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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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THE PEOPLE,

Plaintiff and Respondent,

v.

LEROY DALE HOLSEY,

Defendant and Appellant.

C068281

(Super. Ct. No.  
62098436)

A jury found defendant Leroy Dale Holsey guilty as charged of failing to update his annual sex offender registration. It further found that he had two strikes and had served three prior prison terms, and that he had previously violated the sex offender registration laws. (Pen. Code, §§ 290.012, subd. (a); 290.018, subd. (b); 667, subds. (b)-(i); 667.5, subd. (b).) The trial court sentenced defendant to prison for 28 years to life. Defendant timely appealed.

Defendant's claims may be grouped as follows: (1) the jury should not have been instructed that "I forgot" was no defense;

(2) the trial court mishandled defendant's claim of incompetent counsel; and (3) the trial court should have stricken the strikes, because otherwise the lengthy sentence violates state and federal constitutional norms.

As we will explain, defendant's contentions fail to persuade. Accordingly, we shall affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *Introduction*

Defendant was charged with failing to register as a sex offender within five working days of his birthday. The pattern instruction for that offense sets forth four elements the People must prove, as follows: (1) defendant had been convicted of a sex offense requiring registration; (2) defendant lived at a particular address; (3) defendant knew he had a duty to register within five working days of his birthday; and (4) defendant willfully failed to register. (CALCRIM No. 1170.)

Defendant had been a sex offender registrant for many years, registered many times, and twice before was convicted of registration violations. For tactical reasons, the defense stipulated he had been convicted of a felony sex offense requiring registration, and that he lived at an address on Main Street in Roseville. This left two jury issues, whether or not defendant actually knew he had to register, and whether his failure to do so was willful.<sup>1</sup>

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<sup>1</sup> The priors were tried to the jury separately and no issue about that trial phase is raised on appeal.

*Trial Evidence*

Defendant was born on March 20, 1965. Roseville police officers Rick Fox and Jude Chabot spoke to him at his Main Street apartment on April 14, 2010. On April 27, 2010, they arrested him. He told the officers he forgot to register and was waiting for the police to send him a reminder notice.

A police department analyst described how the registration records were kept, and testified all registrations are done in person. At every registration, the registrant is advised of the duty to re-register each year within five working days of his (or her) birthday, and the form has a line so stating, which the registrant must initial before signing the form. Defendant had registered four times in Roseville, once as an incoming registrant, once as an annual renewer in 2006, once due to a return to the area, and finally, on April 2, 2009, when he moved to Main Street. Each of the four clerks who assisted defendant to register in Roseville testified and identified the forms he filled out. Two clerks did not remember him. One testified he was coherent and responsive. The last clerk, who registered defendant when he moved to Main Street in 2009, testified she did not recall anything unusual in his behavior or questions.

A Department of Justice analyst identified defendant's statewide registration file, which indicated he did not register after 2009. The file reflected registrations dating back to 1986, and that defendant registered at "CDC," the former California Department of Corrections, on October 13, 2002, registered at Atascadero State Hospital on September 24, 2003,

then again registered at CDC on February 13, 2004. Thus, it shows defendant was in the hospital for a period of about five months; this five-month period was seven years before the instant offense.

Defendant was convicted in 2002 of failing to register, and the jury was instructed this fact could be used to show he knew of his duty to register.

Defendant presented no evidence.

#### *Jury Arguments*

The People argued defendant knew he had a duty to register because he had a prior conviction for failing to register, and had registered many times in the past, including three times as annual renewals after his birthday, and that he had initialed and signed multiple forms reflecting this duty. Willfulness was shown because he knew he had to register, was able to register, but failed to register, and a person cannot "just sit back, not register, and simply claim that it wasn't willful."

"[F]orgetting is simply not a defense."

Defense counsel effectively conceded defendant had knowledge of the registration requirement, and in fact *emphasized* that he had a history of registering, but also pointed to evidence in the exhibits showing defendant had spent time in Atascadero State Hospital, and argued there was a reasonable doubt about whether the fact he did not register this time was willful, or due to a mental health problem leading him to forget, as defendant had told the officers.

When the prosecutor began to counter the defense argument by pointing out the lack of evidence of defendant's mental problems, defense counsel objected.

Outside the presence of the jury, the court overruled the objection, stating "you did argue to the jury that or infer that your client has mental health issues, yet you didn't present any evidence of that for the jury. So I feel that the People can comment on the fact that the defendant never . . . produced any evidence to demonstrate any mental health issues."

When rebuttal resumed, the prosecutor emphasized the *meager evidence* of mental health issues, consisting of the fact that about seven years ago defendant was in a state hospital, and emphasized that defendant did not act crazily when questioned by the police, but instead claimed he simply forgot. The prosecutor did not argue evidence of a mental problem could never negate willfulness or actual knowledge.

