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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH ISHMEAL CARMONY,

Defendant and Appellant.

C038802

(Super. Ct. No.
00F856)

Defendant Keith Ishmeal Carmony pleaded guilty to failure to register as a sex offender (Pen. Code, § 290, subd. (g)(2))¹ and admitted three prior strikes under section 1170.12 (the Three Strikes law) and a prior prison term enhancement (§ 667.5,

¹ Further undesignated section references are to the Penal Code.

subd. (b)). The trial court sentenced him to state prison for an aggregate term of 26 years to life.

On appeal, defendant claims the trial court abused its discretion by declining to grant *Romero*² relief and by sentencing him as a third-strike offender for failing to confirm the accurate information already provided to law enforcement with respect to defendant's registration as a sex offender. We agree that under the particular circumstances of this case, the trial court erred by imposing the indeterminate term reserved for third-strike offenders. Accordingly, we shall remand the matter to the trial court for resentencing. In light of our decision, it is unnecessary to directly address defendant's additional argument that his current sentence is unconstitutional.

FACTUAL AND PROCEDURAL BACKGROUND

A. Prior Criminal Record

At the outset, it must be acknowledged that defendant's criminal record is serious. Defendant's prior strike offenses stemmed from a 1983 conviction for oral copulation by force or fear, or with a minor under age 14 (§ 288a, subd. (c) [see Stats. 1982, ch. 1111, § 5])³ and a 1993 conviction for two counts of assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245 (a)(1)). According

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

³ The charging document refers to the date of conviction for the offense as April 1980, but the probation report indicates it was in 1983.

to information in the probation report, the 1983 conviction arose from an incident in which defendant became angry with his girlfriend, picked her 9-year-old daughter up from school, and sexually assaulted the girl. The 1993 offenses arose from separate incidents in which defendant assaulted two girlfriends. In one incident, defendant punched and kicked the pregnant victim multiple times, ultimately causing a miscarriage. In the other, defendant pushed and punched the victim, then cut her hand with a kitchen knife.

Defendant's criminal record includes other convictions. Defendant was convicted of second degree burglary in 1977 and 1978 (§ 459), petty theft with a prior in 1985 (§ 666), violations of section 148 in 1988 and 1991, driving under the influence (DUI) in 1988 and another DUI, with a prior, in 1992 (Veh. Code, § 23152, subd. (a)). In 1990, defendant was convicted of a trespassing offense (§ 602, subd. (1)), petty theft (§ 488) and failure to register as a sex offender (§ 290). In 1997, he was convicted of another registration violation under section 290 and was sentenced to state prison for 32 months. He committed several parole violations in the 1980s and 1990s, including violations unrelated to the commission of new offenses.

B. Background and Current Offense

Defendant was married in 1999. He was 40 years old at the time of the current offense, which was committed that same year. He had a history of drug and alcohol abuse, and his parole

officer indicated he became violent when he was under the influence. Defendant himself reported that his prior criminal conduct and parole violations were related to his use of alcohol, and he admitted to also using drugs. Defendant attended Alcoholic's Anonymous meetings for a period of time around the time of the current offense, but he committed a parole violation based on the use of alcohol while the instant case was pending.

His work history was sporadic due in part to his repeated incarceration. However, the officer who prepared the probation report noted: "[O]n his behalf, [defendant] was acting in a responsible manner by maintaining a residence, seeking job training and placement, and becoming employed" before his recent period of incarceration.

The instant case arose because defendant was required to register as a sex offender. Although he was convicted of registration violations in 1990 and 1997, defendant did comply with the registration obligation by registering with the Redding Police Department on several occasions in 1995, 1996, 1998, and 1999. In fact, defendant registered on September 16, 1999, after being released on parole, and then again on September 23, 1999, to indicate his new address. Thus, defendant registered only one month before the current violation arose.

The current violation arose after defendant failed to update his registration within five working days of his birthday, on October 22, 1999. His parole officer had

purportedly reminded him of the registration requirement, and defendant had also received forms indicating that requirement. However, defendant did not change his address or conceal his whereabouts, and authorities were able to locate him without difficulty at the address where he previously registered. On November 23, 1999, he was arrested by his parole officer.

