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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM ANDREW BOLLINGER,

Defendant and Appellant.

D059696

(Super. Ct. No. FVI902699)

APPEAL from a judgment of the Superior Court of San Bernardino, Cheryl C. Kersey, Judge. Reversed in part, affirmed in part, and remanded with directions.

A San Bernardino County jury convicted William Andrew Bollinger of committing a total of eight sexual offenses against his two younger sisters. Specifically, the jury convicted him of four counts of committing a forcible lewd act upon a child under the age of 14 (Pen. Code,¹ § 288, subd. (b)(1), hereafter § 288(b)(1); counts 3 through 6), and four counts of committing a nonforcible lewd act upon a child under the age of 14 (§ 288, subd. (a), hereafter § 288(a); counts 7 through 10). Bollinger

¹ Undesignated statutory references will be to the Penal Code.

committed counts 3 and 4 against the older sister (Sister 1), and counts 5 through 10 against the younger sister (Sister 2). The jury also found true an allegation under section 667.61, former subdivision (e)(5)² (hereafter section 667.61(e)(5)) that in committing the section 288(b)(1) offenses charged in counts 3 through 6, Bollinger committed the offenses against multiple victims within the meaning of the One Strike law codified in section 667.61 (see *People v. Wutzke* (2002) 28 Cal.4th 923, 926).³

The court sentenced Bollinger under the One Strike law to an aggregate indeterminate prison term of 60 years to life, plus a consecutive determinate term of 12 years. This sentence consisted of four consecutive indeterminate terms of 15 years to life for his convictions of counts 3 through 6, plus a consecutive determinate middle term of six years for his conviction of count 7, plus three consecutive two-year determinate terms for his convictions of counts 8 through 10, for a total term of 72 years to life.

Bollinger appeals, contending (1) his convictions of committing forcible lewd acts upon his sisters between 1997 and 1999, as charged in counts 3 through 6, are time-barred because prosecution of those four counts did not commence within the applicable six-year limitations period and the operative second amended information contained no allegation that any tolling provision was applicable; (2) he was not subject to sentencing

² Former subdivision (e)(5) of section 667.61, which was renumbered in 2010 as subdivision (e)(4) of that section (Stats. 2010, ch. 219, eff. Sept. 9, 2010) provided: "(e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) *against more than one victim.*" (Italics added.)

³ As to counts 7 through 10, the jury found not true the allegations that the offenses were committed against multiple victims.

under either the current version of the One Strike law or the former version of the One Strike law that was in effect when he engaged in the conduct underlying his convictions, and, thus, the sentence the court imposed under the One Strike law "cannot stand"; (3) he is entitled to reversal and a remand for resentencing because the court imposed *consecutive* terms of 15 years to life for each of his four convictions of committing forcible lewd acts upon his sisters, as charged in counts 3 through 6, without being aware it had discretion to impose *concurrent* sentences for these convictions, and without stating any reasons for imposing consecutive terms; and (4) his sentence of a determinate term of 12 years plus a consecutive indeterminate term of 60 years to life violates both the federal and state constitutional prohibitions against cruel and unusual punishment because the sentence is tantamount to a sentence of life without the possibility of parole, and, thus, he is entitled to reversal and a remand for resentencing.

The portion of the sentence requiring Bollinger to consecutively serve the four terms of 15 years to life imposed under the One Strike law for his convictions of counts 3 through 6 is reversed, and the matter is remanded for resentencing solely on the issue of whether, in the exercise of the court's discretion, Bollinger must serve those four properly imposed indeterminate terms concurrently or consecutively. In all other respects, the judgment is affirmed.

FACTUAL BACKGROUND

A. The People's Case

1. Sister 1 (Counts 3 & 4)

Sister 1, who was born in May 1992, was 18 years of age in August 2010 when she testified at trial in this case. Bollinger, who was born in February 1981, is her older brother.

Sister 1 testified that in 1996, when she was four years old, she lived with her parents, her younger sister (Sister 2), and Bollinger, who was then 16. Around this time, Bollinger began sexually molesting Sister 1. Bollinger would rub his penis on her vagina in her bedroom. Sister 1 saw Bollinger do the same thing to Sister 2. Bollinger also grabbed Sister 1's hair and forced her to orally copulate him. On one occasion, Bollinger told her to bend over to the floor and then tried to put his penis in her anus, but he stopped when she screamed because it hurt and she began crying. Sister 1 testified that Bollinger sexually molested her "[e]very week to maybe two times a month" until she was about seven or eight years old.

