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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID JAMES DUNBAR,

Defendant and Appellant.

H040817

(Santa Clara County

Super. Ct. No. C1350111)

I. INTRODUCTION

Defendant David James Dunbar entered no contest pleas to the felony of failing as a transient sex offender to register his new address within five working days (Pen. Code, § 290.011, subd. (b))¹ and the misdemeanor of violating a protective order (§ 273.6, subd. (a)). Defendant also admitted having five strike convictions (§§ 667, subds. (b)-(i); 1170.12), including four 1986 convictions of forcible lewd touching (§ 288, subd. (b)) and one 1983 conviction of attempted residential burglary (§§ 664; 459). Defendant also admitted having served four separate prison terms (§ 667.5, subd. (b)), the first following his lewd conduct convictions, the second following a 1996 conviction of petty theft with

¹ Unspecified section references are to the Penal Code.

Section 290.011 governs registration of transient sex offenders. Subdivision (b) states in part, “A transient who moves to a residence shall have five working days within which to register at that address, in accordance with subdivision (b) of Section 290.”

a prior (§ 666), the third following a 1998 conviction of willful failure to register as a sex offender (former § 290, subd. (g)(2)), and the fourth following a 2003 conviction of felony false imprisonment (§§ 236-237).

Defendant sought to avoid an indeterminate life sentence under the Three Strikes statutes by requesting that the court dismiss four of his strikes under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The prosecutor opposed this motion. After denying defendant's request to strike any of his strikes, the court imposed an indeterminate sentence of 25 years to life for defendant's failure to register as a sex offender. It also imposed but then struck four one-year enhancements for prior prison terms as recommended in the probation report.

On appeal defendant claims the denial of his *Romero* motion was an abuse of discretion. He also asserts that his sentence is unconstitutionally cruel and unusual. We conclude the trial court did not abuse its discretion when it denied defendant's *Romero* motion, and after reviewing the specific circumstances involved in this case, we conclude defendant's sentence is not unconstitutionally cruel and unusual. We will therefore affirm the judgment.

II. FACTUAL BACKGROUND²

A. THE CURRENT OFFENSES

Defendant has been required to register as a sex offender since his June 1986 conviction by a jury of four counts of forcible lewd touching. In late 2009, defendant became involved with Darlene Akins and began living with her in the City of Santa Clara in a motel where she had been staying since 2008. On July 25, 2012, a three-year criminal protective order was issued requiring defendant to not contact Akins and to stay

² Because defendant entered no contest pleas before a preliminary examination, the factual background of defendant's current offenses is derived from the probation report.

300 yards away from her. The order was modified to become a probation condition on August 20, 2012, following defendant's conviction by no contest plea of violating a protective order.

On February 7, 2013, defendant completed a sex offender registration form indicating he was a transient with no residential address. He indicated that he frequented the intersection of Charles and Oakland Road. By initials he acknowledged that "if I am registered as a transient and move to a residence, I have five (5) working days within which to register in person, with the law enforcement agency having jurisdiction over the new address"

On February 14, 2013, after a motel employee reported that defendant had been living with Akins for about two and one-half years and that they were scheduled for eviction, deputies knocked on the door of the motel room. Akins initially refused to open the door and insisted defendant was not there, but when she finally opened the door deputies found defendant hiding in the shower with a pillow case over his head.

B. TRIAL COURT PROCEEDINGS

1. Charges, Pleas, and Admissions

Defendant was charged by complaint with the felony of failing as a transient sex offender to register his new address within five working days (count 1) and the misdemeanor of violating a protective order (count 2). Defendant was also charged with five prior strike convictions and four prior prison terms. Without a preliminary examination, defendant entered no contest pleas to the pending charges and admitted the strike and prior prison term allegations.

2. Motion to Dismiss Strikes

Defendant sought to dismiss four of his five strike convictions. This required an evaluation of the current offenses, defendant's personal and criminal history, and his future prospects.

(A). Defendant's Personal History

Defendant was born in Oakland in 1956. He was the second youngest of five boys. He also had two sisters. He required special education services to assist him in reading. He attended school in Milpitas through the 11th grade. He was first given alcohol at the age of 12; he began with wine and moved to hard alcohol. He used to drink two and a half pints a day, and he realizes he is an alcoholic.

Defendant worked as a wafer sorter in an electronics company for four or five years and on an assembly line for a vehicle manufacturer for eight or nine years. He married a woman named Sherry in 1976. They had three children. One son was recently shot to death. He separated from Sherry in 1986 after he was accused of molesting his stepdaughter.

According to defendant, he has worked in construction when released on parole. He was diagnosed with bi-polar disorder in 2009 and has struggled to keep taking his medication. He began receiving services through the Mental Health Treatment Court in 2010 or 2011. According to the probation report, he was diagnosed with schizophrenia and alcohol abuse while in jail in April 2011. He was not prescribed any psychiatric medication as of the writing of the probation report.

