Filed 4/13/2004

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DELBERT MEEKS, Defendant and Appellant.	C036854 (Super.Ct.No. 00F04187)

Appeal from a judgment of the Superior Court of Sacramento County, James I. Morris, Judge. Affirmed.

Robert Wayne Gehring, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, John G. McLean, Joel Carey and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Delbert Meeks of willfully failing, between January 1 and May 15, 2000, to register within

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I and V.

five days after changing his address (Pen. Code, § 290, subd. (a)(1)(A); unspecified section references that follow are to the Penal Code) and willfully failing, between December 1, 1999, and May 15, 2000, to register within five days of his birthday (§ 290, subd. (a)(1)(D)). After a bench trial, the court found that defendant had been convicted on four previous occasions of offenses that constituted strikes within the meaning of section 667, subds. (b)-(i), and section 1170.12. Defendant was sentenced to state prison for 25 years to life for failure to register after changing his address. For purposes of sentencing, the court struck the prior convictions as they related to his failure to register within five days of his birthday and imposed a consecutive term of two years.

On appeal, defendant contends that (1) the court erred in instructing the jury on the element of "willfulness," (2) the court erred in denying his challenges to multiple counts for the single continuing offense of failure to register, (3) the court violated section 654 when it did not stay his conviction for failure to register within five days of his birthday, and (4) imposition of a term of 25 years to life constitutes cruel and unusual punishment. We affirm the judgment.

FACTS

Defendant was born December 3, 1951. At trial, he stipulated that he was required to register under section 290 based on a felony conviction. Under the provisions of section

290, defendant had a lifelong requirement to register within five days of his birthday and within five days of changing his address. Defendant registered at least nine times from 1982 through 1997; however, the last time he registered was December 15, 1997. He then listed his address as 2557 Rio Linda Boulevard, Sacramento.

Sometime in 1998, defendant was evicted from his Rio Linda residence and moved to 4720 Roosevelt Avenue in Sacramento. In January 1999, defendant was evicted from the Roosevelt Avenue residence after he failed to pay the rent. On April 15, 1999, an officer detained defendant, and he told the officer he was staying at 4720 Roosevelt Avenue. Defendant also told the officer that he knew he had to register this address pursuant to section 290.

After defendant was evicted from the Roosevelt Avenue residence, he spent time living on the street. In February or March 2000, he moved in with Naomi Jefferson, his sister-in-law, at 3540 Y Street in Sacramento, where he lived for several months. Defendant was detained by an officer on May 4, 2000, and gave 4720 Roosevelt Avenue as his address. When defendant was arrested on May 15, 2000, at Jefferson's residence, he gave Jefferson's address as his residence.

Defendant testified that he had been convicted of an offense in 1982 that required him to register under Penal Code section 290 for life. Defendant believed he had registered

somewhere around 12 or 13 times. In 1996 he was diagnosed HIV positive; thereafter, knowing he was going to die, he did not "[c]are about nothing." He also worried that his youngest daughter had contracted HIV from either himself or her mother. As to what he meant when he said he did not care about anything, defendant explained: "I didn't think about nothing else except for the disease. I didn't think about registering. I didn't think about paying bills. I didn't think about doing none of that. I thought about it, but I couldn't deal with it." In 1997 his lack of caring was exacerbated when he was diagnosed with hepatitis C.

From 1995 through 1998, defendant participated in a methadone treatment program in an effort to overcome his addiction to heroin. He went to the clinic "[e]very morning." Although defendant had a bus pass, which he used to get to the clinic, he did not go to the courthouse and register because he was "too depressed." On cross-examination, when asked if it "occurred to him that [he] had to register pursuant to Penal Code Section 290," the following dialogue occurred: "A. I didn't think about it. [¶] Q. You didn't think about it? [¶] A. No. I had priorities. Maybe my priorities could have been better, but they weren't. [¶] Q. But you were aware that you were required to register based on your 1997 registration, correct? [¶] A. Yes."

DISCUSSION

I

The Instructions on Willfulness

Defendant was convicted of failing to register within five days after changing his address and failing to register within five days after his birthday; each offense requires that the failure be "willful[]" (§ 290, subd. (g)(2)). The court instructed the jury: "The word [']willfully[’] when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question. [¶] The word [']willfully[’] does not require any intent to violate the law or to injure another or to acquire any advantage."