When Sister 1 told her mother that Bollinger was molesting her, her mother thought she (Sister 1) had awakened from a bad dream and told her to go back to bed. A couple of years after Bollinger stopped sexually molesting her, Sister 1 told her school counselor about the molestations. Her counselor told Sister 1's parents about the molestations, and her parents talked to Bollinger about it during a family meeting. Bollinger said he did not remember molesting Sister 1, but he was sorry if he did.

Bollinger's parents told him they would not bring it up again if he promised he would never do it again, and Bollinger promised he would not do it again.

2. *Sister 2 (Counts 5-10)*

Sister 2, who was born in November 1993, was 16 years of age when she testified at trial in this case. She testified that Bollinger began to sexually molest her when she was three or four years old. About twice a week, Bollinger would pull down her underwear while they were lying on her bed and rub his penis up and down on her vagina. Bollinger continued to molest Sister 2 in this manner until she was about six years old. She did not tell her parents about the molestation because Bollinger scared her.

Bollinger eventually moved out of the house but moved back in 2006. Sister 2 testified that sometime in August 2006, when she was 12, she was in the backyard with Bollinger when he put his hand inside her pants and penetrated her vagina with his fingers. He then bent her over a woodpile and put his penis inside her vagina, and then sat her down on a piece of wood and again penetrated her vagina with his penis. Sister 2 stated that Bollinger molested her in this manner in various places two or three times each week through November 2006. Bollinger would ejaculate after he took his penis out of her, and sometimes he wore a condom.

In late November 2006, on her 13th birthday, Sister 2 was sitting on the couch when Bollinger took off her clothes and performed oral sex on her. He then put his penis inside her vagina. Bollinger continued to sexually molest Sister 2 for a couple of months after her 13th birthday. She did not tell her parents about the molestations because

Bollinger still scared her. The sexual molestations stopped when Bollinger moved out of the house.

In December 2009 Child Protective Services (CPS) investigated an accusation related to Sister 1's son, and at some point during the investigation Sister 1 told the CPS worker that Bollinger had molested her when she was young.

In December 2009 San Bernardino County Deputy Sheriff Justin Marszalek, who was assigned to investigate Sister 2's lewd acts allegations against Bollinger, met with Bollinger's mother, Sister 1, and Sister 2. Sister 1, who was 17 years old at the time of the interview, told Deputy Marszalek that Bollinger began molesting her when she was about four years old. She recalled that Bollinger once had her sit on top of the washing machine, penetrated her vagina with his fingers, and then rubbed his penis up and down on her vagina. Sister 1 told Deputy Marszalek that most of the molestations took place in her bedroom, and she saw Bollinger molesting Sister 2. Sister 1 told him that Bollinger would undress them, lay them down, and rub his penis up and down against them. Sister 1 indicated that Bollinger would generally ejaculate on their stomachs. Sister 1 also told Deputy Marszalek that Bollinger would make her orally copulate him multiple times each week over a period of three or four years. Sister 1 recalled an incident when Bollinger bent her over and attempted to have anal sex with her.

Sister 2 also told Deputy Marszalek she could remember little about the molestations when she was three years old. She did remember that Bollinger molested her when she was 12 and 13 and that he molested her several times each week for about a year.

Sister 2 testified that at Deputy Marszalek's request she participated in making a recorded and transcribed pretext telephone call to Bollinger from the police station. The audio recording of that call was played for the jury.

During that pretext call, Sister 2 confronted Bollinger about raping and molesting her. Bollinger initially denied raping or molesting her. When Sister 2 asked him why he was denying he molested her, Bollinger stated, "I am not denying — denying anything." Bollinger also told her, "I was [16] years old." Sister 2 replied, "Yeah, and you were how old[] when you did it when I was [12] and [13]?" When Bollinger responded, "I never touched you," she said, "You are a fucking liar." Bollinger said, "All right. Fine. Whatever." Later, after repeatedly denying he touched Sister 2, Bollinger admitted, "Yes, I did do it when I was [16]." He then told her, "I am sorry if I've ever hurt you." When Sister 2 confronted him about molesting her when she was 12 and 13 years old, Bollinger replied, "I never touched you." Sister 2 told Bollinger, "You penetrated me with your dick. You penetrated me with your fingers. You went down on me. Does it ring a bell now?" Bollinger replied, "Bull shit. Bull shit." After Bollinger repeated that he never touched her, Sister 2 told him she was going to tell his wife he had molested her when she was 12 and 13 years old. Bollinger eventually told Sister 2, "If you're saying it happened, then it obviously happened. And if it did, because I can't remember, I am sorry [Sister 2]. I truly am."

