictions in this case were not technical violations of the law. Defendant lied about his identity when he was arrested on the murder charges and repeatedly lied about his identity when questioned by Deputy Sigala. When he was interviewed by the probation officer in this case, he denied committing any of the prior or current offenses and claimed he did not know that he had to register as a sex offender.

D. The Court's Findings and Imposition of the Third Strike Terms

On September 9, 2016, the court conducted the sentencing hearing in this case. It made lengthy findings and denied defendant's motion to dismiss the prior strike convictions. The court stated it had reviewed the parties' motions and defendant's record, which included the two murder convictions, the forcible sexual assault conviction, and a misdemeanor sexual assault conviction.

> "The Court will be looking at the big picture, including not only the present felonies but the prior convictions, the particular history of [defendant], his character, the prospects, if you will, and just to determine whether or not [defendant] is deemed to be outside the spirits of the Three-Strikes Law in whole or in part and should be treated as if those strikes never existed based on what the Court knows about [defendant] and the facts of this case and his history. [¶]
>
> "[W]e have [defendant's] history: Is convicted of two murders, use of a firearm during those murders. He did not take responsibility for those murders, it doesn't seem, at any time in his life; however, he was a model

inmate and was able to obtain parole. So that does speak to [defendant's] ability to comply with rules and obligations and regulations and his ability to conform. It also speaks to his ability to have the knowledge base especially when it comes to registration.

"He was – while in prison, he was commended for his efforts and specifically to his academics and his schooling. And so when somebody tells me that he didn't know because somebody didn't explain it to him, it sounds like I have conflicting information as he had certainly a great ability to comply with education component while he was in custody which shows good things for him. It also shows that he had ability to understand his requirements and to understand his requirements to register when he was released the second time from custody because he demonstrated in his past the ability to understand the things that were presented including to a point where he had some understanding of the English language as well. So it cuts both ways, is my point on that issue.

"[Defendant], for whatever reason I can't tell you, was not deported on release from the original sentence when he was paroled from the two homicide cases. And the only reason why that's important to this Court is that he had an opportunity to remain in the United States and to achieve a lot of things that he wanted to achieve by being ability to remain in the United States and being a productive citizen. He's had that opportunity because he was given that opportunity by the parole board and also by the US government by not deporting him.

"I don't think it's contested that [defendant] is not a citizen, but the point there is he had an opportunity to be productive here in the United States. This is what subsequently happened after that. He got convicted of misdemeanor sexual battery. At that point he was granted and, I believe, probation. Subsequent to that he was then convicted of a more serious offense of [violating section] 288(a) [*sic*] where he did receive state prison. At this time he was notified of his duty to register.[24]

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[24] Many of the court's statements are based on evidence and information contained in the parties' sentencing motions, supporting exhibits, and the probation report. This evidence was not introduced before the jury during the trial on the substantive offenses, and defendant did not file a motion for new trial based on these issues.

Defendant did not object to any of the court's findings at the sentencing hearing. For purposes of explaining the background for the court's statements, the following documents set forth defendant's prior record.

"He was deported at that point in time. And then, according to his own information, that he returned shortly thereafter to the United States until which time Deputy Sigala came in contact with him as it relates to the facts of this case."[25]

According to the parties' sentencing motions and the probation report, defendant was convicted of two counts of second degree murder in Stanislaus County in 1980 and sentenced to two consecutive terms of five years to life in prison.

In its sentencing motion, the People submitted documentary exhibits about defendant's prior murder convictions, including a report prepared for the Board of Prison Terms, dated December 21, 1983, while defendant was serving his prison sentence. That report stated when defendant initially arrived at prison, he "was unable to communicate in English," and he had not been accepted into certain programs "due to limited English." "He has attended school since 9/28/79 up to the present time with a few interruptions for normal reason. He has received above average progress reports and can now communicate on a limited basis but should be able to take care of his interests while in the United States." The report stated that defendant continued to deny committing the murders but had taken steps to improve himself, so he could cope with life upon his release. Defendant had one disciplinary infraction for possession of contraband food, and he had worked in the furniture factory and served as a porter. He had made an "excellent adjustment" since being in prison and made "tremendous effort[s] to better himself." He got along well with staff and other inmates. He had realistic plans upon release, a place to live, and would not have problems finding work as a field hand.