Defendant does not challenge the fact that he had been informed of his lifelong duty to register both within five days of his birthday and within five days of a change in his residence. Instead, he argues that where the failure to register is occasioned by a failure to remember, the failure cannot be "willful." This is so, he claims, because "willfulness" requires conscious knowledge of the duty to register at the time the duty arises, a circumstance negated where one has simply forgotten the duty.

Even if valid (contra, *People v. Cox* (2002) 94 Cal.App.4th 1371), defendant's argument has no application, given the evidence he presented at trial. Theories unsupported by the

evidence should not be presented to the jury. (*People v. Marshall* (1997) 15 Cal.4th 1, 40.) Contrary to defendant's claim on appeal that he "forgot to register because of the pressure of other matters occupying his attention," that was not the nature of his testimony at trial. At trial he said he was aware of the registration requirements, but did not register because of other "priorities" which left him in a state where he did not "[c]are about nothing."

The other priorities to which he referred were his learning that (1) he was HIV positive; (2) his child may have contracted HIV from him or from her mother; (3) his child's mother recently died; and (4) he had hepatitis C. Although defendant testified that because of the HIV he "didn't think about registering," he immediately explained, "I thought about it, but I couldn't deal with it." He testified that he did not register because he was "too depressed"; he did not think about registering because of what was going on in his life; and he did not think about registering because he "had priorities" that "[m]aybe . . . could have been better, but they weren't." Although defendant had ample opportunity, he did not testify that he had forgotten about his duty to register, rather, at most, he put that duty out of his mind because of his many other concerns. That is not the same as forgetting a known duty. Consequently, even if forgetfulness is a defense, the defense was not supported by

substantial evidence. The court was not required to instruct the jury on the issue of forgetfulness.

II

Multiple Offenses

Defendant contends that his conviction for failing to register within five days of his birthday should be stricken because section 290's registration requirements are continuing offenses. He argues: "Once a registrant has willfully failed in the legal duty to update that registration upon birthday or change of address, that state of law violation continues until terminated by some significant event, registration, arrest, death, etc. While a former registrant is in that state of willful failure to comply, the passage of other events requiring registration cannot be new offenses because the existing violation had not yet been completed. That a second birthday passes or another change of residence occurs is not a new offense, but merely a continuation of the state of unlawfulness." We are not persuaded.

Failure to register under section 290 is a continuing offense (§ 290, subd. (g)(8); *Wright v. Superior Court* (1997) 15 Cal.4th 521, 528), that is, one "marked by a continuing duty in the defendant to do an act which he fails to do. The offense continues as long as the duty persists and there is a failure to perform that duty." (*Id.* at p. 525.) But simply because the Legislature intended that a violation of section 290 be a

continuing offense does not mean that a defendant cannot be convicted and punished for new and separate violations of section 290 as he continues to ignore the law.

"'The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]' [Citations.] Plainly, the Legislature perceives that sex offenders pose a 'continuing threat to society' [citation] and require constant vigilance." (*Wright v. Superior Court, supra,* 15 Cal.4th at p. 527.)

The Legislature has found it imperative for the safety of society that the location of sex offenders be known to law enforcement at all times, thus requiring defendants subject to section 290 to reregister annually and upon a change of location serves that purpose by providing law enforcement with updated information through which they may track these defendants. It would ill serve the purpose of section 290 to provide defendants who fail to register with blanket immunity from prosecution for all but a single failure to register. A defendant who knows that he is subject to prosecution for each violation of the registration requirement is more likely to comply in order to avoid additional punishment and is more likely to become visible again to law enforcement. Thus visible, he arguably is less likely to repeat his sexual crimes. By requiring defendants to

register annually and with every change of residence, it was no doubt the Legislature's intent to treat each violation of the registration requirements as a separate, continuing offense in order to encourage compliance with the law and to ensure to the extent possible that a sex offender's whereabouts remain known.

Defendant's reliance on *People v. Lewis* (1978) 77 Cal.App.3d 455, is misplaced. In *Lewis,* the defendant was charged with four separate counts of pimping in violation of section 266h, all of which related to the same woman over a period of time. In *Lewis,* the court noted that the statute at issue described a continuing offense and one that anticipated activity over a period of time. The court noted that the gravamen of the offense was a course of conduct of living or deriving support and maintenance from the earnings of a prostitute. (*People v. Lewis*, *supra*, at p. 462.) Under those circumstances, the defendant could not be charged with separate acts of pimping each time he received money from the prostitute with whom he was involved.