## **DISCUSSION**

### I

#### *The "I forgot" Defense*

Defendant contends the trial court should not have instructed the jury that "I forgot" was not a defense, and separately contends his trial attorney was incompetent for not understanding the defense and not mustering evidence to support it.

We find no error on this record. On these facts, "I forgot" was not a defense. Further, the record on appeal does not support the claim that trial counsel was ignorant of the

scope of such a defense, nor does the record show other evidence supporting such a defense exists.

A. *Background*

Defense counsel filed an extensive pretrial *Romero* motion (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), discussed in Part III, *post*. In seeking to persuade the court not to defer the ruling, defense counsel argued "a jury trial is a complete and total waste of time" because "the odds are pretty substantial" defendant would be convicted, whereas a favorable *Romero* ruling would facilitate "a plea on the spot."

The pretrial *Romero* motion included evidence of defendant's psychiatric history, based on records from the Sacramento County Mental Health Treatment Center beginning in late 1993, after defendant had been released from prison, and extending to 2001. He had been brought to the center several times by peace officers, and he had been delusional, with auditory hallucinations, apparently suffering from amphetamine-related psychosis and polysubstance abuse. The motion also included a discharge summary from defendant's stay at Atascadero State Hospital between September 24, 2003 and April 22, 2004.<sup>2</sup> It stated defendant had been "actively psychotic" during most of his then most recent incarceration, but also included the fact defendant had told staff he was making up his symptoms, and that when he would take his medications (Zoloft, Risperdal, and

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<sup>2</sup> This is two months longer than indicated elsewhere. The discrepancy is immaterial for purposes of this appeal.

lithium) his symptoms would "quickly remit." Defense counsel stated other materials regarding defendant's mental health had not been received and some had not yet been reviewed, but, "The defense will supplement this portion of the motion brief as additional records are received and reviewed, and relevant material located."

The trial court (Nichols, J.) deferred ruling on the *Romero* motion until after trial.

The People moved in limine to have the jury instructed that forgetting to register "'by itself'" was not a defense. The trial court (Curry, J.) agreed, but stated this *did not* preclude the defense from "presenting evidence of substantial mental impairment or other reasons that might have impaired his memory[.]" Defense counsel objected that the instruction "has a tendency to misdirect the jury away from the willful definition." Later during the trial, the People acknowledged that the law allowed a defense based on "such a deteriorating cognitive ability [that a person] cannot comply with the registration requirements[.]"

During trial, defense counsel established the Roseville Police Department had no clear policy dealing with mentally ill registrants. After the People rested, and the parties were discussing the exhibit that referred to defendant's stay at Atascadero State Hospital while incarcerated, the trial court stated: "I've already indicated to [defense counsel] if he wishes to introduce evidence of his client's mental history, he has to do it with some competent evidence in that regard."

Defense counsel advised the court that the defense would be offering no evidence, unless defendant elected to testify the next day. Defendant elected not to testify, and the defense rested without presenting any evidence.

The trial court instructed the jury with a modified version of CALCRIM No. 1170, stating the People had to prove defendant "actually knew" he had a duty to register and "willfully failed to annually update his registration" within five working days of his birthday, stating that willfully meant "willingly or on purpose," and stating, consistent with the in limine ruling, that "Forgetting to register by itself is not a defense to a charge of willful failure to register."

*B. Instructional Claim*

A defendant must have actual knowledge of the sex offender registration duties before he or she can be found guilty of having willfully violated them. (*People v. Garcia* (2001) 25 Cal.4th 744, 752.) In *People v. Barker* (2004) 34 Cal.4th 345 (*Barker*), Barker claimed he forgot to register, and therefore did not have the requisite actual knowledge. The California Supreme Court disagreed: "Admittedly, the argument that a person cannot be said to *know* something if he or she has forgotten it, for whatever reason, does have a superficial plausibility. However, . . . [i]t is simply inconceivable the Legislature intended *just forgetting* to be a sufficient excuse for failing to comply with section 290's registration requirements." (*Barker, supra*, 34 Cal.4th at pp. 356-357.) "[C]ountenancing excuses of the sort given by defendant that he *just forgot* about

his registration obligation 'would effectively "eviscerate" the statute[.]'" (*Barker, supra*, at p. 358.) *Barker* declined to address "whether forgetfulness resulting from, for example, an acute psychological condition, or a chronic deficit of memory or intelligence might negate the willfulness required[.]" (*Ibid.*)

*People v. Sorden* (2005) 36 Cal.4th 65 (*Sorden*) clarified the issue. *Sorden* suffered from severe depression, which he claimed made it difficult for him to remember to register. (*Sorden, supra*, 36 Cal.4th at pp. 69-70.) *Sorden* held that "a defendant charged with violation of section 290 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." (*Sorden, supra*, at p. 72, emphasis added.) Such evidence may negate the People's showing of willfulness, provided the mental condition is sufficient to "nullify[] knowledge of one's registration obligations." (*Id.* at pp. 69, 73.) "Severe Alzheimer's disease is one example that comes to mind; general amnesia induced by severe trauma is another." (*Id.* at p. 69.)