The parties' sentencing motions state that in 1986, defendant was released from prison after serving the term for the murder convictions.

In 1992, defendant was convicted of a misdemeanor violation of section 243.4, subdivision (a), sexual battery, and placed on probation.

As explained in part III, defendant pleaded no contest in 2002 to a felony violation of section 288, subdivision (b)(1), commission of a lewd and lascivious act on a child under the age of 14 years with force or violence. He was sentenced to eight years in prison and ordered to register as a sex offender. He was released from prison in 2008, deported, and said he reentered the country a week later. He was arrested in this case in 2012.

[25] Defendant told the probation officer that he was deported to Mexico after he completed his prison sentence for the sexual assault conviction, he returned to the United States within one week, and he had been living in Modesto for the previous four years. At trial, Deputy Sigala similarly testified that defendant said he returned to the United States within one week of being deported in 2008. However, Sigala testified defendant said he had been living in Modesto for four months prior to their encounter.

The court reviewed defendant's reliance on cases which rejected third strike terms based on "technical" violations of the registration act where the registrant missed the deadline by days and had not changed his location. The court held those cases were distinguishable from this case because defendant used the false documents to conceal his identity, citizenship, and registration requirement.

> "[A]nd [the] clear guise on [defendant's] comments and communications with both Deputy Sigala ... and [in] the probation reports ..., he had no intent to register. So it was not a technical violation of the law. It was a purposeful violation of the law...[26]
>
> "So when we look at all of the facts and the opportunities that [defendant] has had over the course of his career and the criminality that continued, and when we look at the criminality, we're just not talking about you committed ... another serious offense. Every day he was here in Modesto he was committing a criminal act basically in the sense that he failed to register, he continued to fail to register, he continued to hide his identity, and he continued to be in the country by his own admission illegally.
>
> "And that's important because if you look back, back in the homicides, sure enough when they're trying to track him down, all of the efforts he took to conceal his identity back then not only was there – you know, and I grant it that he to this date still – or says he's innocent, but there was a lot of circumstantial evidence against him, and part of that was the guns that were used, the trading of the guns, trading of a car, all of these things to do to hide his identity, being arrested in Fresno, using another name, consistent with his acts that he's currently being charged with. So he hasn't really changed from all of the way back to committing these murders to these days. He's been denying his responsibility to the citizens of the State of California. He's been denying his responsibility to the citizens of the United States. And he's certainly been denying the responsibilities that he's had as required.

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[26] According to the probation report in this case, defendant told the probation officer that he knew that providing false documents to Deputy Sigala was wrong but denied knowing that he was required to register as a sex offender and said he was completely unaware of the registration requirements. Defendant was advised that he had been informed of the requirements after he was convicted of the sex offense. In response, defendant "elaborated on how he was falsely accused and charged with crimes he never committed."

"And just because day in and day out being employed is something good, it's a good factor, the fact that you find that [defendant] is cordial and friendly, those are all nice things, but under the law it doesn't demonstrate that he has fallen outside the confines or the responsibilities of the – and certainly the spirit of the Three-Strikes Law.

"So for those reasons, taking [defendant's] history of serious violent felonies, specifically two murders and a [section] 288 and even a misdemeanor sexual battery and the fact that the continuing his acts of deceit as demonstrated by his lack of acknowledgement, and I would tell you another thing as it relates to facts of this case, not only gave Deputy Sigala a false name, he gave him two false names, because when the first name didn't work, he gave another second name, so that doesn't demonstrate that this is somebody that has lived a law abiding life and falls outside of the spirit of the Three-Strikes Law."

After denying the motion to dismiss, the court sentenced defendant to the third strike term of 25 years to life for count I and a concurrent third strike term for count II.

With this background, we turn to defendant's challenges to the concurrent third strike terms.

IV. The Court's Denial of Defendant's Motion to Dismiss the Prior Strike Convictions

Defendant contends the court abused its discretion when it denied his motion to dismiss the prior strike convictions and imposed concurrent third strike terms of 25 years to life for felony convictions that were not serious or violent.

A. Section 1385

A prior serious felony conviction can be dismissed only if the defendant falls "outside the ... spirit" of the "Three Strikes" law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) In making that decision, a court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Ibid.*)

"[A] court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony I*).)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony I, supra,* 33 Cal.4th at pp. 376–377.)