C. Sentencing

The plea agreement in this case contemplated that the trial court would determine whether to dismiss prior strikes. In fact, the probation department was directed to specifically address the impact of *People v. Cluff* (2001) 87 Cal.App.4th 991 (*Cluff*) on that decision. In a written motion he filed requesting the trial court to dismiss his prior strikes, defendant also relied heavily on *Cluff*.

At sentencing, the trial court found *Cluff, supra*, 87 Cal.App.4th 991, to be distinguishable and declined to dismiss any prior strikes. The court emphasized that defendant's record was more serious than *Cluff's* and, unlike *Cluff*, defendant did not have good prospects because he had not established a work record "of any length because he goes back in to prison [at] nearly every opportunity." The trial court also remarked that the court in *Cluff* had emphasized, "not only was the case technical, but there was some argument to be made that Mr. *Cluff* did not realize he was to register." The court contrasted defendant's case, emphasizing he had "a prior conviction for failure to register" and "was instructed by his parole officer

to go register.”⁴ The court concluded that defendant “is certainly an individual who does fall, as [the prosecutor] says, within the spirit of the 25 years to life, the 3-strikes law.” The court emphasized: “I believe that would be overreaching if I were to strike any of them in light of all that I’ve said.”

DISCUSSION

I. Abuse of Discretion

Defendant claims the trial court abused its discretion by declining to grant *Romero* relief and by sentencing him as a third-strike offender.

Dismissal of a strike is a departure from the sentencing norm. (See *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434; see also § 1385.) In reviewing the trial court’s decision, we must consider “whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

⁴ Although defendant offered an explanation for his failure to update his registration, we defer to the trial court’s findings indicating defendant knew he was required to do so. Those findings are adequately supported by the record.

Although ordinarily reversal is not warranted unless an error affirmatively appears on the record, we must determine whether the trial court's ultimate ruling constitutes an abuse of discretion. (See *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310; *People v. Gillispie, supra*, 60 Cal.App.4th at p. 434, but see *People v. Benevides* (1998) 64 Cal.App.4th 728, 730 [indicating summary denial of appellate relief would generally be appropriate if the record shows the trial court was aware of its discretion].)⁵ This standard is deferential, but it is not empty. Although variously phrased in different decisions, it asks in substance whether the trial court's ruling "'falls outside the bounds of reason' under the applicable law and the relevant facts [Citations]." (*People v. Williams, supra*, 17 Cal.4th at p. 162.) "'[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14

⁵ The People cite *People v. Gillispie, supra*, 60 Cal.App.4th at page 434, to support their claim that "[a] trial judge's imposition of the normal sentence is properly reviewable only to determine whether the trial judge misunderstood the scope of his discretion in fact or law" But the court's opinion emphasizes that the record may also show "that under the peculiar circumstance of the case, the sentencing norms produced an 'arbitrary, capricious or patently absurd' result." (*Ibid.*) Further, we reject the People's suggestion that defendant lacks standing for meaningful appellate review. (Cf. *id.* at pp. 433-434, fn. 2.)

Cal.4th 968, 977; *People v. Stone* (1999) 75 Cal.App.4th 707, 716.)

Here, the trial court acted unreasonably in declining to dismiss any of defendant's prior strikes. The rationale underlying the indeterminate sentence reserved for recidivist offenders is not served here, where the current offense is a violation of the law that bears little indication of recidivist criminal tendencies of the kind to which the three strikes law is directed. Defendant clearly falls outside the spirit of the three strikes law, at least with respect to the 25-year-to-life sentence imposed for the current offense.

The facts underlying commission of the current offense are in fact analogous to those presented in *Cluff, supra*, 87 Cal.App.4th 991. In that case, the appellate court remanded the matter for a new *Romero* hearing after the defendant (Cluff) was initially sentenced to 25 years to life under the three strikes law. (*Id.* at pp. 994, 1005.) Cluff was convicted of failing to register as a sex offender because he failed to annually update his registration within five days of his birthday in 1996 and 1997. (*Id.* at pp. 994-996.) Like defendant, Cluff had previously registered his address. (*Id.* at pp. 994-995.) In October 1997, police were able to contact Cluff at his last registered address, and he subsequently reported to the police station for a scheduled appointment. (*Id.* at pp. 995-996.)