In *Sorden's* case:

"There is no question but that he knew of his duty to register. He simply claimed his depression made it more difficult for him to remember to register. However, life is difficult for everyone. As a society, we have become increasingly aware of how many of our fellow citizens must cope with significant physical and mental disabilities. But cope they do, as best they can, for cope they must. So, too, must defendant and other sex offenders learn to cope by taking the necessary measures to remind themselves to discharge their legally mandated registration requirements. 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." (*Sorden, supra*, 36 Cal.4th at p. 72.)<sup>3</sup>

In *People v. Bejarano* (2009) 180 Cal.App.4th 583

(*Bejarano*), the jury was instructed: "'Only the most disabling conditions may negate the willfulness element of this offense. Some examples would be severe Alzheimer's disease . . . [and] general amnesia induced by severe trauma. [¶] Severe depression does not excuse a convicted sex offender from the registration requirements of Penal Code section 290.'" "

(*Bejarano, supra*, 180 Cal.App.4th at p. 589.) Bejarano claimed he suffered from depression. (*Bejarano, supra*, at p. 589.) The *Bejarano* court agreed the instruction given was erroneous, but not for the reason stated by Bejarano; instead, it "omitted the important notion [from *Sorden*] that the significantly disabling physical or mental condition had to deprive the defendant of *knowledge of his duty to register*." (*Id.* at p. 590.)

There was no evidence at trial that defendant fit within the *Sorden* category of persons whose mental state negates a showing of *actual knowledge* of the duty to register. Defendant spent five months at Atascadero State Hospital, ending in

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<sup>3</sup> A concurring opinion characterized the majority as drawing a distinction between "(1) defendants who have 'forgotten' the duty to register and cannot currently bring it to mind, but who still retain a subconscious knowledge such that, when reminded, they remember that they had a duty to register; and (2) defendants who, because of an involuntary physical or mental condition, no longer have a subconscious memory of the duty to register and, when reminded of that duty, would not remember it but must learn it anew." (*Sorden, supra*, 36 Cal.4th at pp. 74-75 (conc. opn. of Kennard, J.).)

February 2004, seven years before he violated the registration requirement; notably, he had successfully registered several times since then. No evidence was presented at trial about why he was sent to Atascadero, and there was no evidence he had any hospitalizations--or even any medical treatment--since his stay at Atascadero ended. Indeed, in the reply brief defendant concedes he "was a nominally functioning member of society."

A trial court must instruct on a defense "only if substantial evidence supports the defense." (*People v. Shel mire* (2005) 130 Cal.App.4th 1044, 1054-1055.) Because there was no evidence meeting the *Sorden* standard, the trial court properly instructed that forgetting "by itself" was not a defense.

Nor do we accept defendant's view that the instruction permitted the jury to convict him even if it found his mental state precluded actual knowledge. The jury was instructed that, in order to prove willfulness, the People had to show defendant did something "willingly or on purpose." The challenged instruction did not tell the jury to ignore defendant's mental state, it merely stated--correctly--that forgetting to register was not "by itself" a defense. The unrebutted arguments of defense counsel made the defense theory clear. (See *People v. Hughes* (2002) 27 Cal.4th 287, 363 ["defense counsel's unrebutted closing argument . . . emphasized and 'pinpointed' for the jury the defense theory" that intent to rob was formed after killing].) Although the People vigorously (and properly) contested whether the facts supported the defense, they did not challenge its viability.

In short, the trial court's instruction that forgetting "by itself" was not a defense was correct on these facts.<sup>4</sup>

*C. Incompetence of Trial Counsel*

In a separate but logically connected claim, defendant asserts the *reason* evidence supporting a *Sorden* defense was not presented was due to defense counsel's ignorance of the law and failure to prepare for trial. But the record on appeal does not support this contention.

The record shows trial counsel was aware of the defense, which was discussed on the record before trial, as defendant concedes. Posttrial, defense counsel stated on the record that "I saw that issue as being something to be addressed in the *Romero* motion and at sentencing more so than at trial, and so that was the reason I approached that issue the way I did at trial." This statement does not mean defense counsel was ignorant of the fact that, theoretically, a defendant's mental problems could be used both as a substantive defense to the charge of failure to register and as mitigation evidence for

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<sup>4</sup> Whether sufficient evidence supports a defense is a threshold question for the trial court. (See *Sorden, supra*, 36 Cal.4th at p. 73.) Absent evidence supporting the defense, instruction on a *Sorden* defense would have been both academic and confusing. But if there had been evidence from which a rational jury could have found defendant's mental condition was such that he did not know he had to register, an instruction explaining the *Sorden* defense would have been required. That is not this case.