(B). Defendant's Criminal History

Defendant began to accumulate misdemeanor convictions in 1976 when he turned 20. He was convicted of disturbing the peace (§ 415) in 1976 and 1977. He was also convicted of battery (§ 242) in 1978 and 1979.

Before his first strike conviction in February 1983 for attempted burglary, defendant had been convicted of a number of misdemeanors, including forgery (§ 470), driving while intoxicated (former Veh. Code, § 23102), driving with a suspended license (Veh. Code, § 14601.1), and sales of a fake controlled substance (Health & Saf. Code, § 11355). After his arrest for attempted burglary, defendant acknowledged to his probation officer that he had a problem with alcohol. The probation report commented

that “defendant does not appear to this officer to be motivated to control his drinking.” He was placed on felony probation for the attempted burglary conviction.

Defendant’s forcible lewd touching of his stepdaughter began in Contra Costa County in 1984 when defendant was 27 years old and his stepdaughter was 11. Defendant was arrested on December 17, 1985. Following his 1986 conviction on these charges, defendant was sentenced to prison for 12 years and released on parole in June 1992.

Defendant’s parole was revoked in February 1993 following his arrest on January 21, 1993, for brandishing a weapon and for false imprisonment. He was returned to prison until he was paroled again on October 17, 1993.

Defendant was arrested for disturbing the peace on November 25, 1993, and convicted of that offense on December 8, 1993. He was placed on probation for three years. On March 25, 1994, defendant was arrested subject to a parole hold. Parole was revoked in April 1994 and he was returned to prison until he was paroled again on November 20, 1994.

One week later, defendant was arrested and booked on felony charges of petty theft with a prior and possession of stolen property (§ 496). The crimes involved defendant walking into a flower store in a shopping center around 1:00 p.m. in a highly intoxicated state and taking a wallet out of an employee’s unattended backpack. Defendant was apprehended while at the shopping center. In January 1995, parole was revoked for another 12 months.

After his release on parole, defendant remained in custody facing the same charges in court. Defendant acknowledged a long-standing alcohol problem to the probation officer. He sought placement in a live-in alcohol program. He recognized where he stood as a “‘three-striker.’” The probation officer noted that “defendant will say he wants a program, an opportunity he has received twice, and then he doesn’t complete it or cooperate, he simply leaves.” On March 26, 1996, defendant agreed to plead guilty to

petty theft with a prior and to admit one strike and one prison prior, while the court struck the remaining priors and prison terms. Defendant was sentenced to prison for 32 months and the court struck the prison prior enhancement. Defendant was released on parole on December 9, 1997.

On March 19, 1998, defendant was arrested for the felony of failure to register as a sex offender. About a month later, on April 16, 1998, he was arrested for public intoxication. (§ 647, subd. (f).) Parole was revoked and defendant was returned to prison until his release on September 17, 1998. On September 16, 1998, defendant was convicted by plea of the felony of failure to register as a sex offender (former § 290, subd. (g)(2); Stats. 1997, ch. 821, § 3.5, p. 5714), and he was again sentenced to prison for 32 months with the court striking prior strikes and prison terms. He was released on parole on August 11, 2000.

On November 15, 2000, defendant was arrested for the felony of inflicting corporal injury on a cohabitant (§ 273.5), his girlfriend Linda Howard, and the misdemeanors of making criminal threats (§ 422) and resisting arrest (§ 148). According to the police report, defendant and Howard had been living together for about a month. While walking down the street, defendant yelled at her, grabbed her neck, choked her, and said he would get someone to kill her. When police arrived, defendant ran away and hid.

On November 17, 2000, defendant was convicted by plea of misdemeanor violations of section 148, subdivision (a)(1) and 273.5, subdivision (a), and placed on probation. Parole was revoked on November 28, 2000, and he was returned to prison for 12 months. He was released on November 15, 2001.

Four days later, defendant was arrested and parole was again revoked. He was released on parole on April 10, 2002. On April 21, 2002, defendant was arrested on charges of battery on a cohabitant (§ 243, subd. (e)), criminal threats, and resisting arrest. According to a police report, after a night of drinking, defendant became verbally abusive

to Howard, tried to hit her, succeeded in choking her, and said he was going to kill her. He also said he was going to kill himself. On April 24, 2002, defendant was convicted by plea of the misdemeanors of battery and resisting arrest. The trial court placed him on probation. Parole was revoked on June 21, 2002. He was released on parole on November 20, 2002.

Two days later, defendant was arrested for the felonies of criminal threats and burglary and the misdemeanors of violating a protective order and battering a cohabitant. According to the probation report, defendant went to Howard's residence shortly before 3:00 a.m. and demanded that she step outside. He kicked in a locked door and dragged her out of the residence, saying he was going to kill her. When officers responded to the scene, defendant tried to hide. This conduct led to his convictions by no contest pleas to felony false imprisonment and the misdemeanors of resisting arrest, vandalism (§ 594, subd. (b)(2)(A)), and violating a protective order resulting in physical injury (§ 273.6, subd. (b)). Defendant also admitted one strike and one prison prior. Pursuant to a plea agreement, defendant received a four-year prison sentence with other punishments stricken. Defendant's parole was also revoked. On January 16, 2006, defendant was released on parole.