To the extent the trial court attempted to distinguish *Cluff* based on the arguably unintentional nature of the

violation in that case, the court erred. It is true the appellate court in *Cluff* emphasized facts that might suggest the violation was unintentional and noted that the trial court had refrained from determining whether it was negligent or intentional until the sentencing hearing. (See *Cluff, supra*, 87 Cal.App.4th at pp. 995-996, 1002-1003.) But the appellate court emphasized, "We accept the trial court's finding that the violation was intentional (as we would have if the court had made that finding at trial); the evidence that Cluff had notice of the new requirement [to confirm his registration] supports that determination." (*Id.* at p. 1003.) The appellate court nevertheless found no basis to conclude Cluff was attempting "to obfuscate his residence or escape the reach of law enforcement." (*Ibid.*) The same could be said in the instant case.

Considering the variety of circumstances that can lead to a felony violation of section 290, the instant case must be characterized as "the most technical violation of the section 290 registration requirement we have seen." (*Cluff, supra*, 87 Cal.App.4th at p. 994.) In fact, defendant's failure to update his registration is arguably less serious than Cluff's since defendant had registered *very recently* and was arrested only *one month* after he should have registered. Under the circumstances, "[t]he purpose of the registration statute was not undermined by [defendant's] failure to annually update his registration." (*Id.* at p. 1002.) Law enforcement (and the public) had already been provided with recent, accurate information on defendant's

whereabouts and could take protective measures if need be, such as surveillance or quick apprehension of defendant. (See *In re Luisa Z.* (2000) 78 Cal.App.4th 978, 982 [describing purpose of registration]; *People v. Castellanos* (1999) 21 Cal.4th 785, 796 (maj. opn. of George, C. J.) [same].)

Cluff can, of course, be distinguished based on other pertinent factors such as the defendant's record, character, and prospects. Further, the appellate court's decision to reverse was based on its conclusion that the trial court was wrong to make its "critical finding" of obfuscation. (*Cluff, supra*, 87 Cal.App.4th at pp. 1002-1004.) The record in the instant case does not, however, indicate that the trial court labored under any particular misconceptions in this respect. But such factors are not dispositive. Indeed, the court in *Cluff* implied it would be entirely improper to sentence Cluff as a third-strike offender, based in large part on the facts underlying commission of the current offense. The court commented, "[F]or the guidance of the trial court on remand, we note that the severe penalty imposed on Cluff appears disproportionate by any measure. The nature of Cluff's current offense did not demonstrate recidivist tendencies toward child molestation. While there is no requirement that a third strike be a serious or violent felony, neither the Legislature nor the voters intended the Three Strikes law to be used as a nuisance statute to rid society forever of persons who fail to meet technical

requirements to confirm an accurate registration.” (*Cluff, supra*, 87 Cal.App.4th at p. 1004.)

Although this quotation is dictum, the appellate court’s reasoning is persuasive. The People criticize *Cluff, supra*, 87 Cal.App.4th 991, asserting that defendant’s conviction for a felony brings him within the spirit of the three strikes law and that there must be something about defendant’s “nature” to bring him outside the spirit of the law. But the three strikes law is designed to punish recidivist conduct, and the nature and circumstances of the current offense are important considerations in deciding whether a defendant falls outside the spirit of the law. Here, commission of the current offense bears little indication that defendant has recidivist tendencies to commit other offenses, violent or otherwise. Defendant’s violation would not be a crime at all if not for the strict annual registration requirement, which applies even though defendant had not moved and law enforcement knew it, and defendant had recently updated his registration. The instant violation was passive and without practical impact in a way that many misdemeanor offenses and minor drug crimes are not. There was simply no harm, even indirect harm to the public, that resulted from defendant’s inaction since defendant had previously registered as a sex offender and provided accurate information to authorities. Nor is there any evidence defendant was planning on moving or otherwise evading the purpose underlying the registration law.

Accordingly, the instant case presents the rare situation where, based on the nature and circumstances of the present offense, it must be concluded that defendant falls outside the spirit of the three strikes law at least with respect to a sentence of 25 years to life. That is not to say, however, that defendant falls entirely outside the spirit of the law, in light of his current offense, his prior record, and other relevant considerations such as his background, character, and prospects. At resentencing the trial court may wish to consider dismissing two prior strikes and sentencing defendant as a second-strike offender. Doubling of the upper term would amount to a prison sentence of seven years (including the one-year prior prison term enhancement). (See §§ 290, subd. (g)(2), 667.5, subd. (b).) That determination is best left to the informed discretion of the court.