"[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony I, supra*, 33 Cal.4th at p. 378.)

"In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce [] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case.' [Citation.]" (*Carmony I, supra*, 33 Cal.4th at p. 378.)

"But '[i]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. [Citation.] Where the record is silent [citation], or '[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Carmony I, supra*, 33 Cal.4th at p. 378.)

"Because the circumstances must be 'extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary case – where the relevant factors described in *Williams* ... manifestly support the striking of a prior conviction and no reasonable minds could differ – the failure to strike would constitute an abuse of discretion." (*Carmony I, supra*, 33 Cal.4th at p. 378.)

B. *Cluff* and *Carmony I*

Defendant contends that he was outside the spirit of the Three Strikes law as explained in *People v. Cluff* (2001) 87 Cal.App.4th 991 (*Cluff*). In that case, the defendant was convicted of failing to annually update his registration within five days of his birthday. The defendant had been registered with the police department and continually resided at the same address. The Legislature had added the requirement to annually reregister on birthdays five years after he had been released from prison, and there was conflicting evidence whether defendant had been notified of the new requirement. The defendant was still living at the same address, he was employed, and he had not reoffended when his parole agent realized he had not reregistered on his birthday, and asked defendant to meet with him. The defendant timely met with his parole agent and was immediately arrested for failing to reregister on his birthday. He

was convicted of the felony violation, and the trial court denied his request to dismiss his prior strike convictions and sentenced him to 25 years to life. (*Id.* at pp. 994–996, 1002.)

Cluff held the trial court abused its discretion when it denied the defendant's request to dismiss the prior strike convictions because the case involved "the most technical violation of the section 290 registration requirement we have ever seen," without the "intent to deceive or evade law enforcement." (*Cluff, supra*, 87 Cal.App.4th at pp. 994, 1001.) The defendant "was exactly where he said he would be when he registered ..., and the police were able to quickly find him. The purpose of the registration statute was not undermined by his failure to annually update his registration." (*Id.* at p. 1002.) *Cluff* rejected the trial court's finding that the defendant had taken steps to conceal his whereabouts. "[N]one of the facts before the court ... support the inference that [the defendant] failed to update his registration in order to obfuscate his residence or escape the reach of law enforcement." (*Id.* at p. 1003.)

In *Carmony I, supra*, 33 Cal.4th 367, the California Supreme Court reached a different conclusion. The defendant in *Carmony I* had been released from prison and timely registered as a sex offender. About a week later, he moved to a new residence and registered the new address. His birthday fell on the following month and his parole agent called to remind him to register. He also received written notices of the rule to reregister on his birthday, but he failed to do so. A month after his birthday, his parole officer asked to meet with him. The defendant went to the parole agent's office and was arrested for failing to annually register within five days of his birthday. The defendant pleaded guilty and admitted the prior strike convictions for oral copulation by force or fear on a minor under the age of 14 years and assault with a deadly weapon or by means of force likely to produce great bodily injury. (*Id.* at pp. 371–373.) The trial court denied his motion to dismiss the prior strike convictions and found he had a lengthy history of juvenile adjudications, a long adult criminal record, and numerous parole violations, " 'with a yearly visit to state prison most of his adult life.' " (*Id.* at p. 373.) The trial

court also found the defendant could not plausibly claim he did not now about his duty to register. Based on his criminal record, his "poor work record and lack of future prospects," the trial court found he fell within the spirit of the Three Strikes law and imposed the third strike term. (*Ibid.*)

The appellate court in *Carmony I* held the trial court had abused its discretion by refusing to dismiss the prior strike convictions. The appellate court acknowledged the defendant's prior strike convictions were serious but found his failure to register was a passive act and a technical violation of the law. (*Carmony I, supra*, 33 Cal.4th at pp. 373–374.)

The California Supreme Court granted review in *Carmony I* and held that, in light of the defendant's prior record, the trial court did not abuse its discretion when it refused to strike his prior convictions and the defendant's case was "far from extraordinary." (*Carmony I, supra*, 33 Cal.4th at p. 378.)