A few months later, defendant was arrested for public intoxication on April 25, May 7 and May 11, 2006. A parole hold followed his May 11 arrest and parole was revoked again. He was released on parole on August 23, 2006. The following day, defendant was convicted by plea of three public intoxication misdemeanors and placed on probation. On September 8, 2006, he was once again arrested for public intoxication. This led to another revocation of parole on September 26, 2006. He was released on parole on December 28, 2006.

On January 6, 2007, defendant was arrested for public intoxication. Parole was revoked on February 28, 2007, and he was returned to prison until his release on June 29, 2007. Parole was suspended effective July 20, 2007.

On August 22, 2007, defendant's parole was revoked and he was returned to prison until his release on November 4, 2007. Parole was suspended four days later and he was taken into custody on November 24, 2007. Parole was revoked again on December 27, 2007, for three months, and again on March 28, 2008.

Defendant was released on parole on June 26, 2008. He was arrested for public intoxication on July 7, 2008, and convicted one month later. Probation was denied, and he was sentenced to 30 days in jail. Meanwhile, parole was revoked on July 24, 2008, and he was released on parole on October 14, 2008. On November 19, 2008, defendant was arrested and parole was again revoked.

Defendant was released on parole on March 7, 2009. On April 27, 2009, he was arrested for trespassing (§ 602, subd. (m)) and convicted of that offense on May 27, 2009. Probation was denied. On May 24, 2009, defendant was arrested following a suspension of parole and reinstated on parole four days later. Parole was revoked on June 10, 2009, and defendant was returned to prison until his release on September 13, 2009.

On November 18, 2009, defendant completed a sex offender registration form indicating that he had moved into the jurisdiction and was transient and homeless. He indicated that he showered at his sister's house on Homestead Avenue in the City of Santa Clara. He acknowledged by initials that "if I am registered as a transient and move to a residence, I shall have five (5) working days within which to register with the law enforcement agency having jurisdiction over the new address or transient location."

By December 9, 2009, defendant had become involved with Darlene Akins. On that date defendant's parole agent gave him permission to live in Akins' motel room in the City of Santa Clara on El Camino Real. The agent later withdrew permission after determining the room was too close to parks.

On December 13, 2009, police responded to a domestic violence report at Akins' motel room. Defendant said he had been living with Akins for about three months and paid \$300 rent a week. The violence report was determined to be unfounded. But

because defendant was on parole, he had a GPS tracking device on his ankle. Police investigation revealed he had been spending a lot of time in Akins' room. On December 15, 2009, defendant completed a sex offender registration form indicating that he was transient and homeless. He indicated that he frequented "El Camino Real" in the City of Santa Clara. He again initialed his obligation to report any new address within five working days.

On December 17, 2009, defendant was arrested and booked for failing to update his address. (§ 290.013.) Defendant told police he had not registered the motel room as his address at his girlfriend's request.

A felony complaint filed on December 21, 2009, charged defendant with failure to report the end of his transient status (§ 290.011, subd. (b)). The complaint also alleged four prior strikes. Parole was revoked on December 28, 2009, and defendant was returned to prison. The Santa Clara County District Attorney's Three Strikes Committee decided to strike three of the four alleged strikes. On March 8, 2010, defendant was discharged from prison because he had reached the statutory maximum. On September 20, 2010, defendant was convicted by no contest plea of the felony of failing to report the end of his transient status. (§ 290.011, subd. (b).) He also admitted a prior strike.

On October 27, 2010, defendant was arrested for battering a cohabitant after he slapped Akins on her face in her motel room during an argument. Defendant appeared to the arresting officer to be under the influence of alcohol.

On November 16, 2010, the court granted defendant's *Romero* motion, suspended the imposition of sentence, and placed defendant on probation for failure to register as a sex offender. On November 29, 2010, defendant was convicted of disturbing the peace (instead of battery) and placed on probation, which included a peaceful contact condition.

Defendant was arrested for public intoxication on November 8, 2011, convicted of that offense on December 2, 2011, and placed on probation.

On July 20, 2012, defendant was arrested at Akins' motel room after he punched Akins in the face. Defendant told police he was a transient who visited the motel to see Akins and his sister. Both defendant and Akins appeared intoxicated to the arresting officer. On August 20, 2012, defendant pleaded no contest to an amended charge of violating a protective order. The battery charge was dismissed. Imposition of sentence was suspended and defendant was placed on probation with several conditions, including the no contact protective orders described above.