Our dissenting colleague goes on at great length that defendant's felony offense for failure to register his address a second time within a month is within the letter of the three strikes law. It obviously is. That is not the issue.

The question we must ask, as we note, is whether the trial court should have stricken "a prior serious and/or violent felony conviction . . . 'in furtherance of justice' pursuant to Penal Code section 1385(a)" (*People v. Williams, supra*, 17 Cal.4th at p. 161.) This requires consideration inter alia "whether, in light of [defendant's] present [felony] and prior serious and/or violent felony convictions . . . the defendant

may be deemed outside the scheme's spirit . . . and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Ibid.*)

This manifestly directs us to consider the nature of defendant's present felony conviction in relation to his past criminal conduct, i.e., whether defendant's failure to register his present address a second time with the police within one month without moving or otherwise preventing the police from knowing his whereabouts has anything to do with his prior criminal conduct. It does not for the obvious reason the police were not prevented by defendant's failure from accomplishing any reasonable objective of the registration law.

Our dissenting colleague goes as far as to suggest, "Exempting the knowing and willful failure to register annually as a sex offender from the scope of the Three Strikes law would exempt a type of felony and thereby rewrite the statutory scheme." (Diss. Opn. at p. 2.) In so commenting, he implies that the nature and circumstances of defendant's current offense cannot be dispositive in deciding to dismiss a strike under section 1385, at least in cases in which the defendant's prior record is serious and his background and prospects questionable. But our state Supreme Court has indicated that the nature and circumstances of defendant's present offense are always relevant considerations in a decision under section 1385. We hold no more than that these considerations are dispositive in this particular case.

Our dissenting colleague fails to tell us in what way, other than the bare fact of defendant's felony conviction, defendant's conduct has anything to do with the "spirit" of the three strikes law. Throughout, he simply has substituted the letter for the spirit of the law. This, our Supreme Court has prohibited us from doing. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Our holding allows the trial court to retain one prior serious felony conviction and impose a seven-year prison sentence. This result is manifestly in "furtherance of justice."

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for resentencing in accordance with this opinion.

BLEASE, Acting P. J.

I concur:

NICHOLSON, J.

KOLKEY, J.

I respectfully dissent.

The whole purpose of the Three Strikes law is to "ensure longer prison sentences" for those criminals with a history of serious or violent felonies, who commit yet another felony (Pen. Code, § 667, subd. (b); italics added) and to limit judicial discretion in sentencing repeat offenders. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 528 (hereafter *Romero*).) Defendant's lengthy criminal record of 14 crimes and 10 parole violations over 25 years, including his forcible sexual assault of a 9-year-old girl, his violent assault of a pregnant girlfriend (which caused a miscarriage), and his assault of yet another girlfriend, whose hand he cut with a kitchen knife, makes him precisely the type of career criminal that the Three Strikes law was meant to attack. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 332.) His "third" strike -- a knowing failure to register as a sex offender -- followed two previous failures to register. The trial court cannot be deemed to have abused its discretion -- that is, acted beyond the bounds of reason (*People v. Garcia* (1999) 20 Cal.4th 490, 503) -- by following a sentencing scheme that was designed to restrict the discretion to depart from it when sentencing a career criminal.

The majority's contrary conclusion is premised on its view that the "third" strike here, based on defendant's knowing failure to register as a sex offender, places him outside the

spirit of the Three Strikes law, on the ground that "the current offense bears little indication that defendant has recidivist tendencies to commit other offenses." (Maj. opn. ante, at p. 11.) The problem with this reasoning is that the Three Strikes law provides that "any felony triggers a longer sentence under the Three Strikes law as long as the defendant has sustained at least one strike." (*People v. Strong, supra*, 87 Cal.App.4th at p. 344.) Exempting the knowing and willful failure to register annually as a sex offender from the scope of the Three Strikes law would exempt a type of felony and thereby rewrite the statutory scheme. But "[t]his court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365.)

Moreover, it is difficult to reconcile the majority's claim that "the current offense bears little indication that defendant has recidivist tendencies" (Maj. opn. ante, at p. 11) with the fact that the current offense is his third willful failure to comply with his registration obligations.