> "[Defendant] failed to register even though he was informed of his duty to do so on several occasions. He had a lengthy and violent criminal record – which included two prior convictions for failing to register. He had also done little to address his substance abuse problems, had a spotty work history, and appeared to have poor prospects for the future. All of these factors were relevant to the trial court's decision under *Romero,* and the court properly balanced them in concluding that [defendant] fell within the spirit of the three strikes law. Indeed, [defendant] appears to be 'an exemplar of the "revolving door" career criminal to whom the Three Strikes law is addressed.' [Citation.]" (*Id.* at pp. 378–379.)

Carmony I acknowledged the holding in *Cluff* but distinguished the two cases:

> "Unlike the trial court in *Cluff,* which relied on a factor – the defendant's intentional obfuscation of his whereabouts – allegedly unsupported by the record, the trial court in this case refused to strike defendant's prior convictions based on factors allowed under the law and fully supported by the record. Thus, the Court of Appeal in this case, unlike the court in *Cluff,* did not conclude that the trial court relied on improper factors in refusing to strike. Rather, it simply disagreed with the

court's weighing of these factors. And in doing so, it erred. [Citations.]" (*Carmony I, supra*, 33 Cal.4th pp. 379–380.)[27]

C. Analysis

The superior court did not abuse its discretion when it denied defendant's request to dismiss his two prior strike convictions for murder, and his prior strike conviction for forcible commission of a lewd or lascivious act on a child. The court extensively reviewed defendant's record, acknowledged that he had been employed when he was not in custody, that the murder convictions occurred in 1980, and he had not been charged with any offenses after he was released from prison for the sex offense in 2008.

However, the court declined to dismiss the prior strike convictions because of defendant's prior history of violence, the circumstances of the two murders and his use of the firearm, the forcible sexual assault on a child, and the misdemeanor sexual battery conviction. The court also cited defendant's history of using false identities to evade detection, as he did when he was about to be arrested on the murder charges, and his use of multiple false identifications in this case.

Defendant asserts his situation is similar to the technical violation described in *Cluff*, that supported the dismissal of the prior strike convictions in that case, because he was convicted of two regulatory offenses and did not commit any serious or violent felonies. Defendant complains it was inappropriate for the court to rely on his failure to register, since it simply amounted to a finding that he was guilty of the charged offense.

Defendant admitted to Deputy Sigala that he returned to the United States almost immediately after his deportation in 2008, and he had been living in Modesto for four

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[27] As we will explain in issue V, *post*, *Carmony I* remanded the matter to the appellate court to address the issue it had not resolved in the first instance – whether a third strike term would constitute cruel and/or unusual punishment in that case. (*Carmony I, supra*, 33 Cal.4th at p. 380, fn. 6.) On remand in *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony II*), the appellate court held that the defendant's third strike term violated the Eighth Amendment; the California Supreme Court has not overruled that holding. (*In re Coley* (2012) 55 Cal.4th 524, 530–531 (*Coley*).)

months. It was undisputed that defendant had never registered as a sex offender. The evidence supported the superior court's inference that defendant carried the multiple false identifications to avoid detection because of the existing registration order, and defendant's failure to register was not similar to the technical violation found in *Cluff*.

Defendant also complains the court improperly found he "understood English sufficiently so as to actually be aware of his obligation to register as a sex offender," and renews his argument that he was not fully advised of the registration requirements in Spanish in support of his *Romero* contentions. As explained in issue III of the Discussion, *ante*, we have found there is substantial evidence of defendant's "actual knowledge" of the registration requirements to support his conviction for failing to register based on the uncontested evidence that was introduced before the jury from the court's advisement in 2002 and the "8047" form that was initialed and signed in 2007. In addition, defendant did not object to the exhibits the People submitted in opposition to his *Romero* request.

As in *Carmony I*, we cannot say that the superior court abused its discretion when it denied defendant's request to dismiss the three prior strike convictions.

V. Cruel and/or Unusual Punishment

Defendant argues the imposition of third strike terms for failing to register and presenting false identification constitutes cruel and/or unusual punishment in violation of the state and federal Constitutions.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment, but strict proportionality between crime and punishment is not required. (*Coley, supra*, 55 Cal.4th at p. 542.) " 'Rather, [the Eighth Amendment] forbids only extreme sentences that are "grossly disproportionate" to the crime.' [Citation.]" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135.) "Outside the death penalty context, ' "successful challenges to the proportionality of particular sentences have been exceedingly rare." ' [Citations.]" (*People v. Reyes* (2016) 246

Cal.App.4th 62, 83.) The United States Supreme Court has upheld statutory schemes that result in life imprisonment for recidivists upon a third conviction for a nonviolent felony in the face of challenges that such sentences violate the federal constitutional prohibition against cruel and unusual punishment. (See *Lockyer v. Andrade* (2003) 538 U.S. 63 [two consecutive terms of 25 years to life for two separate thefts of approximately $150 worth of videotapes]; *Ewing v. California* (2003) 538 U.S. 11 [25-year-to-life sentence under Three Strikes law for theft of three golf clubs worth $399 each].)