Under section 290, a failure to register when one moves to a different residence is a continuing offense; a failure to register on the event of the defendant's birthday is a separate continuing offense. Unlike *Lewis*, where a single continuing offense was parsed into separate and discrete offenses, in this matter there are two separate offenses, the statute was violated in two different ways. Had the prosecution charged a separate

offense for each day of defendant's failure to register when he changed his address, the defendant would then have been subjected improperly to multiple convictions for a single criminal act. Here however he was subjected to multiple convictions for multiple criminal acts.

Defendant's separate convictions for failure to register upon a change of address and to register annually on his birthday are lawful. (See *People v. Davis* (2002) 102 Cal.App.4th 377.)

III

Violation of Section 654

Defendant contends that sentencing him for failing to register after changing his address and failure to register on his birthday violated section 654 because "the two counts for which [he] was found guilty . . . were merely subdivisions of a single, continuing offense." However, as pointed out in part II, each count constituted an offense unrelated to the other, i.e., the violation of a separate duty. Hence section 654's proscription against multiple punishment based on a single course of conduct (*People v. Beamon* (1973) 8 Cal.3d 625, 639-640) is inapplicable.

IV

Cruel and/or Unusual Punishment

As noted above, defendant was sentenced under the three strikes law to a term of 25 years to life for failing to

register within five days of changing his address. The court struck the prior convictions for purposes of sentencing on the count alleging a failure to register within five days of his birthday, and imposed a two-year term, resulting in a total term of 27 years to life.

Defendant contends that his sentence of 25 years to life for failing to register after changing his address constitutes cruel and/or unusual punishment under the United States and California Constitutions. We disagree.

Defendant raised this argument in a superficial way at trial, but provided no specifics. Even so, both the trial and the appellate court have the authority to determine whether a sentence results in cruel or unusual punishment. (*People v. Sandoval* (1987) 194 Cal.App.3d 481, 487; *People v. Williams* (1986) 180 Cal.App.3d 922, 926.) While the proper determination of this claim may be fact specific (*People v. Dillon* (1983) 34 Cal.3d 441, 479), it is a role of the appellate court to decide mixed questions of fact and law (*People v. Cromer* (2001) 24 Cal.4th 889, 900-901; *People v. Louis* (1986) 42 Cal.3d 969, 984 [determining mixed questions of fact and law]; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 318-319, pp. 357-359.)

"Mixed questions are those 'in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant legal] standard, or to put it another way, whether the rule of law as

applied to the established facts is or is not violated.'" (*People v. Louis, supra,* 42 Cal.3d at p. 984, quoting *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289, fn. 19 [72 L.Ed.2d 66, 80].) Moreover, the People have addressed the argument.

We review these questions independently. (*People v. Cromer, supra,* 24 Cal.4th at p. 901; *People v. Louis, supra,* 42 Cal.3d at p. 984.)

Under the separation of powers doctrine, the courts may not encroach lightly in matters that are normally left to the Legislature and must always be aware that one function of the legislative branch of government is to define crimes and describe punishments. (*In re Foss* (1974) 10 Cal.3d 910, 917.) The courts examine legislative acts to determine whether the punishment exceeds constitutional limits in individual cases. (*Ibid.; In re Lynch* (1972) 8 Cal.3d 410, 414.)

The Eighth Amendment to the United States Constitution proscribes "cruel *and* unusual punishment" and "contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) ___ U.S. ___, ___ [155 L.Ed.2d 108, 117] (lead opn. of O'Connor, J.) quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 [115 L.Ed.2d 836].) That principle prohibits "'imposition of a sentence that is grossly disproportionate to the severity of the crime'" (*Ewing v. California, supra,* ___ U.S. ___, ___ [155 L.Ed.2d at p. 117] (lead opn. of O'Connor, J.), quoting *Rummel v. Estelle* (1980)

445 U.S. 263, 271 [63 L.Ed.2d 382, 389], although in a noncapital case, successful proportionality challenges are "'exceedingly rare.'" (*Ibid.*)

A proportionality analysis requires consideration of three objective criteria, which include "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (*Solem v. Helm* (1983) 463 U.S. 277, 292 [77 L.Ed.2d 637, 650].) But it is only in the rare case where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality that the second and third criteria come into play. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 1005 [115 L.Ed.2d at pp. 871-872] (conc. opn. of Kennedy, J.).)