Deputy Marszalek later arrested Bollinger. After he was advised of, and waived, his *Miranda*⁴ rights, Bollinger admitted to police that he molested Sister 1 and Sister 2 when he was 16 years old. Bollinger said he did not remember if he molested Sister 2 when she was 12 or 13 years old, but he indicated he did not think there was any reason why she would lie about it. When a detective asked Bollinger, "[D]o you think this honestly happened, if she came to me and said this is what happened," Bollinger replied, "It's gotta if she's saying it." Later in the interview, Bollinger said, "She ain't gonna lie about it. I mean, I feel bad that I hurt her that way."

Bollinger's wife testified that as Bollinger was being taken into custody, he told her he was being arrested because he "did some pretty bad things to [his] sisters."

B. *The Defense Case*

Bollinger testified and denied that he molested Sister 1 or Sister 2.

Bollinger's father testified that Sister 2 lies and falsely accuses people. He indicated he was afraid to be alone with her because he was worried she would falsely accuse him of molesting her.

DISCUSSION

I

STATUTE OF LIMITATIONS (COUNTS 3 THROUGH 6)

Bollinger first contends his convictions of committing forcible lewd acts (§ 288(b)(1)) upon his sisters between 1997 and 1999, as charged in counts 3 through 6,

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436.

are time-barred because prosecution of those four counts did not commence within the applicable six-year limitations period and the operative second amended information contained no allegation that any tolling provision was applicable. This contention is unavailing because the One Strike law, including the multiple victim circumstance provision (§ 667.61(e)(5)),⁵ under which Bollinger was prosecuted in this case creates an alternative penalty scheme for which there is no limitations period.

A. Background

In December 2009 Sister 1 told a CPS worker that Bollinger had sexually molested her when she was young, and Deputy Marszalek thereafter interviewed Sister 1 and Sister 2 about the molestations. On December 14 of that year, after the interviews, the San Bernardino County District Attorney's Office filed a felony complaint charging Bollinger with committing numerous sexual offenses against his two sisters in 2006. The complaint also alleged that in committing the crime of continuous sexual abuse (§ 288.5, subd. (a)) between January 1 and December 31 of 2006, Bollinger unlawfully engaged in "substantial sexual conduct" as defined in section 1203.066, subdivision (b) (hereafter

⁵ See footnote 2, *ante*. In the interest of clarity, we reiterate that section 667.61(e)(5) provides: "(e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) *against more than one victim.*" (Italics added.)

section 1203.066(b)).⁶ The next day, Bollinger was arraigned on the complaint and pleaded not guilty to all counts.

The second amended information (hereafter the information), which is the final accusatory pleading in this case, was filed in early June 2010. As pertinent here, the information charged Bollinger in *count 3* with committing a forcible lewd act (§ 288(b)(1)) upon Sister 1, a child under the age of 14 years, on or about February 20, 1997 through February 19, 1998; in *count 4* with committing a forcible lewd act (§ 288(b)(1)) upon Sister 1, a child under the age of 14 years, on or about February 20, 1998 through February 19, 1999; in *count 5* with committing a forcible lewd act (§ 288(b)(1)) upon Sister 2, a child under the age of 14 years, on or about February 20, 1997 through February 19, 1998; in *count 6* with committing a forcible lewd act (§ 288(b)(1)) upon Sister 2, a child under the age of 14 years, on or about February 20, 1998 through February 19, 1999; in *count 7* with committing a nonforcible lewd act (§ 288(a)) upon Sister 2, a child under the age of 14 years, on or about August 1, 2006 and through August 31, 2006; in *count 8* with committing a nonforcible lewd act (§ 288(a)) upon Sister 2, a child under the age of 14 years, on or about September 1, 2006 through September 30, 2006; in *count 9* with committing a nonforcible lewd act (§ 288(a)) upon Sister 2, a child under the age of 14 years, on or about October 1, 2006 through October 31, 2006; and in *count 10* with committing a nonforcible lewd act