Under the California Constitution, punishment is cruel or unusual if, although not cruel or unusual in its method, it nevertheless is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*).) "A defendant has a 'considerable burden' to show a punishment is cruel or unusual under the California Constitution. [Citation.] 'The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment.' [Citation.] Thus, ' "[o]nly in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive[.]" ' [Citation.]" (*People v. Reyes*, *supra*, 246 Cal.App.4th at p. 86.)

Lynch held that "[t]o determine whether a particular sentence is disproportionate to the offense for which it is imposed, we first examine 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' [Citations.] 'A look at the nature of the offense includes a look at the totality of the circumstances, including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of defendant's acts. A look at the nature of the offender includes an inquiry into whether "the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his

age, prior criminality, personal characteristics, and state of mind." ' [Citation.] We next compare the punishment imposed with punishments prescribed by California law for more serious offenses. [Citation.] Finally, we compare the punishment imposed with punishments prescribed by other jurisdictions for the same offense. [Citation.]" (*People v. Reyes*, *supra*, 246 Cal.App.4th at pp. 86–87.)

A. *Carmony II*

Defendant relies on a series of cases that address constitutional challenges to third strike terms for convictions for failing to register.

"In analyzing a cruel and unusual punishment challenge to a sentence imposed upon a defendant convicted of [the failure to register], a court may not simply look to the nature of the offense in the abstract, but must take into consideration all of the relevant specific circumstances under which the offense actually was committed." (*Coley, supra,* 55 Cal.4th at p. 553.) Where the failure to register demonstrates an effort to evade law enforcement (as opposed to simple negligence which does not affect law enforcement's ability to locate the defendant), a life sentence is constitutional for a three-strike offender. (*Ibid.; People v. Nichols* (2009) 176 Cal.App.4th 428, 435–437; *Crosby v. Schwartz* (9th Cir. 2012) 678 F.3d 784, 794 (*Crosby*).)

Defendant's primary reliance is on *Carmony II*. As explained in part III, *ante*, the defendant in *Carmony I* had been sentenced to the third strike term of 25 years to life for failing to annually update his sex offender registration within five working days of his birthday. *Carmony I* held the trial court did not abuse its discretion when it denied the defendant's request to dismiss his prior strike convictions. It did not reach the defendant's alternative argument that the third strike term constituted cruel and/or unusual punishment and remanded for further proceedings. (*Carmony I, supra*, 33 Cal.4th at pp. 378–380.)

On remand in *Carmony II, supra*, 127 Cal.App.4th 1066, the court held the same defendant's indeterminate third strike term constituted cruel and/or unusual punishment

in violation of the federal and state Constitutions. *Carmony II* noted that the defendant "had recently married, maintained a residence, participated in Alcoholics Anonymous, sought job training and placement, and was employed. Just prior to the current offense, he worked as a forklift operator ... and was employed ... until ... the day following his arrest for the present offense." (*Id.* at p. 1073, fn. omitted.) The court held that "because defendant did not evade or intend to evade law enforcement officers, his offense was the most technical and harmless violation of the registration law we have seen." (*Id.* at p. 1078.) The court acknowledged the seriousness of the defendant's prior offenses but noted they had occurred in 1983 and 1992. While he had not been crime-free since that time, he had not committed other serious or violent offenses. His third strike convictions were "remote from and bear no relation to the current offense and the current offense reveals no tendency to commit additional offense that pose a threat to public safety." (*Id.* at pp. 1080–1081.) "[T]his is a rare case, in which the harshness of the recidivist penalty is grossly disproportionate to the gravity of the offense.... [It] was an entirely passive, harmless, and technical violation of the registration law, ..." (*Id.* at p. 1077.) *Carmony II* also found the third strike term "for the duplicate registration offense ... shocks the conscience of this court." (*Id.* at p. 1089.)[28]

Other decisions have distinguished the unique facts of *Carmony II*. In *People v. Meeks* (2004) 123 Cal.App.4th 695 (*Meeks*), the defendant was convicted for failing to register within five days of changing his address and sentenced to the third strike term of 25 years to life. The same appellate court that decided *Carmony II* held that the third strike sentence in *Meeks* was not unconstitutional because the defendant had moved three times in two years and then lived as a transient for a period of time, without registering his new addresses or transient status. (*Meeks*, *supra*, at pp. 700–701.)