In *Ewing v. California, supra,* ___ U.S. ___, ___ [155 L.Ed.2d 108], the United States Supreme Court's most recent case involving a claim of cruel and unusual punishment, the high court upheld a three strikes prison term of 25 years to life after the defendant committed grand theft by shoplifting three golf clubs, having been convicted previously of four serious or violent felonies. (*Id.* at pp. ___, ___ [155 L.Ed.2d at pp. 115-117.)

Justice O'Connor stated in her lead opinion that "[r]ecidivism has long been recognized as a legitimate basis for

increased punishment." (*Ewing v. California, supra,* ___ U.S. ___, ___ [155 L.Ed.2d at p. 120].) In considering the gravity of the offense, the Supreme Court looked not only to Ewing's current felony, but also to his long criminal felony history, stating "[a]ny other approach would fail to accord proper deference to the policy that judgments find expression in the legislature's choice of sanctions. In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction . . . `[i]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.´" (Id. a p. ___ [155 L.Ed.2d at p. 122], quoting *Rummel v. Estelle, supra*, 44 U.S. at p. 276 [63 L.Ed.2d at p. 392].)

Applying the proportionality test in light of *Ewing*, we conclude that defendant's sentence of 25 years to life in prison for failing to register cannot be considered a sentence that is grossly disproportionate to his crime in light of his long and serious criminal history.

First, his sentence is the same as the one imposed in *Ewing.* He has violated a law that is intended to avoid, or at least minimize, the danger to public safety posed by those who have been convicted of certain sexual offenses. It is at least as serious as theft of three golf clubs.

In addition to the instant two felony convictions, defendant's prior convictions and sentences were as follows: convicted in Missouri in 1969 of burglary and received a state prison term; convicted in Los Angeles County in 1973 for possession of material for arson and was granted probation, but probation was later revoked and he was sentenced to state prison for six months to five years; convictions in Sacramento County in 1975 for rape, second degree robbery and assault with a deadly weapon for which he received life sentences; convicted in Sacramento County in 1982 for attempted rape by force and sentenced to state prison for four years, and, when paroled, he violated his parole and was returned to custody; convicted in Santa Clara County in 1987 of felony possession of drugs and two misdemeanors for which he was sentenced to state prison for two years; convicted in Sacramento County in 1989 of second degree burglary and sentenced to state prison for two years; convicted in Sacramento county in 1991 of second degree robbery with an enhancement for service of a prior prison term and sentenced to four years in state prison; and convicted in Sacramento County in 1993 of misdemeanor driving under the influence and granted probation.

Taking into account, as we should, not only the seriousness of defendant's current offense, but also his history of repeated violations of the criminal law that spanned at least 30 years, we cannot say that his sentence is grossly disproportionate to

his current offense when viewed in light of his long-standing, and sometimes violent, criminal history. The sentence does not constitute cruel and unusual punishment.

The California Constitution prohibits "cruel *or* unusual punishment." (Cal. Const., art. I, § 17, italics added.) A punishment may violate the California Constitution "although not cruel or unusual in its method, [if] 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, supra,* 8 Cal.3d at 424.)

The court in *In re Lynch* spoke of three "techniques" the courts have used to administer this rule, (1) an examination of the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*In re Lynch, supra,* 8 Cal.3d at p. 425), (2) a comparison of the challenged penalty with the punishments prescribed for more serious offenses in the same jurisdiction (*id.* at p. 426), and (3) "a comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision" (*id.* at p. 427). As under the federal standard, a defendant's history of recidivism, which is part of the nature of the offense and the offender, justifies harsh punishment. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824; *People v. Weaver* (1984) 161 Cal.App.3d 119, 125-126.)

Defendant minimizes the severity of his current offenses for failing to register, referring to them as "de minimis as felonies go." We do not share that view.