⁶ Section 1203.066(b) provides: "'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

(§ 288(a)) upon Sister 2, a child under the age of 14 years, on or about November 1, 2006 through November 30, 2006.⁷

The information also alleged that Bollinger, in committing the offenses charged in counts 3 through 10, committed those offenses against more than one victim within the meaning of section 667.61(e)(5), which (as already noted) is the multiple victim circumstance provision of the One Strike law (see fn. 5, *ante*).

The information did not allege that any of the charged offenses was subject to the tolling provisions of section 803, subdivision (f) (hereafter section 803(f)), discussed, *post*). The court did not instruct the jury on any statute of limitations issue, and the jury returned no such findings.

B. *One Strike Law Generally*

Section 288 has long criminalized lewd conduct committed on a minor under the age of 14 years. (*People v. Hammer* (2003) 30 Cal.4th 756, 765.) Subdivision (a) of that section criminalizes *nonforcible* lewd conduct, subdivision (b)(1) criminalizes forcible lewd conduct, and both subdivisions provide that such lewd acts shall be punished by state prison sentences of three, six, or eight years. (*Ibid.*; § 288, subs. (a) & (b)(1)).

However, in 1994 section 667.61, known as the "One Strike" law, was enacted, providing for indeterminate terms of either 25 years to life or 15 years to life for section

⁷ Counts 1 and 2 of the information, which charged Bollinger with the crime of continuous sexual abuse against Sister 2 and Sister 1, respectively, were dismissed under section 1118.1 at the conclusion of the prosecution's case-in chief. In dismissing those two counts, the court also dismissed the allegations in those counts that Bollinger engaged in acts of "substantial sexual conduct" as defined in section 1203.066(b).

288(b)(1) and other specified sex offenses if certain circumstances apply, regardless of whether the defendant has prior convictions. (Stats. 1993-1994, 1st Ex. Sess., ch. 14, § 1, pp. 8570-8572; *People v. Wutzke, supra*, 28 Cal.4th at pp. 929-930; see § 667.61, subds. (a)-(c) & (e)(7).) The One Strike law "was enacted to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction . . . where the nature or method of the sex offense 'place[d] the victim in a position of elevated vulnerability.'" (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1296, italics omitted; *People v. Hernandez* (2009) 180 Cal.App.4th 337, 346.)

Where only one circumstance under subdivision (e) of section 667.61 is found—here, for example, the multiple victim circumstance codified in section 667.61(e)(5)⁸—the mandated term under the One Strike law is 15 years to life. (§ 667.61, subd. (b).) Because "persons convicted of sex crimes against multiple victims within the meaning of section 667.61[(e)(5)] 'are among the most dangerous' from a legislative standpoint," the One Strike law "contemplates a separate life term for each victim attacked on each separate occasion." (*People v. Wutzke, supra*, 28 Cal.4th at pp. 930-931.)

C. Analysis

Outside of the One Strike law sentencing scheme, prosecution of a violation of section 288(b)(1) is subject to a six-year limitations period. Specifically, section 800

⁸ As noted, the jury found true an allegation that in committing the forcible lewd act offenses charged in counts 3 through 6 (§ 288(b)(1)), Bollinger committed those offenses against multiple victims within the meaning of the One Strike law (§ 667.61(e)(5)).

states that, "[e]xcept as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more . . . shall be commenced *within six years* after commission of the offense." (Italics added.) In addition, section 805, subdivision (a) provides: "An offense is deemed punishable by the *maximum punishment prescribed by statute for the offense*, regardless of the punishment actually sought or imposed. Any enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute for an offense." (Italics added.) Outside of the One Strike law sentencing scheme, a violation of section 288(b)(1) is punishable by a maximum prison term of eight years. (See § 288(b)(1).) Thus, prosecution of a violation of section 288(b)(1) outside of the One Strike law sentencing scheme is subject to a six-year limitations period. (§§ 288(b)(1), 800, & 805, subd. (a).)