Finally, even if a trial court could lawfully conclude that the commission of particular types of felonies should not trigger the Three Strikes law, an appellate court may not reverse a trial court's exercise of discretion to instead follow the statutory scheme unless "the trial court's decision was irrational or arbitrary." (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.) When reviewing a trial court's

exercise of discretion, the California Supreme Court has cautioned: “[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.]’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) Accordingly, in order to reverse the trial court in this case, we must not only find that it is appropriate to exempt a particular type of felony from the Three Strikes law (which it is not), but also find that no reasonable person could deem defendant to fall wholly within the letter and spirit of the Three Strikes law, despite his lengthy and sometimes violent criminal record of 14 crimes and 10 parole violations and a present felony that is his third violation of the registration requirements. Since we cannot properly do so, I respectfully dissent.

I.

“[T]he Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court ‘conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.’” (*People v. Strong, supra*, 87 Cal.App.4th at pp. 337-338.) As

our Supreme Court observed in *Romero, supra*, 13 Cal.4th at page 528, “[p]lainly the Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.”

In *People v. Williams* (1998) 17 Cal.4th 148, 161, the California Supreme Court ruled that a court could only dismiss a strike -- and thus reduce the sentence mandated by the Three Strikes law -- if it found the defendant to be outside the spirit of the Three Strikes law, in whole or in part:

“We therefore believe that, in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth.”

Conversely, where the trial court has refused to depart from the statutory scheme, it need not articulate any reasons (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 433), and we reverse only where "the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers, supra*, 69 Cal.App.4th at pp. 309-310.)

"Although variously phrased in various decisions [citation], [the abuse of discretion standard] asks in substance whether the ruling in question "*falls outside the bounds of reason*" under the applicable law and the relevant facts [citations].'" (*People v. Garcia, supra*, 20 Cal.4th at p. 503, quoting *People v. Williams, supra*, 17 Cal.4th at p. 162.)

Accordingly, in this case, in order to reverse the trial court's decision to *follow* the sentencing norm established by the Three Strikes law, we must find that a determination that the defendant falls *within* the spirit of the Three Strikes law ""*falls outside the bounds of reason*" under the applicable law and the relevant facts [citations].'" (*People v. Garcia, supra*, 20 Cal.4th at page 503.) And under the Supreme Court's decision in *People v. Williams, supra*, 17 Cal.4th at page 161, that

requires that no reasonable person could deem the defendant to fall wholly within the letter and spirit of the Three Strikes law, in light of the nature and circumstances of his present felony and prior serious and/or violent felony convictions and the particulars of his background, character, and prospects. To this test, I now turn.

II.

In determining what constitutes circumstances that take a defendant outside the spirit of the Three Strikes law, in whole or in part, we concluded in *People v. Strong, supra*, 87 Cal.App.4th at p. 338, that "extraordinary must the circumstance be by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack." After all, "longer sentences for career criminals who commit at least one serious or violent felony certainly goes to the heart of the statute's purpose -- or spirit." (*Ibid.*)

Defendant is the very type of career criminal that the Three Strikes law was meant to address. (*People v. Strong, supra*, 87 Cal.App.4th at pp. 331-332; *People v. Gaston* (1999) 74 Cal.App.4th 310, 312.) As the majority acknowledges, defendant's criminal record is "serious." (Maj. opn. ante, at p. 2.) Defendant has a criminal record spanning over 25 years comprised of 14 crimes and 10 parole violations, not including the current crime and parole violation based thereon. His

record includes not only three violent assaults but two second degree burglaries, two petty thefts, two convictions for driving under the influence, trespassing, and two prior failures to register as a sex offender, one in 1990 and one in 1997, for which he was sentenced to 32 months in prison. (Maj. opn. ante, at p. 3.) Defendant was still on parole from his last failure to register when he violated the registration requirement once again: his current offense. Indeed, defendant even sustained another parole violation for consuming alcohol while this matter was pending in the trial court. The Three Strikes law is designed to impose a lengthy sentence on such defendants once he (or she) commits one more felony, regardless of its type.

A. Prior Felonies

In determining whether a defendant falls outside the spirit of the Three Strikes law, one of the circumstances to consider under *People v. Williams, supra*, 17 Cal.4th at page 161, is defendant's prior serious or violent felonies.

The defendant here had three prior serious or violent felonies, comprised of sexual assault in 1983 of a 9-year-old girl (described as rape in the probation report), an assault by means of force likely to produce great bodily injury on a pregnant girlfriend in 1993 (causing a miscarriage), and another assault in 1993 with a deadly weapon upon another girlfriend (cutting her hand with a kitchen knife so as to create a wound 3 inches in length and 1 inch deep).