3. Defendant's Future Prospects

Defendant wrote a letter to the court explaining that he had not reported the motel room as his address "because I did not have any serious ties to the residence" He stated that he had cut back his alcohol consumption to a "few beers a week," and that finding employment had been difficult due to his criminal record. With the support of his girlfriend, Darlene Akins, he said he had made "great progress" in changing his life by attending Alcoholics Anonymous and substance abuse classes and helping elderly people in his neighborhood. At the hearing on the *Romero* motion, defendant said, "I'm pretty old now, and I've really settled down the last four or five years. And I have a memory loss." He said he forgot to register due to his memory loss. He also said he may only have ten years left because he has an enlarged heart. And he said he slipped up because of his medication.

Akins submitted a letter asserting that defendant is no longer a threat to society. She said he is "an alcoholic mental patient . . . with a learning disability, one [deaf] ear[,] extremely high blood pressure, out of control bow[e]l movement, along with congestive heart failure due to [his] enlarged heart." She also said "his lawyer failed to collect all mental and health paper work history from Valley Medical Hospital that he's been going to for the last 3 years for his mental medication and health medication along with seeing his psychiatrist every month for years." And she said she accompanied him to AA meetings three times a week and substance abuse classes two times a week.

According to the probation report, the Static 99R test indicated that defendant was “in the Low-Moderate Risk Category for being charged or convicted of another sexual offense.” Defendant declined to participate in the CAIS risks and needs assessment. Defendant presented 9 out of 21 factors identified by the probation department as predictors of future domestic violence, including a history that included alcohol use and mental illness.

4. Trial Court’s Ruling

At a January 2014 hearing on defendant’s *Romero* motion, the trial court reviewed the details of defendant’s five strikes and noted they are old. The court also reviewed the details of defendant’s court appearances in 1996, 1997, 1998, 2002, 2009, and 2010. It then concluded: “The convictions in the case here at hand are not violent or serious. I am going to indicate that I am most distressed because of the violation of the protective order misdemeanor in this particular case. This is not a normal 290 case. [¶] Secondly, it’s the type of situation where the Court perceives [defendant], contrary to what he was indicating, was trying to fly under the radar on this particular case. [¶] The strikes, while they are old, have been explored by the People; and it discloses an unbroken path of criminal offenses that are of nuisance value and also of violence in terms of the domestic violence case.”

The court identified two factors as “extremely important.” First, it said, “I have great reservations to send anybody [to] 25 to life for what [defense counsel] indicated was an omission.” It then said: “The second factor that is most distressing is that there have been, as far as this Court is concerned, innumerable opportunities to be cognizant, aware, of the fact that you had an absolute duty to register. [¶] You had two prior prison commitments that were from Judge Ball and Judge Taylor and an act of total grace by Judge Navarro four years ago on another case of 290. [¶] In each matter, you had to have known you were exposed to [T]hree [S]trikes. You had to have known that there were consequences to be paid at some point in time. [¶] I am considering all of the

factors that have been raised by each of the filings and the probation report. And at this time the Court will deny the request to strike any of the strike priors.”

III. ANALYSIS

A. THE FAILURE TO STRIKE FOUR STRIKES

As enacted in 1994, the Three Strikes statutes provided that an indeterminate sentence of 25 years to life in prison was the minimum sentence applicable to any felony conviction of a person who has at least two prior strike convictions of serious or violent felonies. (§§ 667, subd. (e)(2)(A)(ii); 1170.12, subd. (c)(2)(A)(ii)). A defendant with only one prior strike was subject to a doubled term. (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1).)

On November 7, 2012, voters passed Proposition 36, the Three Strikes Reform Act (Reform Act). Under the Reform Act, a doubled term is the maximum sentence available for a third felony conviction unless either the current offense is a serious or violent felony, or one or more of many statutory exceptions apply. (§§ 667, subd. (e)(2)(C); 1170.12, subd. (c)(2)(C).) The ameliorative provisions of the Reform Act do not apply to defendants who—like defendant here—have a prior section 288 conviction. (§§ 667, subd. (e)(2)(C)(iv)(III); 1170.12, subd. (c)(2)(C)(iv)(III).) Thus, for defendant to obtain relief from the 25-year minimum term, the trial court would have to strike at least four of his five strikes. On appeal, defendant contends the trial court abused its discretion by not striking four strikes.

1. Standard of Review

The California Supreme Court has provided much guidance for trial courts considering whether to dismiss under section 1385 a serious or violent felony conviction which is alleged as a strike under the Three Strikes statutes (§§ 667, subs. (b) - (i); 1170.12). (E.g., *Romero, supra*, 13 Cal.4th 497 [concluding strike allegations are subject to § 1385]; *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*) [finding abuse of discretion in striking a strike]; *People v. Garcia* (1999) 20 Cal.4th 490 (*Garcia*) [finding

no abuse of discretion in striking a strike as to one count, though not another]; *People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony I*) [establishing standard of review when *Romero* motion is denied].) *Garcia* summarized *Williams* as holding that “the trial court could give ‘no weight whatsoever . . . to factors extrinsic to the [Three Strikes] scheme.’ (*Williams, supra*, 17 Cal.4th at p. 161.) On the other hand, the court must accord ‘preponderant weight . . . to factors intrinsic to the scheme, such as the nature and circumstances of the defendant’s present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects.’ (*Ibid.*) Ultimately, a court must determine whether ‘the defendant may be deemed outside the scheme’s spirit, in whole or in part.’ (*Ibid.*)” (*Garcia, supra*, 20 Cal.4th at pp. 498-499; cf. *Carmony I, supra*, 33 Cal.4th at p. 377.)