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[28] The California Supreme Court denied the People's petition for review in *Carmony II*.

In *Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875 (*Gonzalez*), the Ninth Circuit agreed with *Cluff's* characterization of the annual registration requirement as " 'the most technical violation' " (*id.* at p. 885) and held the defendant's third strike sentence was grossly disproportionate to his offense. The defendant's failure to annually reregister on his birthday violated a law that was "only tangentially related to the state's interest in ensuring that sex offenders are available for police surveillance," and the defendant had regularly updated his registration, except for failing to reregister the same address a third time in a 12-month period. (*Id.* at pp. 884–885.)

In *People v. Nichols*, *supra*, 176 Cal.App.4th 428, the defendant was sentenced to a third strike term after being convicted for failing to register a new address within five working days of a change of residence. *Nichols* rejected the defendant's Eighth Amendment argument and distinguished his situation from the technical violation found in *Carmony II,* since the defendant had never registered, his whereabouts had been unknown for several months, and he thwarted any attempts to monitor his activities. (*Nichols*, *supra*, at p. 437.)

In *Crosby, supra,* 678 F.3d 784, the court similarly rejected an Eighth Amendment claim after the defendant was sentenced to a third strike term for failing to annually update his registration within five days of his birthday and failing to register within five days of a change of address. (*Crosby*, *supra*, at pp. 786–787.) *Crosby* found a "consistent principle" in prior cases on this topic, that "whether the crime is a *de minimis* crime for which a life sentence is disproportionate is related to how closely the violation is tied to helping achieve the purposes of the sex offender registration statute. [Citations.]" (*Id.* at p. 794.) Crosby noted that defendant was actively attempting to evade his obligation to register "through the theft and falsifying of stolen identification cards." (*Ibid.*)

B. *Coley*

In *Coley, supra*, 55 Cal.4th 524, the California Supreme Court addressed the constitutionality of a third strike term for failing to register as a sex offender, and what facts could be considered in reviewing an Eighth Amendment claim.

The defendant in *Coley* had a lengthy and significant criminal record, and numerous violations of parole. He had been repeatedly advised of the registration requirements, and he never registered or updated his registration after he was released from prison in 2001. When he was arrested for failing to register, he admitted that he knew he had to register, but he wanted to get by without contacting law enforcement about his whereabouts. He offered contrary testimony at his trial and claimed he registered, but the papers were not filed correctly. The defendant was acquitted of failing to register his residence but was convicted of failing to register annually within five days of his birthday and sentenced to a third strike term. The defendant subsequently filed a habeas petition and argued his sentence was unconstitutional based on *Cluff* and *Carmony II*. (*Coley, supra*, 55 Cal.4th at pp. 532–537.)

Coley held the defendant's sentence of 25 years to life was not unconstitutional. *Coley* extensively reviewed *Carmony II* and related cases and summarized the distinctions. (*Coley, supra*, 55 Cal.4th at pp. 544–551.)

> "[O]n the one hand, these decisions conclude that a 25-year-to-life sentence under the Three Strikes law is constitutional as applied to a defendant whose current address is unknown to law enforcement authorities and who has failed to comply with a crucial aspect of the sex offender registration requirements – such as a defendant's failure to register a current address upon arrival in a jurisdiction. On the other hand, the decisions conclude that such a sentence is unconstitutional as applied to a defendant who has provided law enforcement authorities with accurate information regarding his or her current address and has generally demonstrated a good faith effort to comply with the sex offender registration requirements but who, through a negligent oversight, has failed to affirmatively confirm the continued accuracy of his or her existing registration information by updating the information each year within five working days of his or her birthday." (*Id.* at p. 551.)