Defendant's commission of yet a new felony brings him within the letter of the Three Strikes law. (*People v. Strong, supra*, 87 Cal.App.4th at pp. 337-338.) And while the 1983 assault might be deemed remote (but see *People v. Strong, id.*, at p. 342), the two 1993 convictions are not: Defendant's release from prison from those convictions was followed by a series of parole violations that returned him to prison until he was released and thereafter convicted of a failure to register as a sex offender in 1997. And he was on parole from that conviction when he committed the instant felony. There is absolutely nothing mitigating about his prior serious or violent felonies that takes him outside the spirit of the Three Strikes law.

B. Background, Character, and Prospects

The Supreme Court in *People v. Williams, supra*, 17 Cal.4th at page 161, also instructed the courts to consider "the particulars of [the defendant's] background, character, and prospects."

The probation report here concludes that defendant's background and character do not support striking his priors: "Since early adulthood, the defendant has been involved in numerous criminal offense and parole violations. Additionally, the defendant was on parole at the time of the current offense, and incurred a separate and unrelated parole violation while pending Court in this matter." He also has had "a lengthy history of substance abuse," "his cooperation with parole has

been superficial and sometimes openly defiant," and his parole agent believes that he has "a great potential for violence."

As for his prospects, the majority notes that his work history is sporadic owing in part to his repeated incarcerations. (Maj. opn. ante, at p. 4.)

C. Current Felony

This leaves only the circumstances of defendant's current felony as a basis for finding that he falls outside the spirit of the Three Strikes law.

The Three Strikes law was expressly intended "to ensure longer prison sentences . . . for those who commit a felony" as long as they were previously convicted of at least one strike. (§ 667, subd. (b); Ballot Pamp., Gen. Elec. (Nov. 8, 1994) Prop. 184: Text of Proposed Law, p. 64.) Thus, we must consider whether there are extenuating circumstances about this particular felony that takes defendant outside the spirit of the Three Strikes law.

The majority contends: "[The] commission of the current offense bears little indication that defendant has recidivist tendencies to commit other offenses, violent or otherwise. Defendant's violation would not be a crime at all if not for the strict annual registration requirement, which applies even though defendant had not moved . . . , and defendant had recently updated his registration. The instant violation was passive and without practical impact in a way that many

misdemeanor offenses and minor drug crimes are not. There was simply no harm, even indirect harm to the public, that resulted from defendant's inaction since defendant had previously registered as a sex offender and provided accurate information to authorities." (Maj. opn. ante, at p. 11.)

Careful scrutiny of these arguments reveals that they do no more than assert that the Three Strikes law should be rewritten to exclude certain types of felonies from its coverage. That, however, is the Legislature's province, not ours.

First, the majority claims that the "commission of the current offense bears little indication that defendant has recidivist tendencies to commit other offenses, violent or otherwise." (Maj. opn. ante, at p. 11.) But this is no more than a contention that the failure to register annually as a sex offender should not trigger the Three Strikes law because such a violation of the law does not show that the defendant is a recidivist. However, as noted, the Three Strikes law is premised on the theory that every defendant with a qualifying strike, who commits yet another felony, should be deemed a recidivist and given a longer sentence. (*People v. Strong*, supra, 87 Cal.App.4th at pp. 337-338; Pen. Code, §§ 667, subd. (f)(1), 1170.12, subd. (d)(1).) Moreover, in this case, the majority's claim that the "commission of the current offense bears little indication that defendant has recidivist tendencies" (Maj. opn. ante, at p. 11) is a wee bit bold given the fact that defendant's current failure to register followed

two previous failures to register -- and arose while defendant was still on parole from his last failure to register. How many times does a defendant with a prior qualifying strike have to willfully fail to register before he qualifies as a recidivist? The Legislature and the people of this State have answered that question when they enacted the Three Strikes law. And we, as courts, must respect that decision if we are to be faithful to our limited constitutional role.

Second, the majority contends that "[d]efendant's violation would not be a crime at all if not for the strict annual registration requirement, which applies even though defendant had not moved" (Maj. opn. ante, at p. 11.) By that logic, statutory rape and many other crimes would not be crimes at all but for the fact that criminal statutes prohibit such acts or omissions. Thus, the majority's argument is simply a disagreement with the legislative determination that the willful failure of a sex offender to register annually, within five working days of his or her birthday (Pen. Code, § 290, subd. (a)(1)(D)), is a crime (*id.*, § 290, subd. (g)(2)).