This court has previously observed that “section 1385, subdivision (a), requires trial courts to state reasons for granting a motion to strike (*Williams, supra*, 17 Cal.4th at p. 159; *Romero, supra*, 13 Cal.4th at pp. 530-531), but not for declining to strike a strike.” (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 960 (*Zichwic*); cf. *In re Large* (2007) 41 Cal.4th 538, 550-551; *In re Coley* (2012) 55 Cal.4th 524, 560 (*Coley*).)

“[A] court’s failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*Carmony I, supra*, 33 Cal.4th at p. 374.) “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*, at pp. 376-377; cf. *Zichwic*, *supra*, 94 Cal.App.4th at p. 961.)

2. Applying the Law

Defendant contends the trial court “gave insufficient attention to [his] background and personal characteristics, while focusing almost exclusively on his criminal history.” He argues that “the court focused exclusively on [defendant’s] criminal history, and gave no consideration to [his] mental illness, alcohol addiction, age, and health as circumstances in mitigation.”

Defendant has spent the vast majority of his time since 1984 in custody for committing crimes. Between December 17, 1985, and March 8, 2010, he spent more than 24 years in almost continuous custody, either under arrest with pending charges or in prison pending or following revocation of parole. During that time period, defendant had the following custody-free periods: approximately six months at the end of 1992, two nonconsecutive months in 1993, three months in 1994, three weeks in 1997, four months in 1998, three months in 2000, one month in 2002, five nonconsecutive months in 2006, four nonconsecutive months in 2007, two nonconsecutive months in 2008, and six nonconsecutive months in 2009. His total out-of-custody time during this 24-year period was about three years and three weeks.

Since defendant’s release from prison in March 2010, he has been convicted of the same crimes underlying his current charges—failure to report the end of his transient status and violation of a protective order. He has also been convicted of disturbing the peace and public intoxication.

Defendant’s current conviction of failing to register his address is his third. He was first convicted in September 1998 of willful failure to register and he received a 32-month prison sentence after the trial court struck prior strikes and prison terms. He was next convicted of failing to report the end of his transient status in September 2010 and

was granted probation after the trial court struck the only strike not previously stricken by the District Attorney's Three Strikes Committee.

In November 2000, defendant was convicted of the misdemeanor of inflicting corporal injury on Linda Howard after grabbing and choking her. In April 2002, he was convicted of misdemeanor battery on a cohabitant after choking Howard just 11 days after his release on parole. In January 2003, he was convicted of felony false imprisonment of Howard after kicking in a locked door on her residence and dragging her outside just two days after his release on parole. In November 2010, he was convicted of disturbing the peace after slapping Akins during an argument. In August 2012, he was convicted of violating a protective order after punching Akins in the face.

Defendant notes that his last strike offenses of forcible lewd touching occurred 28 years before his latest sentencing. He also points out that he was 57 years old at sentencing. If defendant had lived a crime-free life since his 1992 release from prison following those strike convictions, it would weigh in favor of striking old strikes. But as we have described, the record shows otherwise.

Defendant echoes the trial court's characterization of his misdemeanor convictions as primarily being of "nuisance value," except for the domestic violence cases. But the trial court also emphasized the "unbroken path of criminal offenses" And we note that the "commission of a virtually uninterrupted series of nonviolent felonies and misdemeanors over a lengthy period" militates in favor of an indeterminate life sentence. (Cf. *People v. Strong* (2001) 87 Cal.App.4th 328, 331.)

Defendant contends that his current felony of failing to register his address as a sex offender is a "nonviolent, regulatory offense." He argues it is established that "[s]ection 290 is 'regulatory in nature, intended to accomplish the government's objective by mandating certain affirmative acts.'" (*People v. Barker* (2004) 34 Cal.4th 345, 354, quoting *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.)

Though the registration requirements are regulatory, they still serve an important law enforcement function. The nature of this felony offense does not necessarily exempt a violator from application of the Three Strikes statutes. We find *Carmony I* instructive. In that case, the California Supreme Court noted: “Carmony 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 Carmony fell within the spirit of the three strikes law. Indeed, Carmony appears to be ‘an exemplar of the “revolving door” career criminal to whom the Three Strikes law is addressed.’ [Citation.] As such, the court’s decision not to strike Carmony’s priors is neither irrational nor arbitrary and does not constitute an abuse of its discretion.” (*Carmony I, supra*, 33 Cal.4th at pp. 378-379.)