Here, Bollinger claims his convictions of counts 3 through 6 and the four indeterminate 15-year-to-life terms imposed under the One Strike law for those convictions should be reversed because (he maintains) prosecution of those counts was time-barred because (1) the prosecution of those section 288(b)(1) counts did not commence within six years after the commission of those crimes, and (2) the information contained no allegation that any tolling provision was applicable in this case. As we now explain, this claim is unavailing because it is based on the legally incorrect premise that prosecution of counts 3 through 6 was subject to a six-year limitations period.

Under section 799, which provides an exception to the provisions of section 800, prosecution of offenses punishable by life imprisonment is not subject to any limitations

period and may be commenced at any time. (§ 799 ["Prosecution for an offense punishable . . . by imprisonment in the state prison for life . . . may be commenced at any time."]; see 1 Witkin, Cal. Criminal Law (3d ed. 2000) Defenses, § 219, p. 582.)

The One Strike law establishes an alternative sentencing scheme, not an enhancement of punishment. (*People v. Mancebo* (2002) 27 Cal.4th 735, 741 ["[section 667.61] sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes"]; see also *People v. Perez* (2010) 182 Cal.App.4th 231, 238 ["the One Strike sentencing scheme is an alternate penalty scheme"].)

The crime of committing a forcible lewd act upon a child under 14 years of age (§ 288(b)(1)) is one of the sex crimes enumerated in the One Strike law. (See § 667.61, subd. (c)(4).)

The effective date of the One Strike law was November 30, 1994. (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 257.) Here, the information alleged that Bollinger committed the section 288(b)(1) sex crimes charged in counts 3 through 6 (as well as the § 288(a) sex crimes charged in counts 7 through 10) on dates *after* the effective date of the One Strike law.⁹

In addition to convicting Bollinger of the four section 288(b)(1) offenses enumerated in subdivision (c) of section 667.61, the jury found true the One Strike law

⁹ In counts 3 through 6, the information alleged that Bollinger committed those sex offenses during specified time periods "[o]n or about" February 20, 1997 through February 19, 1998.

special circumstance allegation that Bollinger committed those offenses against multiple victims within the meaning of section 667.61(e)(5)).

Thus, the record shows with respect to counts 3 through 6 that Bollinger was charged, tried, convicted, and sentenced under the One Strike law. We hold the One Strike law creates an alternative penalty scheme for which there is no limitations period in this case, and, thus, prosecution of counts 3 through 6 was not time-barred. Bollinger's claim to the contrary finds no support in either the law or the facts in this case.

II

APPLICABILITY OF THE ONE STRIKE LAW SENTENCING SCHEME

Bollinger next contends he was not subject to sentencing under either the current version of the One Strike law or the former version of the One Strike law in effect when he engaged in the conduct underlying his convictions, and, thus, the sentence imposed by the court under the One Strike law "cannot stand" because he "was not subject to sentencing pursuant to the One Strike law." We reject this contention.

Citing *People v. Hiscox*, *supra*, 136 Cal.App.4th at pages 257-262, the Attorney General correctly acknowledges that "application of the current amended 2006 version of the One Strike law is proscribed by the ex post facto clause[s]" of the federal and California Constitutions. However, the Attorney General argues Bollinger is incorrect in arguing that the prosecution's failure to expressly plead and prove his ineligibility for probation precluded his sentencing under the One Strike law for his convictions of counts 3 through 6 (§ 288(b)(1)). We agree.

In support of his contention that he is not subject to the One Strike law sentencing scheme, Bollinger asserts that, "[a]t the time of [his] alleged offense conduct, proof of statutory probation ineligibility was required to trigger application of the One Strike law in cases like [his], *which only involve convictions for violating [section 288(a)].*" (Italics added.) More specifically, Bollinger contends "he is not subject to sentencing under any version of the One Strike law" because "the prosecution in this case did not plead or prove [his] convictions for violating [section 288(a)] rendered him ineligible for probation pursuant to Penal Code section 1203.066, as was required to trigger application of" former subdivision (c)(7) of section 667.61, which provided that a conviction of nonforcible lewd or lascivious acts on a child under the age of 14 years (§ 288(a)) qualified for One Strike law sentencing treatment "unless the defendant qualifies for probation under subdivision (c) of section 1203.066." (See *People v. Mancebo, supra*, 27 Cal.4th at p. 741, fn. 3.)