In the reply brief, defendant asserts he "does not argue that he was unaware of his duty to register." If defendant concedes that he knew of his duty to register, his mental state arguments collapse in any event.

*Romero* or sentencing purposes. As we explained *ante*, the evidence presented to the jury did not meet the strict *Sorden* standard for an "I forgot" defense, and it appears trial counsel was aware of that fact, which rationally explains why no *Sorden* instruction was requested. No incompetence is demonstrated.

Further, the pretrial *Romero* motion, which included information not presented to the jury, did not show defendant lacked an actual awareness of the duty to register. At best, the evidence available to defense counsel showed defendant had a history of psychotic hallucinations (possibly drug-induced) *predating* his state hospital release--seven years before the current offense--with four intervening successful registrations in Roseville. Indeed, when defendant was questioned upon his arrest, he stated he was *waiting for a reminder* from the police. Far from showing a lack of ability to remember his duty to register, this shows defendant's general awareness of that duty, and his failure to take steps to satisfy that duty.

Even two posttrial psychiatric evaluations (which, of course, were not presented to the jury) did not support a *Sorden* defense. Before ruling on the *Romero* motion, the trial court appointed a psychiatrist, Dr. Roof, to examine defendant to determine whether he posed a threat to society. The ensuing report by Dr. Roof noted defendant's claim that he had been on disability for four years due to memory loss, but found no evidence of "cognitive impairment" during the examination. When

defense counsel questioned Dr. Roof's report, the trial court granted a continuance to allow defense counsel to obtain a second opinion, noting how important the issue was to the defense.

Dr. Nelson's report found "no evidence to indicate a formal thought disorder" but did diagnose defendant as psychotic, found his intellect in the "low average range" and found "some degree of memory impairment[.]" Dr. Nelson also opined "that the defendant's reported problems with his memory are genuine and could possibly impact his ability to accurately remember his registration requirements."

The latter opinion of Dr. Nelson edged toward impermissible diminished capacity evidence. (See *People v. Vieira* (2005) 35 Cal.4th 264, 292; *Bejarano, supra*, 180 Cal.App.4th at pp. 588-589.) In any event, at best for defendant, the opinion shows "a condition that falls short of nullifying knowledge of one's registration obligations." (*Sorden, supra*, 36 Cal.4th at p. 73.) "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." (*Sorden, supra*, at p. 72.) A condition that Dr. Nelson believed "could possibly impact his ability to accurately remember his registration requirements" but otherwise left defendant capable of functioning in society, registering four times in the recent past, and knowing enough to tell the arresting officers that he

forgot and was waiting for a reminder, is simply insufficient to successfully assert a defense under the *Sorden* standard.<sup>5</sup>

To prevail on a claim of incompetence of trial counsel, defendant must demonstrate both that counsel's performance fell below professional norms, and that he would have obtained a better result absent counsel's failings. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218 (*Ledesma*).) Here, the record does not support the claim that trial counsel was ignorant of the law regarding a *Sorden* defense or failed to unearth evidence to support such a defense. The totality of the evidence in the record does not support a *Sorden* defense. If any such evidence exists, defendant's remedy lies in habeas corpus. (See *Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

## II

### *Right to Counsel*

Defendant contends the trial court mishandled his request for a new trial based on his trial counsel's incompetence, and that the court should have appointed "conflict-free" counsel and conducted a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118) to inquire about defendant's dissatisfaction with counsel. We disagree.

#### A. *Background*

At the final sentencing hearing on May 20, 2011, defense counsel indicated that since the last appearance in the case,

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<sup>5</sup> Defendant concedes Dr. Nelson's report did not "directly" address "the memory issue[.]"

defendant had contacted him and "indicated a desire to have a new trial." Counsel saw no statutory grounds for a new trial motion, but conceded such a motion could "always be predicated on an ineffective assistance claim." Counsel "gleaned that there were five things that [defendant] was dissatisfied with[,]" the most important of which was his desire to have a registration clerk testify she told him "he could leave the state and then come back again and that would cure the late registration." After counsel explained some other points, including the fact that he had determined defendant's "low IQ and/or partially retarded mental status" were best addressed in the *Romero* motion rather than at trial, defendant addressed the court and stated counsel had confused which clerk defendant had identified, and made other claims.

The trial court proceeded to sentencing matters.