As to defendant’s alcoholism and recent attendance at Alcoholics Anonymous, as this court stated in *People v. Martinez* (1999) 71 Cal.App.4th 1502, “drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment.” (*Id.* at p. 1511.) Defendant has claimed awareness of his alcohol problem since he spoke with a probation officer in 1983, but he has done little until recently to address his substance abuse problem.

Defendant also contends it is economically infeasible to incarcerate him until his death or the age of 82, whichever comes first, due to predictably increasing costs of treatment for his health problems and a corresponding decline in his danger to society. But it is pure speculation that medical services in prison would be more costly than those offered to the elderly by the State of California (Welf. & Inst. Code, §§ 14000.4 [Medi-Cal Act]; 14592 [California Program of All-Inclusive Care for the Elderly]) and its counties. (Welf. & Inst. Code, § 17000.)

In denying defendant's request to strike at least four of his strikes, the trial court was not required to articulate every circumstance relevant to its denial. As did the Supreme Court in *Carmony I*, we conclude the trial court did not abuse its discretion when it declined to strike four of defendant's five strikes.

B. CRUEL AND UNUSUAL PUNISHMENT

For the first time on appeal, defendant contends that his sentence of 25 years to life violates federal and state constitutional prohibitions of cruel or unusual punishment. He contends that if the issue was forfeited by trial counsel's failure to raise it, then trial counsel was ineffective.

1. Standard of Review

It is ultimately a question of law whether the punishment for a crime is cruel or unusual in violation of the federal and state constitutions. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496; *People v. Felix* (2003) 108 Cal.App.4th 994, 1000.) What facts are relevant to this determination depends on the analytical approach taken.

The United States Supreme Court has employed at least two different approaches in considering a claim of cruel and unusual punishment. In some cases involving extreme punishments (e.g., the death penalty or life imprisonment without the possibility of parole), the United States Supreme Court has taken what it has characterized as a "categorical" approach, focusing on specific characteristics of the offender, such as youth or low mental functioning, and not the details of the offense. (*Graham v. Florida* (2010) 560 U.S. 48, 61 (*Graham*)). *Graham* extended the categorical approach in determining that a juvenile offender who did not commit homicide cannot be sentenced to life without parole. (*Id.* at pp. 78-79.)

A second analytical approach is more detail-oriented and does not focus exclusively on the nature of the punishment and the type of offender. Instead, it "considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." (*Graham, supra*, at p. 59.) *Solem v. Helm* (1983) 463 U.S.

277 (*Solem*) and *Harmelin v. Michigan* (1991) 501 U.S. 957 (*Harmelin*) are examples of the second approach. (*Graham, supra*, at pp. 59-60.)

In *Coley, supra*, 55 Cal.4th 524, the California Supreme Court described how appellate courts are to determine what circumstances of the case are relevant to evaluating whether a punishment is cruel and unusual. Willie Coley, a sex offender, was charged with two registration offenses—not registering when arriving in a jurisdiction and not updating his registration within five working days of his birthday. (*Id.* at p. 533.) The jury convicted him of the second charge while acquitting him of the first. (*Id.* at p. 535.) However, in rejecting a claim of cruel and unusual punishment and imposing a Three Strikes sentence of 25 years to life, the sentencing court expressly disbelieved Coley’s testimony about having registered on his arrival and concluded that he had “‘consistently refused to register as a sex offender’” (*Id.* at p. 536.) Because sentencing factors may be based on a preponderance of the evidence (*id.* at pp. 557-558), the Supreme Court concluded: “[I]n order to understand the actual criminal conduct upon which a sentence that has been imposed under the Three Strikes law is based, a court, in evaluating a claim of gross disproportionality under the Eighth Amendment, must take into account a trial court’s factual findings regarding the circumstances of the triggering offense.” (*Id.* at p. 560.) Thus, when an appellate court is considering whether a punishment is unconstitutionally excessive in light of all the circumstances of the case, it should defer to those express and implicit factual findings by the sentencing court that are supported by substantial evidence. (Compare *People v. Martinez, supra*, 76 Cal.App.4th at p. 496 [“the underlying disputed facts must be viewed in the light most favorable to the judgment.”].)

2. Forfeiture

Without an objection being lodged in the trial court to the punishment being cruel and unusual, the trial court may have no opportunity to make factual findings relevant to the issue. Thus, a claim of cruel and unusual punishment is forfeited on appeal to the

extent it depends on facts not brought to the trial court's attention. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) But as our analysis above demonstrates, a *Romero* motion requires the sentencing court to consider the nature of the current offense and defendant's nature, criminal history, and future prospects. "[A] trial court's factual determinations with regard to the nature and circumstances of a defendant's triggering offense may play a significant role in determining the sentence that is actually imposed upon the defendant under the Three Strikes law." (*Coley, supra*, 55 Cal.4th at p. 560.) Thus, we conclude defendant may argue on appeal that his sentence is cruel or unusual based on the trial court's findings in response to his *Romero* motion. In light of this conclusion, we need not consider whether defense counsel was ineffective in failing to assert the sentence was cruel or unusual.