Even if we were to assume Bollinger's convictions for violating *section 288(a)* (counts 7 through 10) were not subject to the One Strike sentencing scheme¹⁰ because the prosecution failed to plead and prove that those convictions rendered him ineligible

¹⁰ Bollinger was not subject to the One Strike sentencing scheme with respect to his section 288(a) convictions as shown by the fact that, as to those counts, the court imposed determinate sentences rather than the indeterminate sentences provided by the One Strike sentencing scheme. (See § 667.61, subs. (a) & (b).)

for probation under former subdivision (c) of section 1203.066,¹¹ his contention that none of his convictions in this case is subject to the One Strike sentencing scheme is unavailing because his contention is based on a false premise. Specifically, Bollinger's contention is based on his claim—in both his appellant's opening brief and his reply brief—that this case "only involve[s] convictions for violating [section 288(a)]." This claim is belied by the record, which clearly shows—as Bollinger himself repeatedly acknowledges elsewhere in his appellant's opening brief—that the jury, in addition to convicting him of four counts of committing a nonforcible lewd act upon a child under 14 years of age in violation of section 288(a), also convicted him of four counts of committing a forcible lewd act upon a child under the age of 14 years in violation of section 288(b)(1). Former subdivision (c)(7) of section 1203.066, on which Bollinger relies, has no application with respect to the latter four convictions of violating section 288(b)(1) for each of which he was properly sentenced to indeterminate terms of 15 years to life under the One Strike sentencing scheme based on the jury's true finding that he committed those triggering section 288(b)(1) offenses against multiple victims within the meaning of the One Strike law. (See § 667.61, subs. (b), (c)(4), & (e)(5).)

In sum, Bollinger's claim that the sentence imposed by the court under the One Strike law cannot stand because he was not subject to sentencing under the One Strike

¹¹ Former subdivision (c) of section 1203.066 provided that if the defendant was the victim's "relative" or "member of the victim's household," and if other conditions were met, a trial court could exercise discretion to grant probation to the defendant upon conviction of violating section 288(a). (See *People v. Hammer*, *supra*, 30 Cal.4th at pp. 765-766.)

law, is unavailing because he was legally subject to sentencing under the One Strike law with respect to his four convictions of committing section 288(b)(1) offenses against multiple victims. The record shows he was not subject to the One Strike sentencing scheme only with respect to his four convictions of committing section 288(a) for which the court imposed determinate, rather than life, prison terms.

III

CONSECUTIVE TERMS OF 15 YEARS TO LIFE (COUNTS 3 THROUGH 6)

Bollinger also claims he is entitled to reversal and a remand for resentencing because the court imposed *consecutive* terms of 15 years to life for each of his four convictions of committing forcible lewd acts upon his sisters (§ 288(b)(1)) between 1997 and 1999 without being aware it had discretion to impose *concurrent* sentences for this convictions, and without stating any reasons for imposing consecutive terms. We reach the merits of Bollinger's claim over the Attorney General's objection that Bollinger forfeited it by raising it for the first time on appeal. We reverse the portion of the sentence ordering Bollinger to *consecutively* serve the four terms of 15 years to life properly imposed under the One Strike law and remand the matter for resentencing solely on the issue of whether, in the exercise of the court's discretion, Bollinger must serve those four indeterminate terms concurrently or consecutively.

A. *Background*

As Bollinger points out, the probation report omitted any reference to the One Strike law (§ 667.61). The People's sentencing brief¹² argued that section 667.61 "require[d]" the court to impose consecutive terms of 15 years to life for each of Bollinger's section 288(b)(1) convictions because the jury found true the allegation that he committed those offenses against more than one victim.

At the sentencing hearing, Bollinger's counsel argued, "I think I understand the legislative intent behind [section] 667.61, and I don't think this is it. [¶] I think given when the crimes occurred, given the family dynamic, how Mr. Bollinger was raised, how the—you know, his age at the time, I don't think this is the intent, and I don't think the punishment fits the crime."

Prior to sentencing Bollinger, the court, after hearing the parties' oral arguments and noting it had reviewed the probation report and the People's sentencing brief, stated:

"[T]his case is difficult in some ways for sentencing and easy in some ways. [¶] After listening to the testimony and damage to the family, it's quite easy to sentence Mr. Bollinger to life sentences. But after hearing family and seeing them also in court again, recognizing that there was some kind of odd manipulation in the family dynamic, that, I don't even begin to understand.