#### *B. Analysis*

Defendant contends the trial court erred by not appointing him conflict-free counsel and by not conducting a *Marsden* hearing. But defendant never *sought* replacement of counsel.

In *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*), our Supreme Court held that when a defendant seeks to withdraw a plea because of incompetence of counsel, "a trial court must conduct . . . a *Marsden* hearing only when there is at least some clear indication by the defendant, either personally or through counsel, that the defendant wants a substitute attorney." (*Sanchez, supra*, 53 Cal.4th at p. 84.) *Sanchez* quoted an

earlier case that arose after a jury trial. That earlier case, referencing the duty to hold a *Marsden* hearing, stated: "We do not necessarily require a proper and formal legal motion, but at least some clear indication by defendant that he wants a substitute attorney. The record in this case reveals no such indication by defendant." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8, approved by *Sanchez, supra*, at pp. 87-88, 89-90.)

Accordingly, "Statements by the defendant that he or she is dissatisfied with certain aspects of counsel's handling of the case absent a request for substitution of counsel [do] not trigger the court's duty." (Cal. Judges Benchguides, Benchguide 54, *Right to Counsel Issues* (2010) § 54.23, p. 54-25; see *People v. Gay* (1990) 221 Cal.App.3d 1065, 1070 [Gay moved for a new trial based on incompetence of counsel but did not ask for new counsel; the appellate court held: "A trial judge should not be obligated to take steps toward appointing new counsel where defendant does not even seek such relief"].)

Here, there was never a "clear indication by the defendant, either personally or through his current counsel" *that defendant wanted a new attorney.* (*Sanchez, supra*, 53 Cal.4th at p. 84; see *id.* at pp. 90, 91.) Therefore, the trial court was not required to conduct a *Marsden* hearing or appoint new counsel.<sup>6</sup>

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<sup>6</sup> It would not have been inappropriate for the trial court to have asked defendant if he wanted new counsel. Some judges follow that prophylactic practice. But we agree with the *People* that, to the extent *People v. Kelley* (1997) 52 Cal.App.4th 568

### III

#### *Sentencing*

In separate but related claims, defendant contends the trial court abused its discretion by not dismissing his strikes, and the result is an unconstitutionally harsh sentence. In large measure, defendant likens his case to that of another defendant, who was also given a Three Strikes sentence after a conviction for failing to register promptly after his birthday. (See *People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony I*); *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony II*).) As we explain *post*, such comparison dooms his claims, because *Carmony I* rejected Carmony's *Romero* contention and although *Carmony II* accepted Carmony's cruel punishment claims, defendant's case is readily distinguished from Carmony's.

#### A. *Background*

As referenced *ante*, defendant filed an extensive pretrial *Romero* motion, which sought to have both strikes dismissed. The People opposed the motion on the merits and argued it should be heard posttrial. The trial court deferred hearing on the motion until after the trial. Defendant renewed his motion posttrial, incorporating the materials tendered in the pretrial motion, but explicitly attacking only the oldest strike, a 1985 forcible oral copulation conviction. However, at the hearing on the renewed motion, he asked the court to strike both strikes.

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(at p. 580) mandated a *Marsden* hearing absent an explicit request for new counsel, it did not survive *Sanchez*.

The *Romero* motion generally minimized defendant's criminal history ("admittedly . . . a long criminal history"), maximized his mental problems, and argued the current offense was minor, because he had not changed his address since his last registration, therefore the police knew his location, satisfying the purpose of the sex offender registration laws.<sup>7</sup>

The probation reports and other material presented to the trial court shows defendant's criminal past began in 1982 with a misdemeanor burglary conviction.<sup>8</sup> Defendant spent time in the former California Youth Authority on two separate occasions. This was followed by two misdemeanors before his first felony conviction, in 1985, for oral copulation by force--his first strike. The facts show he forcibly orally copulated a woman in a bar, threatening to kill her with a knife. In 1992, defendant suffered his second strike, for second degree robbery, wherein defendant and his cohort grabbed a gold chain from the victim's neck, then fled. Also in 1992, defendant suffered a misdemeanor sex offender registration conviction. For his 1995 misdemeanor child annoyance conviction (Pen. Code, § 647.6) defendant pulled his pants down and told a 10-year-old child, "'I'm going to make you suck my dick just like an ice cream, just like all the other

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<sup>7</sup> The posttrial motion also unsuccessfully attacked defendant's 1985 strike on the ground the trial court in that case had not properly advised that the registration duty was a lifetime duty. That claim is not renewed on appeal.

<sup>8</sup> The 1992 probation report lists this 1982 "conviction" under "juvenile adjudications," with a result of a one year sentence to county jail. Defendant would have been 17 in 1982.

kids did[.]’”<sup>9</sup> In 2002, he picked up a felony sex offender registration conviction. He served prison terms for the 1985 sex offense, the 1992 robbery, and the 2002 sex registration offense, with multiple parole violations. He was released from parole just over a year before the instant offense.