The defendant in *Coley* argued that his sentence was unconstitutional because his situation was identical to *Gonzalez*: He had only been convicted of failing to reregister on his birthday and acquitted of failing to register on arriving in the jurisdiction. *Coley* rejected this distinction and found the defendant's conduct was more comparable to the situations in *Nichols* and *Crosby*. (*Coley, supra*, 55 Cal.4th at p. 553.)

> "The triggering offense at issue here – failure to annually update one's sex offender registration within five working days of one's birthday – can be committed under a wide range of circumstances. Some defendants – as in *Carmony II* and *Gonzalez* – who have properly registered their current address and whose overall conduct demonstrates a general good faith effort to comply with the sex offender registration requirements may commit this offense through a mere negligent oversight that does not adversely impact the fundamental purpose of the sex offender registration regime. Other defendants, however, may violate this statutory provision by intentionally failing to update their sex offender registration within five working days of their birthdays as part of a more general course of conduct that demonstrates a deliberate general unwillingness to comply with the sex offender registration requirements. In analyzing a cruel and unusual punishment challenge to a sentence imposed upon a defendant convicted of this offense, a court may not simply look to the nature of the offense in the abstract, but must take into consideration all of the relevant specific circumstances under which the offense actually was committed." (*Ibid.*)

In conducting this analysis, *Coley* relied not only on the jury's verdict, but the sentencing court's finding "that [the defendant] failed to register at the Palmdale [S]heriff's [D]epartment upon his release from prison in January 2001," even though the defendant had been acquitted of that charge. (*Coley, supra*, 55 Cal.4th at p. 561.) *Coley* held the sentencing court's reliance on such facts did not violate *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). "[T]he *Apprendi* line of decisions does not apply [in such a] context. Both the United States Supreme Court and this court have expressly held that a trial court, in exercising its discretion in sentencing a defendant on an offense of which he or she has been convicted, may take into account the court's own factual findings with regard to the defendant's conduct related to an offense of which the defendant has been acquitted, so long as the trial court properly finds that the evidence

establishes such conduct by a preponderance of the evidence. [Citations.]" (*Colely*, *supra*, at pp. 557–558.)

> "In view of the trial court's findings at the sentencing hearing, the circumstances of the triggering offense in this case are clearly distinguishable from the circumstances that underlay the decisions in *Carmony II* and *Gonzalez*. Because the trial court found that [defendant] deliberately failed to register as a sex offender even though he knew he had an obligation to do so, [defendant's] triggering offense demonstrated that, notwithstanding the significant punishment that he had incurred as a result of his prior serious and violent felony convictions, [defendant] was still intentionally unwilling to comply with important legal requirements prescribed by the state's criminal laws. As a consequence, [defendant's] current criminal conduct and conviction clearly bore a rational and substantial relationship to the antirecidivist purposes of the Three Strikes law. [Citation.]" (*Id.* at pp. 561–562.)

In rejecting defendant's Eighth Amendment arguments, *Coley* declined to find that *Carmony II* was wrongly decided since the defendant's conduct in *Coley* was "clearly distinguishable in a significant respect from the conduct of the defendant in *Carmony II*." (*Coley*, *supra*, 55 Cal.4th. at p. 530.)

> "Unlike the defendant in *Carmony II,* who had very recently registered at his current address and who the Court of Appeal found 'did not evade or intend to evade law enforcement officers' [citation], the trial court in this case, in refusing to strike any of petitioner's prior convictions and in imposing a 25-year-to-life sentence under the Three Strikes law, found that petitioner's triggering offense was not simply a minor or technical oversight by a defendant who had made a good faith effort to comply with the sex offender registration law. Rather, the court found that petitioner [in *Coley*] had never registered as a sex offender at his current address and had knowingly and intentionally refused to comply with his obligations under the sex offender registration law." (*Ibid.*)

Coley held that in light of these distinguishing facts, it did not need to decide whether the Eighth Amendment prohibited a third strike term in a factual situation like that in *Carmony II*, where the defendant had "properly registered his current residential address and demonstrated a good faith attempt to comply with sex offender registration

law but due to a negligent oversight had failed to update his registration within five working days of his birthday." (*Coley, supra*, 55 Cal.4th at p. 531.)