Third, the majority complains that the "instant violation was passive and without practical impact." (Maj. opn. ante, at p. 11.) But the willful failure to register is, by its very nature, passive. This, again, suggests a disagreement with the Legislature's determination to define, as a felony, the willful failure to register, in those cases where, as here, the obligation to register was based on a felony or the defendant

was previously convicted of a failure to register. (Pen. Code, § 290, subd. (g)(2).) Likewise, the fact that the failure to register will not have a practical impact where the defendant has not changed address presents a mere disagreement that this type of offense should be covered by the Three Strikes law. After all, a different provision under Penal Code section 290 requires a sex offender to register whenever the offender changes his or her residence. (Pen. Code, § 290, subd. (a)(1)(A).) Thus, the annual registration requirement ought not to normally result in a change of address, but is a prophylactic measure designed to assure that persons convicted of specified crimes are readily available for police surveillance at all times. (See *People v. Castellanos* (1999) 21 Cal.4th 785, 790.) Indeed, the failure of sex offenders to register, and the concomitant inability of law enforcement to keep track of them, is a growing national problem that certainly warrants separate enforcement of this prophylactic measure. (See Murr, *Holes in the Safety Net* (Feb. 24, 2003) Newsweek, at p. 40.)

Fourth, the majority claims that "[t]here was simply no harm, even indirect harm to the public, that resulted from defendant's inaction since defendant had previously registered as a sex offender and provided accurate information to authorities." (Maj. opn. ante, at p. 11.) But the mere fact that defendant reported a change of address the month before does not excuse his willful and knowing failure to register the following month. Compliance with the law the prior month does

not justify or soften a knowing failure to comply with the law the next month.

This, of course, would be an entirely different case if the defendant was unaware of the need to register after registering a change of address the prior month. But the majority properly defers to the trial court's findings indicating that the defendant knew that he was required to register but failed to do so. (Maj. opn. *ante*, at p. 6, fn. 4.) Indeed, the probation report notes that defendant's parole agent spoke with him by telephone on his birthday and reminded him that he had to update his registration at that time. The majority cannot find defendant outside the spirit of the Three Strikes law, in whole or in part, by reason of the type of felony he committed without rewriting the Three Strikes law to exclude certain felonies from its reach. But, again, that is the Legislature's province, not ours.

In response to these points, the majority claims that I "impl[y] that the nature and circumstances of defendant's current offense cannot be dispositive in deciding to dismiss a strike under [Penal Code] section 1385 . . . ," but that "our state Supreme Court has indicated that the nature and circumstances of defendant's present offense are always relevant considerations in a decision under section 1385." (Maj. opn. *ante*, at p. 13.)

But our Supreme Court has never said that the nature of the present felony is *sufficient* to take a defendant outside the spirit of the Three Strikes law. Instead, in *People v. Williams, supra*, 17 Cal.4th at page 161, our Supreme Court stated that in ruling whether to strike a prior serious or violent felony conviction, a court must consider a variety of factors, including "the nature and circumstances of his present felonies," in determining whether "the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies."

But rather than looking at all of the factors, as I have at pages 7 to 9, *ante*, what the majority has done is only rely on the nature of the current felony and has concluded that such a felony does not warrant, in whole or in part, application of the Three Strikes law, despite defendant's serious record. By relying only on the nature (and not the circumstances) of defendant's present felony -- and finding it wanting -- the majority has exempted this type of felony from the Three Strikes law. This effectively rewrites the law and cannot be a proper interpretation of the test enunciated in *People v. Williams, supra*, 17 Cal.4th at page 161.

Finally, the majority argues: "Our dissenting colleague fails to tell us in what way, other than the bare fact of defendant's felony conviction, defendant's conduct has anything to do with the 'spirit' of the three strikes law. Throughout,

he simply has substituted the letter for the spirit of the law. This, our Supreme Court has prohibited us from doing." (Maj. opn. ante, at p. 14.)