As noted earlier, California has recognized, and reasonably so, that sex offenders present a serious danger to society because of their tendency to repeat their sexual offenses. Sexual offenses not only invade the deepest privacies of a human being, and thereby may cause permanent emotional scarring, but they frequently result in serious physical harm to, or death of, the victim. Hence, "'it is necessary to provide for continued registration' to effectuate the statutory purpose of protecting the safety and general welfare of the public." (*Wright v. Superior Court, supra,* 15 Cal.4th at p. 529.) Defendant's willingness to ignore his duty to register and thus ignore society's right to maintain some control over sexual offenders may seem "di minimis" to him but does not seem so to a society seeking to protect itself from sexual predators. Defendant's history of prior convictions for rape and attempted rape, approximately seven years apart, shows that he is one of those persons who law enforcement needs to have "readily available for police surveillance at all times." Here, defendant, without legal excuse or justification, admitted having failed to register after 1997 because he had other "priorities." We see nothing "de minimis" either in the offenses in the abstract or in the circumstances attending their commission.

Similarly, in considering the nature of the offender, we have already outlined the highlights of his criminal record, which demonstrates that he has been guilty of violent sexual conduct and other violent conduct and has dedicated himself to a life of crime from the age of 18 in 1969 when he was convicted of burglary through age 46 in 1997 when he was convicted of possession of controlled substance paraphernalia.

Regarding the second *In re Lynch* "technique," comparing defendant's penalty with the punishments prescribed for different offenses in California, defendant concedes that "all three strikes defendants with a current conviction will receive the same sentence without regard to the current felony." Defendant thus recognizes that his sentence is no more severe than that of any other defendant in California with a similar criminal history who is convicted of a felony.

Finally, regarding the third *In re Lynch* "technique," defendant presents a survey of registration requirements across the country. While it is fair to say that the various states treat the issue of registration of sexual offenders in widely diverse ways, defendant concedes that seven states treat a failure to register as felonies carrying penalties of from one to 12 years, depending on their recidivism statutes, one (Texas) would assess a term of life or a term of 25 to 99 years and one (Mississippi) would sentence an offender such as defendant to life without parole. Even if it could be said that defendant's

penalty "exceed[s] the punishments decreed for the offense in a significant number of [other jurisdictions] . . ." (*In re Lynch, supra,* 8 Cal.3d at p. 427), this is but one measure of excessiveness. And viewed against the backdrop of the other two *In re Lynch* considerations, a comparison of the laws in other states is not so significant that it demands a finding of excessiveness in this instance.

On this record, defendant's sentence does not shock the conscience or offend fundamental notions of human dignity. It does not violate California's constitution.

V

The Trial Court's Ruling Regarding Prior Convictions

Prior to trial defendant requested that the court, pursuant to the provisions of section 1385, subdivision (a), strike the allegations of prior conviction that brought the matter within the provisions of the three strikes law (section 667, subds. (b)-(i).) The court denied the motion subject to reconsideration later in the proceedings.

After the jury returned its verdicts on the substantive counts, the trial court found that each of the four allegations of a prior conviction within the meaning of section 1192.7, subdivision (c) were true.

At the time of judgment and sentencing, defendant

requested that the court vacate its findings as to each of the prior conviction as to each of the counts, and to sentence defendant accordingly.

The trial court decided to vacate each of the four findings of prior convictions as they related to one count, thus reducing defendant's indeterminate term from 50 to 25 years to life. The court considered (1) the nature and circumstances of the present offenses, (2) the nature and circumstances of the prior serious and/or violent felonies, and (3) the defendant's "background, character and prospects." The court acknowledged that the current offense was not a violent offense but found that the other two factors weighed against further relief. Defendant argues that the trial court abused its discretion by failing to strike or vacate the prior conviction allegations as they related to the remaining count.

In *People v. Williams* (1998) 17 Cal.4th 148 the California Supreme Court held 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(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of [defendant's] 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." (*Id.* at p. 161.)

We review the trial court's decision for an abuse of discretion. Defendant must demonstrate that the trial court's decision was arbitrary or irrational. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

The trial court correctly considered the factors bearing on its decision whether to strike or vacate the prior convictions. We need only refer to the recitation of defendant's criminal history summarized in part III to find that the court's decision was neither irrational nor arbitrary. There was no abuse of discretion.

DISPOSITION

The judgment is affirmed. (**CERTIFIED FOR PARTIAL PUBLICATION.**)

HULL, J.

I concur:

MORRISON, J.

I concur in parts I, II, and III of the majority opinion.