The probation officer reported that defendant claimed he suffered from memory loss, had schizophrenia, and was taking medications including Risperdal and Thorazine. Defendant claimed his 1985 forcible sex offense resulted from alcohol and immaturity. Before his arrest he lived on social security payments, due to his mental health problems, but he claimed he had previously worked as a carpenter.

As mentioned *ante*, defendant’s psychiatric records showed a history of psychotic delusions (amphetamine-induced) and drug abuse. The 2004 discharge summary from Atascadero State Hospital states he may have been malingering. It recites a history of noncompliance with medication, “prominent thought

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<sup>9</sup> The People introduced an *arrest report* stating that defendant engaged two 11-year-old girls through a school fence, claimed to be a substitute teacher, and when they refused to let him into the fenced area, he threatened to hurt them, come to their house at night, and “fuck” them. It appears the People conflated two different events, because this report pertains to a 1999 arrest, not the 1995 conviction. Dr. Nelson’s and Dr. Roof’s report also seem to conflate the two incidents. The trial court referred to each incident separately at the sentencing hearing, noting the 1999 incident involved merely an arrest, without objection. On appeal, defendant does not challenge the facts of the 1999 incident. (See *People v. Evans* (1983) 141 Cal.App.3d 1019, 1021 [failure to object to sentencing information forfeits claim].)

disorder, paranoia, and auditory hallucinations" and showed diagnoses of schizoaffective disorder and polysubstance dependence, along with an antisocial personality disorder.

Before ruling on the *Romero* motion, the trial court received reports from two psychiatrists. Dr. Roof concluded defendant was at "high relative risk" of sexual reoffense, with the likely victims being random females, and believed defendant's risk of reoffense "increases with use of alcohol and other drugs." Dr. Nelson found defendant's risk of sexual reoffense to be "in the moderate-high category" or "in the moderate range" depending on the metrics used, but he believed those ratings "probably overstate" defendant's actual risk.

Defense counsel had argued the facts of *Carmony II*-- described *post*--were "very very similar" to defendant's facts, except that defendant was convicted of a misdemeanor sex offense in 1995, whereas *Carmony* had no further sex offense convictions, purportedly "a minor point." At the final sentencing hearing, counsel emphasized that the facts of the instant case were "almost identical" to *Carmony II*, and asked the court to strike *both* strikes.

After a thorough recitation of defendant's criminal history, the trial court denied the *Romero* motion, sentenced defendant to 25 years to life under the Three Strikes Law, and added a year for each prior prison term defendant had served, for a total sentence of 28 years to life in prison. In denying the *Romero* motion, the trial court found defendant presented an "extreme risk" to public safety, "based on both his violent

offenses, his prior violations of parole, prior violations of law, his mental instability and his propensity . . . to engage in sexual acts with children or around children. All these in total present to the court a person that poses a grave risk to society." Further, defendant's two prior registration violations showed he did not take his duty to register seriously; he was unemployed and had a history of drug and alcohol abuse, and he had only "dim" prospects for rehabilitation. The trial court found a Three Strikes sentence would not violate cruel punishment standards, distinguishing *Carmony II* as defendant remained dangerous to society, had been in prison "most of his life" and had two prior convictions for registration offenses.

B. *Romero* Motion<sup>10</sup>

A trial court may strike a felony conviction for purposes of sentencing if and only if the defendant falls outside the spirit of the Three Strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*)). The trial 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

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<sup>10</sup> Defendant briefed the *Romero* and cruel punishment claims separately, although, as his trial counsel emphasized and the trial court agreed, the issues overlap.

not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra*, 17 Cal.4th at p. 161.)

Dismissal of a strike is a departure from the sentencing norm, and, as such, we may not reverse the denial of a *Romero* motion unless the defendant shows the decision was "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony I, supra*, 33 Cal.4th at p. 377.) Reversal is justified where the trial court was unaware of its discretion or applied improper factors. (*Carmony I, supra*, at p. 378.) But where the trial court knew of its discretion, "'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[.]'" (*Ibid.*)

Here, defendant could be a poster child for the Three Strikes law. (See *Carmony I, supra*, 33 Cal.4th at pp. 378-379.) He has a continuous record of criminality beginning with a burglary at age 17. His first felony was a violent sexual assault in 1985, and in 1995 he flagrantly propositioned a 10-year-old child to suck his penis. He has been to prison three times, with multiple parole violations, yet his criminality persists. The present offense, committed a year after defendant's release from parole, represents defendant's third conviction for violating the sex offender registration laws. He is supported by social security due to his mental problems. He has no prospects as the record shows.