3. Federal and State Approaches

The California Supreme Court has essentially applied a test of gross proportionality when evaluating whether a nondeath sentence violates California's cruel or unusual punishment clause. A sentence may violate the California Constitution if, "although not cruel or unusual in its method, it 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 (*Lynch*); fn. omitted.) *Lynch* identified three "techniques" (*id.* at p. 425) useful to assessing proportionality, and our high court has since elaborated on those techniques. (*People v. Dillon* (1983) 34 Cal.3d 441, criticized on another ground by *People v. Chun* (2009) 45 Cal.4th 1172, 1186). The first technique involves comparing the severity of the sentence to the circumstances of the commitment offense, including the defendant's role and mental state, and also to the defendant's individual characteristics, including age and prior criminality. (*Id.* at p. 479; *Martinez, supra*, 71 Cal.App.4th at p. 1510; *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085 (*Carmony II*)). The second technique compares the sentence to other sentences imposed in California for more serious offenses. The third technique

asks what sentence would be imposed for the same offense in other jurisdictions.

(*Martinez, supra*, at p. 1510; *Carmony II, supra*, at p. 1085.)

In *Solem, supra*, 463 U.S. 277, the United States Supreme Court determined that “a court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” (*Id.* at p. 292.) These criteria have been recast in dicta in *Graham, supra*, 560 U.S. 48, with a majority of the United States Supreme Court (J. Kennedy, J. Stevens, J. Ginsburg, J. Breyer, J. Sotomayor) affirming “the concept of proportionality” as “central to the Eighth Amendment” (*id.* at p. 59), while noting that a comparison of “the gravity of the offense and the severity of the sentence” is only the first step in a proportionality analysis. (*Id.* at p. 60.) “ [I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality’ the court should then compare the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [Citation.] If this comparative analysis ‘validate[s] an initial judgment that [the] sentence is grossly disproportionate,’ the sentence is cruel and unusual. [Citation.]” (*Ibid.*, quoting J. Kennedy’s concurring opinion in *Harmelin, supra*, 501 U.S. at p. 1005.)

The United States Supreme Court considered the constitutionality of indeterminate life terms under California’s Three Strikes statutes in companion cases. In *Ewing v. California* (2003) 538 U.S. 11 (*Ewing*), the court directly confronted the issue “whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of 25 years to life under the State’s ‘Three Strikes and You’re Out’ law.” (*Id.* at p. 14.) The indeterminate term was imposed after a grand theft of three golf clubs together worth almost \$1,200. (*Id.* at pp. 18-20.) A plurality (J. O’Connor, J. Rehnquist, J. Kennedy) reasoned that “[t]he Eighth Amendment, which forbids cruel and unusual

punishments, contains a ‘narrow proportionality principle’ that ‘applies to noncapital sentences.’ (*Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 (Kennedy, J., concurring in part and concurring in judgment).)” (*Ewing*, at p. 20.) “In weighing the gravity of Ewing’s offense, we must place on the scales not only his current felony, but also his long history of felony recidivism.” (*Id.* at p. 29.) “[T]he State’s public-safety interest in incapacitating and deterring recidivist felons” is a “legitimate penological goal” (*Ibid.*) The indeterminate life sentence “is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.” (*Id.* at pp. 30-31.) Two concurring justices (J. Scalia, J. Thomas) disavowed the existence of a proportionality principle, but still concluded that the sentence did not violate the Eighth Amendment. (*Id.* at pp. 31-32.)

In the companion case of *Lockyer v. Andrade* (2003) 538 U.S. 63, which involved federal habeas corpus review, the court concluded that it was not a clear violation of the federal prohibition of cruel and unusual punishment to impose two consecutive terms of 25 years to life under California’s Three Strikes statutes for Andrade’s two crimes of petty theft with a prior. The thefts involved the taking of videotapes worth \$84.70 from one store and \$68.84 from another store. (*Id.* at pp. 67-68.) A majority (J. O’Connor, C.J. Rehnquist, J. Scalia, J. Kennedy, and J. Thomas) determined that “[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case” and that was not such a case. (*Id.* at p. 77.)

4. Applying the Law

There is a considerable overlap in the state and federal approaches to determining whether a punishment is cruel and unusual. Nevertheless, applying these approaches has led to different conclusions about the constitutionality of an indeterminate life sentence imposed after a failure to register as a sex offender.

Coley, supra, 55 Cal.4th 524 reviewed four decisions at length, explaining that *Carmony II, supra*, 127 Cal.App.4th 1066 and *Gonzalez v. Duncan* (9th Cir. 2008)

551 F.3d 875 (*Gonzalez*) concluded that indeterminate sentences of 25 years to life for failures to register were cruel and unusual under the federal constitution. *Carmony II* also found a violation of the state constitution’s prohibition of cruel or unusual punishment. (*Coley, supra*, at pp. 544-550.) On the other hand, *People v. Nichols* (2009) 176 Cal.App.4th 428 and *Crosby v. Schwartz* (9th Cir. 2012) 678 F.3d 784 upheld indeterminate life sentences for failure to register against federal constitutional challenges. (*Coley, supra*, at pp. 550-551.)