C. Analysis

Defendant contends that as in *Carmony II*, the imposition of a third strike term in this case for a technical violation of failing to register in count II resulted in a sentence that was cruel and/or unusual under both the state and federal constitutions. Defendant further argues that a third strike term for count I, presentation of false identification, also was unconstitutional because he did not use the false documents to illegally enter the country or obtain any benefits. Defendant complains the court made inappropriate factual findings at the sentencing hearing that were not supported by the evidence, when it found that defendant used the false identifications to evade detection for failing to register.

In contrast to *Carmony II* and *Gonzalez*, defendant had not complied with the registration order and then suffered a conviction for a technical violation for failing to reregister. It was undisputed that defendant never registered after he was released from prison in 2008. Defendant admitted he returned to the country almost immediately after being deported and he had been living in Modesto for the previous four months, which included the time of his birthday. Defendant was not charged or convicted of failing to register his residential address as in *Meeks* and *Nichols*. As in *Coley* and *Crosby*, however, the court did not improperly infer from the entirety of the record that he had continuously failed to register and used the multiple false identifications and birthdates to evade detection as a sex offender who had violated the lifetime registration order.

Defendant argues the third strike term is unconstitutional because he was 64 years old at the time of trial, and the imposition of an indeterminate life term on a senior citizen violates the Eighth Amendment. Defendant argues the same factors addressed in *Miller v. Alabama* (2012) 567 U.S. 460 for juveniles should be reviewed for senior citizens. *Miller* held that a juvenile may not be automatically sentenced to life without parole but

did so because of the fundamental differences between juvenile and adult minds, and how "transient rashness, proclivity for risk, and inability to assess consequences" reduced a child's moral culpability. (*Id.* at p. 472.) *Miller's* discussion does not apply to defendant's status as a 64-year-old felon who had committed three prior strike convictions and served time in state prison, who was not suffering from any physical or mental deficits, and who apparently realized the need to carry false identifications that misstated both his name and birthdate to evade detection as a sex offender who had failed to register.

DISPOSITION

The judgment is affirmed.

POOCHIGIAN, Acting P.J.

WE CONCUR:

FRANSON, J.

MEEHAN, J.

APPENDIX B

Court of Appeal, Fifth Appellate District - No. F074422

S254219

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent,

v.

ANGEL MEZA MADUENO, Defendant and Appellant.

The time for granting or denying review in the above-entitled matter is hereby extended to and including May 23, 2019, or the date upon which review is either granted or denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX C

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Fourteenth Amendment, Section One:

"... No State ... shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive a person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. "

California Constitution, Article I, Section 13:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly
describing the place to be searched and the persons and things to be seized."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257, sub. (a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Cal. Penal Code, § 1538.5:

(a)(1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: (A) The search or seizure without a warrant was unreasonable. (B) The search or seizure with a warrant was unreasonable because any of the following apply: (i) The warrant is insufficient on its face. (ii) The property or evidence obtained is not that described in the warrant. (iii) There was not probable cause for the issuance of the warrant. (iv) The method of execution of the warrant violated federal or state constitutional standards. (v) There was any other violation of federal or state constitutional standards.

(2) A motion pursuant to paragraph (1) shall be made in writing and accompanied by a memorandum of points and authorities and proof of service. The memorandum shall list the specific items of property or evidence sought to be returned or suppressed and shall set forth the factual basis and the legal authorities that demonstrate why the motion should be granted.

(b) [procedural provision not at issue]

(c)(1) Whenever a search or seizure motion is made in the superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(2) [procedural provisions not at issue]

(c) through (l) [provisions applicable to particular procedural situations]

(m) The proceedings provided for in this section, and Sections 871.5 , 995 , 1238 , and 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been

offered or will be offered as evidence against him or her. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty. Review on appeal may be obtained by the defendant provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence.

(n) This section establishes only the procedure for suppression of evidence and return of property, and does not establish or alter any substantive ground for suppression of evidence or return of property. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the United States and California Constitutions. Nothing in this section shall be construed as altering (1) the law of standing to raise the issue of an unreasonable search or seizure; (2) the law relating to the status of the person conducting the search or seizure; (3) the law relating to the burden of proof regarding the search or seizure; (4) the law relating to the reasonableness of a search or seizure regardless of any warrant that may have been utilized; or (5) the procedure and law relating to a motion made pursuant to Section 871.5 or 995 , or the procedures that may be initiated after the granting or denial of a motion.

(o) -- (p) [further procedural provisons not at issue]