Neither the 1985 or 1992 strikes were remote, because defendant had an unbroken record of convictions, incarcerations,

and parole violations, since then. (See *Williams, supra*, 17 Cal.4th at p. 163 ["not significant" that 13 years passed between the prior and current felony because Williams did not refrain from criminality]; *People v. Gaston* (1999) 74 Cal.App.4th 310, 321 [1981 strikes not remote in light of record that "substantially spanned his entire adult life"].) Defendant's claim that his crimes were showing "de-escalation" over time does not change their *continuity*, nor is the claim persuasive in any case, in light of Dr. Roof's report--presumably credited by the trial court over Dr. Nelson's somewhat more favorable report--that defendant presents a "high relative risk" of reoffense.

Defendant's reliance on *People v. Cluff* (2001) 87 Cal.App.4th 991 (*Cluff*) is unpersuasive. Defendant emphasizes that he had not moved from his last registration address, and therefore the current offense is a mere "technical" violation as in *Cluff*. In *Cluff*, the trial court drew the factually unsupported conclusion that Cluff had obscured where he could be found, although he was living at his last registered address, therefore the appellate court remanded for a new *Romero* hearing. (*Cluff, supra*, 87 Cal.App.4th at pp. 1001-1004.)

*Cluff* does not support the proposition that a mere "technical" nature of a violation of the registration laws brings a person outside the spirit of the Three Strikes law. In *Carmony I*, our Supreme Court upheld the denial of a *Romero* motion for a registrant whose current offense was failing to update a registration, but who had not changed his residence

since his last registration. (*Carmony I, supra*, 33 Cal.4th at pp. 379-380.) There, the court emphasized the narrowness of *Cluff*: “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.” (*Carmony I, supra*, at p. 379.) Therefore, *Cluff* does not assist defendant in this case.

The bulk of defendant’s *Romero* briefing invites us to reweigh relevant factors, and contends the trial court should have given more or less weight to particular points. But we may not reverse the denial of a *Romero* motion unless the decision was “so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony I, supra*, 33 Cal.4th at p. 377.) Given defendant’s record, we certainly cannot say the trial court erred in declining to find defendant fell outside the spirit of the Three Strikes law.

### C. Cruel Punishment

We also reject defendant’s contention that his sentence is unconstitutionally cruel.

Generally speaking, for state law purposes, a sentence is too harsh if it is “so disproportionate to the crime that it ‘shocks the conscience’ in light of the defendant’s history and the seriousness of his offenses.” (*People v. Nichols* (2009) 176 Cal.App.4th 428, 435 (*Nichols*).) Generally, for federal purposes, a sentence is too harsh if it is found to be grossly

disproportionate "by weighing the crime and defendant's sentence 'in light of the harm caused or threatened to the victim or society, and the culpability of the offender.'" (Ibid.)

1. *Carmony II*

In *Carmony II*, this court found a Three Strikes sentence of 25 years to life violated both state and federal constitutional norms where Carmony failed to register within five days of his birthday but had not moved since his last registration, and where Carmony had evidently turned his life around.<sup>11</sup>

In *Carmony II*, we noted that the defendant had committed no further sex offenses since his original 1983 sexual offense, had committed no serious or violent offenses since 1992, had "no tendency to commit additional offenses that pose a threat to public safety," and "was acting in a responsible manner" in that he had married, participated in alcohol classes, was employed, and did not pose "a serious risk of harm to the public justifying a life sentence." (*Carmony II, supra*, 127 Cal.App.4th at pp. 1073, 1080-1081, 1087-1088.)<sup>12</sup>

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<sup>11</sup> One justice dissented in *Carmony II*. (*Carmony II, supra*, 127 Cal.App.4th at pp. 1089-1092, dis. opn. of Nicholson, J.) We note that we have limited *Carmony II* to cases involving a registrant who did not move away from the last registered address. (See *Nichols, supra*, 176 Cal.App.4th at pp. 435-437.)

<sup>12</sup> The People's briefing vigorously attacks *Carmony II*. For purposes of deciding this appeal, we need not reach the issue of whether *Carmony II* was correctly decided. Recently, in a habeas corpus case, the California Supreme Court also considered *Carmony II* and declined to reach that issue. (*In re Coley* (2012) 55 Cal.4th 524, 528-531 (*Coley*)). Instead, distinguishing *Carmony II* on its facts, in *Coley* our Supreme Court pointed out that the trial court had found the

In contrast, in the instant case, defendant persisted in committing sexual and other offenses, has two prior registration convictions, is unemployed, and has neither stable relationships nor discernible prospects. Critically, as the trial court found, *unlike* the defendant in *Carmony II*, here defendant presents a high danger of sexual reoffense and therefore is a threat to society.