The majority has it backwards. It is not my burden (or the trial court's) to show how a career criminal who falls within the letter of the Three Strikes law also falls within its spirit; that, after all, is the statutory scheme. (*People v. Strong, supra*, 87 Cal.App.4th at pp. 337-338; *People v. Gillispie, supra*, 60 Cal.App.4th at p. 433.) Instead, it is the majority's obligation to show how, "'for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.'" (*People v. Strong, supra*, at p. 338.) And other than the fact that the majority does not deem worthy of coverage by the Three Strikes law the willful failure of a violent sex offender to comply with the annual registration requirements, it gives no reason.

In sum, the nature of defendant's current felony, in and of itself, cannot take him outside the Three Strikes law without rewriting the Three Strikes law to exempt such felonies.

III.

Finally, the majority contends that the facts of this case are "analogous to those presented" in *People v. Cluff* (2001) 87 Cal.App.4th 991 (*Cluff*). (Maj. opn. ante, at p.8.) It argues that "defendant's failure to update his registration is

arguably less serious than Cluff's since defendant had registered *very recently* and was arrested only *one month* after he should have registered." (Maj. opn. ante, at p. 9.)

But *Cluff* involved a questionable violation of the sex offender registration law, which the Court of Appeal characterized as "the most technical violation of the section 290 registration requirement we have seen." (87 Cal.App.4th at p. 994.) That, in and of itself, distinguishes that case from this case.

In *Cluff*, the Court of Appeal noted that the trial court, in rendering its verdict, had observed that "the evidence was insufficient to determine whether Cluff's failure to register was 'negligent as opposed to intentional.'" (87 Cal.App.4th at p. 996.) And the record revealed that "[t]he annual updating requirement [that Cluff violated] was added to the Penal Code five years after Cluff left prison" and that "the new requirement was omitted from the only document he was allowed to keep in 1995." (*Id.* at p. 1001.) Oddly, at sentencing, the trial court disagreed with its earlier determination that it was a technical violation and found that Cluff's misrepresentation of his address and criminal background in a job training application was an "obfuscation" that went beyond "the technical 290 violation." (*Ibid.*) But the Court of Appeal concluded that "the evidence in the record [did] not support the inference of obfuscation that was central to the trial court's ruling. Therefore, the [trial] court abused its discretion when it

denied Cluff's *Romero* motion." (*Id.* at p. 1004.) Thus, in *Cluff*, the very basis for the trial court's determination that the failure to report was *not* a technical violation was not supported by substantial evidence. In contrast, here, as the majority acknowledges, the trial court's determination that the violation was knowing is supported by substantial evidence. (Maj. opn. *ante*, at p. 6, fn. 4.)

Further, Cluff's background, character, and prospects were more favorable than defendant's. In *Cluff*, the defendant had worked as an electrician prior to his conviction, and his criminal record was not as serious as the defendant's.

In short, even if Cluff fell outside the spirit of the Three Strikes law, the 25-year-long criminal history of the defendant in this case, including three violent assaults and numerous other convictions and parole violations, places him squarely within its scope.

Accordingly, I do not understand how we can say that it falls outside the bounds of reason to sentence the defendant pursuant to the Three Strikes law, based on a current felony of knowingly failing to register as a sex offender -- which followed two previous such violations -- simply because he did not commit yet another felony by failing to register the month before.

Nor do I understand how we can say that it falls outside the bounds of reason to sentence a habitual and sometimes

violent offender pursuant to the Three Strikes law for the knowing failure to register as a sex offender on the grounds that such a failure is supposedly "passive" or "harmless," even though that is the nature of that felony as defined by the Legislature and any new felony triggers the Three Strikes law against a defendant with a qualifying strike.

Nor do I understand how we can say it falls outside the bounds of reason to sentence a career criminal for the knowing failure to register because the criminal offense purportedly "bears little indication that the defendant has recidivist tendencies" when this is the third time he has violated the registration requirements. Yes, a failure to register a month after the defendant properly registered is less egregious than a blanket refusal to comply with the law. But the trial court found that defendant's failure to register was knowing, and the defendant had violated the registration requirement *twice* before. In sentencing a habitual and sometimes violent offender, whose third strike was his third violation of that particular statute, it surely was not beyond the bounds of reason -- that is, an abuse of discretion -- for the trial court to follow a statutory scheme designed to restrict the courts' discretion to depart from it.

Unless we are prepared to say that a knowing violation of the registration requirements is not sufficient to trigger the Three Strikes law -- a policy determination that is outside our

province as courts -- we must affirm the trial court's adherence to the provisions of the Three Strikes law.

_____ KOLKEY _____, J.