Carmony II, supra, 127 Cal.App.4th 1066, 1071 and *Gonzalez, supra*, 551 F.3d 875, 877, each involved the same registration offense of failing to update registration within five days of the registrant’s birthday. The registrant in *Coley, supra*, 55 Cal.4th 524 had also been convicted by a jury of the same offense. (*Id.* at p. 535.) *Coley* noted: “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.” (*Coley, supra*, 55 Cal.4th at p. 553.)

Coley looked not only at the jury’s verdict, but the sentencing court’s finding—despite *Coley*’s acquittal of the charge—“that petitioner failed to register at the Palmdale sheriff’s department upon his release from prison in January 2001.” (*Id.* at p. 561.) Our high court observed: “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 petitioner deliberately failed to register as a sex offender even though he knew he had an obligation to do so, petitioner’s triggering offense demonstrated that, notwithstanding the significant punishment that he had incurred as a result of his prior serious and violent felony convictions, 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.” (*Id.* at pp. 561-562.)

The *Coley* court went on to note that, “as the United States Supreme Court explained in *Ewing*, *supra*, 538 U.S. 11, in determining the gravity of petitioner’s conduct in evaluating an Eighth Amendment challenge to a sentence imposed under a recidivist sentencing statute, we must consider not only petitioner’s triggering offense but also the nature and extent of petitioner’s criminal history. (*Ewing*, *supra*, at p. 29.)” (*Coley*, *supra*, 55 Cal.4th at p. 562.) The court concluded that the Three Strikes sentence did not violate the federal constitution.³

Defendant compares himself to the defendants in *Carmony* and *Gonzalez* and not the defendant in *Coley*. He contends that his “case falls in the category of cases in which the defendant committed a technical violation of registration requirements. He did not

³ Because the habeas petition did not originally assert a violation of the state constitution, the Court did not reach that issue. (*Id.* at p. 537, fn. 8.)

conceal his location from law enforcement or show himself unwilling to comply with registration requirements. Rather, he had registered only days before his arrest, but as a transient. As a transient, he was subject to additional monitoring through a monthly registration requirement. [Citation.] Thus [he] did not fail to register, make himself unavailable to law enforcement, or show himself unwilling to register. At worst he made himself less readily available, but he was not attempting to ‘fly under the radar,’ as the court suggested.”

We recognize that, just as the failure to provide an annual update may result from a good faith, honest oversight or a general bad faith unwillingness to comply with registration requirements, so may the nonperformance of other registration requirements. As defendant acknowledged when he registered, sex offenders who are transients are required to register their locations (1) within five working days of release from custody and every 30 days thereafter (§ 290.011, subd. (a)); (2) within five working days of moving to a residence (*id.* at subd. (b)); and (3) within five working days of his or her birthday (*id.* at subd. (c)).

In this case, the sentencing court found that, contrary to defendant’s myriad excuses, he was “trying to fly under the radar” during his latest failure to report the end of his transient status. In other words, the trial court found that he was deliberately ignoring his known obligation to provide his new address within five days of obtaining one.

Defendant disputes the trial court’s characterization of his conduct, but his violation of registration requirements cannot reasonably be characterized as merely “technical.” Defendant asserts that he was registering regularly, but as a transient. However, it does not appear that defendant has ever registered the address of Akins’ motel room where he was ultimately apprehended in February 2013. Defendant has been continuously associated with Akins and her motel room since December 2009, and he was convicted in September 2010 of failing to register that address as his. Filing false or misleading registration documents is not a technical violation or merely a negligent

oversight. Thus, we conclude that substantial evidence supports the sentencing court's conclusion that defendant deliberately failed to register as sex offender as required.

In determining whether defendant's sentence of 25 years to life is cruel and unusual, we are not considering whether such punishment may be appropriate for a solitary deliberate refusal by a convicted sex offender to provide law enforcement with his or her location information. Unlike *Carmony II*, *supra*, 127 Cal.App.4th 1066, 1080, we do not discount the relevance of defendant's criminal past to his punishment. We recognize that a longer sentence is warranted by the repetitive nature of defendant's criminal conduct, not just the last crime. (*Coley*, *supra*, 55 Cal.4th at p. 562; *People v. Meeks* (2004) 123 Cal.App.4th 695, 709; *People v. Poslof* (2005) 126 Cal.App.4th 92, 109; see *Ewing*, *supra*, 538 U.S. at p. 29.) It is also relevant that this crime, in terms of the Three Strikes statutes, is defendant's seventh third strike. He has previously been allowed to avoid an indeterminate life term four times, including twice for registration offenses. Under these circumstances, imposing a sentence of 25 years to life is not cruel or unusual.

IV. DISPOSITION

The judgment is affirmed.

Márquez, J.

WE CONCUR:

Rushing, P. J.

Premo, J.

No. H040817
People v. Dunbar