Because defendant's personal history sharply differs from that of Carmony's, in that he has not rehabilitated himself and presents a danger to society, we agree with the trial court that *Carmony II* does not govern this case. The sentence is not "so disproportionate to the crime that it 'shocks the conscience' in light of the defendant's history and the seriousness of his

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petitioner's registration violation stemmed not from inadvertence or "a good faith effort" to comply with the law, but reflected that the "petitioner was still intentionally unwilling to comply with important legal requirements prescribed by the state's criminal laws. As a consequence, petitioner's current criminal conduct and conviction clearly bore a rational and substantial relationship to the antirecidivist purposes of the Three Strikes law." (*Coley, supra*, 55 Cal.4th at pp. 553, 561-562.) The court also emphasized that, "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." (*Coley, supra*, at p. 553.)

As we shall explain, we uphold the trial court's findings that this case, too, is distinguishable from *Carmony II*, and that defendant merits treatment under the Three Strikes law, which does not amount to cruel or unusual punishment *on these particular facts*.

offenses.” (*Nichols, supra*, 126 Cal.App.4th at p. 435.) Nor can we find the sentence grossly disproportionate “by weighing the crime and defendant’s sentence ‘in light of the harm caused or threatened to . . . society[.]’” (*Nichols, supra*, at p. 435, emphasis added.)

## 2. Ninth Circuit cases

Apart from his reliance on *Carmony II*, defendant also relies on three Ninth Circuit decisions to support his Eighth Amendment claim. We are not bound by these decisions. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Further, we find them distinguishable.

In *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755 (*Ramirez*), both of the defendant’s strikes were nonviolent robberies arising from shoplifts, and the current offense was a petty theft (shoplift of a VCR) with a prior theft conviction; the strikes jointly resulted in a single county jail sentence, Ramirez displayed no further criminality until the VCR shoplift, and he presented evidence of rehabilitation. (*Ramirez, supra*, 365 F.3d at pp. 756-759, 761, 768-769.) In marked contrast to the defendant in *Ramirez*, here defendant’s strikes were forcible oral copulation and second degree robbery, he has served three prior prison terms, he has not demonstrated reform, and he remains a danger to society.

In *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964 (*Reyes*), the defendant’s prior strikes were residential burglary (committed at age 17 in 1981, resulting in a commitment to the former CYA) and a 1987 armed robbery (resulting in a prison sentence); the

current offense (committed in 1997) was perjury on a driver's license application. (*Reyes, supra*, 399 F.3d at pp. 965-966, 968.) The Ninth Circuit held Reyes would be eligible for relief on habeas corpus unless the armed robbery "was a 'crime against a person' or involved violence" so as to justify a Three Strikes sentence, and remanded so the nature of that robbery could be sufficiently developed. (*Reyes, supra*, at pp. 969-970.) We agree with the dissent, which concluded the majority unduly minimized the fact Reyes's conviction was for *armed* robbery, that he had been sent to prison, and that he was a career criminal. (*Id.* at pp. 970-972 [dis. opn. of Tallman, J].) Further, here defendant used a knife in his 1985 strike, has served *three* prior prison terms, is a career criminal, and poses a high danger of sexual reoffense. Even were we to agree with the majority, here defendant's case is distinguishable from the defendant in *Reyes*.

The Ninth Circuit decision cited by defendant which is most comparable to the instant case is *Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875 (*Gonzalez*). *Gonzalez*, like defendant, failed to update his sex offender registration but had not moved, and received a sentence of 28 years to life, based on two prior strikes and three prior prison terms. (*Gonzalez, supra*, 551 F.3d at pp. 878-879.) The court concluded that despite *Gonzalez's* criminal history, there was "no evidence that, as of 2001 [i.e., at the time of his current offense], *Gonzalez* was a recidivist" and that "*Gonzalez's* present offense does not reveal

any propensity to recidivate.” (*Gonzalez, supra*, at pp. 886-887.)

We need not decide whether we agree with the holding in *Gonzalez*, as we agree with the trial court that *Gonzalez* is distinguishable for the same reasons we distinguished *Carmony II*: Here, viewed in support of the trial court’s sentencing findings, the record shows defendant presents a continuing threat to society.

Accordingly, we reject the cruel punishment claims.<sup>13</sup>

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_  
DUARTE, J.

We concur:

\_\_\_\_\_  
NICHOLSON, Acting P. J.

\_\_\_\_\_  
BUTZ, J.

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<sup>13</sup> For the first time in the reply brief, defendant purports to make inter- and intra-jurisdictional arguments. We decline to address these points both because they come too late (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29) and because they add little to the analysis of the same issues undertaken in *Carmony II, supra*, 127 Cal.App.4th at pages 1081 to 1084.