I respectfully dissent from the majority's conclusion, in part IV, that the sentence in this case does not constitute cruel or unusual punishment. In my view, defendant's sentence of 25 years to life on count 2, plus a two-year consecutive sentence on count 3, constitutes cruel or unusual punishment under the California Constitution.

Article 1, section 17 of the California Constitution provides in pertinent part, "Cruel or unusual punishment may not be inflicted . . . ."

Construing this provision, the California Supreme Court in *In re Lynch* (1972) 8 Cal.3d 410, said, "the power to prescribe penalties [must] '"be exercised within the limits of civilized standards."' [Citations.] 'The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.' [Citations.] Punishment which is so excessive as to transgress those limits and deny that worth cannot be tolerated. [¶] We conclude that in California a punishment may violate article 1, section 6 [now section 17] of the 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." (*Id.* at p. 424, fn. omitted.)[1]

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[1] **Article I, section 24 of the California Constitution was amended by Proposition 115 in 1990 to provide in part: "In criminal cases the rights of a defendant to . . . not suffer the imposition of cruel or unusual punishment, shall be construed by**

In determining whether a sentence is cruel or unusual, it is appropriate to examine whether the penalty is grossly disproportionate to the crime committed and also whether the punishment fits the offender. (*In re Lynch, supra,* 8 Cal.3d at pp. 431, 437.)

The offenses for which defendant was convicted in this case--failure to register--are obviously non-violent offenses. Before 1995, failure to register was a misdemeanor offense. (See former Penal Code § 290, subd. (g)(1), Stats. 1993, ch. 595, § 8, p. 3137.) Even now, violation of section 290 (without prior "strikes") is punishable by the lowest triad of punishments: 16 months, two or three years. (Pen. Code, § 290, subd. (g)(2).)

The majority make much of defendant's record of offenses and justify his sentence primarily on this ground. However, defendant committed his most recent sex offenses some 23 years ago, in 1981. He committed his most recent felony offense in 1990--more than nine years before he failed to register. Defendant's prior felony offenses are old and stale and his

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the courts in this state in a manner consistent with the Constitution of the United States." In *Raven v. Deukmejian* (1990) 52 Cal.3d 336, in an opinion by Chief Justice Lucas, the Supreme Court concluded that this portion of Proposition 115 "contemplates such a far-reaching change in our governmental framework as to amount to a qualitative constitutional revision, an undertaking beyond the reach of the initiative process." (*Id.* at p. 341.) The court therefore held that "new article I, section 24, represents an invalid revision of the California Constitution." (*Id.* at p. 355.)

recent conduct--exemplified by nine years of felony-free life--indicates that he had turned the corner on his felonious past.

In considering the nature of the offender, the evidence on this record (including the probation report) is uncontradicted that defendant was suffering from AIDS, that he became homeless, that he was living on the street, and that eventually he moved in with his sister-in-law for several months. The reason that defendant tendered for failing to register--that he was dying of AIDS and was consumed by it--is uncontradicted on this record and is entirely plausible.

This is a pathetic case. This is not a case in which defendant has done anything to justify imposition of a term of 25 years to life in state prison, let alone the draconian two-year consecutive term (on top of the 25-year-to-life term) for failing to register on his birthday.

It is no answer to say that we are protecting society from contamination by one with AIDS. We do not, should not, and constitutionally cannot incarcerate persons *in state prison* because they have a disease like AIDS. (*Robinson v. California* (1962) 370 U.S. 660, 666-667 [statute making narcotics addiction a criminal offense violated cruel and unusual punishment clause].)

What are we doing sending this dying man to state prison for 27 years to life? What has become of our society? Why has "compassion" become a dirty word in the law? I think that, some years from now, law professors and law students will read this case and will ask, "What on earth were they thinking?"

Considering this record as a whole, the sentence imposed in this case is so disproportionate to the crime for which it is inflicted that it shocks my conscience and offends my fundamental notions of human dignity. (*In re Lynch, supra,* 8 Cal.3d 410, 424.) Because defendant's sentence was unconstitutional, the trial court abused its discretion in refusing to strike defendant's strikes, as defendant contends, because striking the strikes would have allowed the court to impose a constitutional sentence.

I would affirm defendant's convictions and remand to the trial court for resentencing.

SIMS, Acting P.J.