So with that being said, the Court will make the following findings and orders. The Court after reviewing and understanding [defense counsel's] position that [Bollinger] technically could be given probation as a sentence, however, the Court denies probation. I'm going to sentence the defendant to the life term just so Mr. Bollinger understands what's coming to him. [¶] Basically -- and the reasons

¹² It appears from the record that Bollinger did not submit a sentencing brief or a written response to the People's sentencing brief.

for that is the nature and circumstances of the crime are serious. The victims were very vulnerable. Young girls, sisters, who trusted you, and you were supposed to take care of them, and you didn't. [¶] [The] Court believes their testimony in that you inflicted physical and emotional injury. You took sexual advantage of young girls. You were an active participant in the crime. And you took advantage of the position of trust and confidence within your family dynamic. And, Mr. Bollinger, you're responsible for, in a lot of ways, for the behavior of both [Sister 2] and [Sister 1] as they carry on through their lives. Although you do not have a prior record of criminal conduct, the Court still will sentence you appropriately for your conduct in this case.

"The jury also found true the multiple victim enhancement [sic] under [section] 667.61 which requires the life terms."

The court then denied probation and sentenced Bollinger, stating in pertinent part:

"[Bollinger's] probation will be denied. . . . [¶] As to Count 3, as stated before, [the] Penal Code section 667.61 allegation having been found true by the jury, as to Count 3, the Court sentences [Bollinger] to 15 years to life. [¶] Consecutive to that on Count 4, the Court sentences [him] to 15 years to life. Consecutive to Count 5, the Court sentences [him] to 15 years to life. Also Count 6, the Court sentences [him] to 15 years to life. It should be noted that there are errors in the probation report. I have corrected those errors. [¶] Your total term in State Prison then is 72 years to life."

B. *Applicable Legal Principles*

As already discussed, where only one circumstance under subdivision (e) of section 667.61 is found—here, for example, the multiple victim circumstance codified in section 667.61(e)(5)—the mandated term under the One Strike law is 15 years to life. (§ 667.61, subd. (b).)

A trial court must "state the reasons for its sentence choice on the record at the time of sentencing." (§ 1170, subd. (c).) "Where the court has discretion, the imposition

of a consecutive, rather than concurrent, term represents a sentencing choice." (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.)

Absent an express statutory provision to the contrary, a trial court retains discretion to impose either consecutive or concurrent indeterminate terms under the One Strike law. (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262-1263 [explaining that "although the statutory language of section 667.61, subdivision (b), mandates the imposition of 15 years to life for *each* count involving separate occasions and separate victims, section 667.61 does *not* mandate that those terms must be served consecutively" (original italics), citing former subd. (g) of section 667.61].)¹³

In exercising its discretion whether to impose concurrent or consecutive terms, a trial court should consider the factors set forth in California Rules of Court, rule 4.425. (*People v. Rodriguez, supra*, 130 Cal.App.4th at p. 1262.) If the trial court

¹³ As the Attorney General points out in her supplemental letter brief dated September 4, 2012, in 2006—after *Bollinger* committed the offenses (between 1997 and 1999) for which he was convicted of counts 3 through 6, and after *Rodriguez* was decided in 2005—section 667.61 "was amended through emergency legislation and former subdivision (g) [of that section] was removed and re-enacted as subdivision (i)," which provides: "For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), or in paragraphs (1) to (6), inclusive, of subdivision (n), the court shall impose a *consecutive* sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." (§ 667.61, subd. (i), italics added; see Stats. 2006, ch. 337, § 33, eff. Sept. 20, 2006; Ballot Pamp., Gen. Elec. (Nov. 7, 2006) summary of Prop. 83 by Attorney General, text of Prop. 83, § 12, pp. 127, 130, 131.) The Attorney General correctly argues that "[r]etrospective application of the one strike law in effect at the time of sentencing would constitute an ex post facto violation as to Counts 3 through 8, as they all occurred before the post-September 2006 versions when imposition of punishment under the section was according to the trial court's exercise of its discretion under [] section 667.6."

misunderstands the scope of its sentencing discretion, the matter must be remanded for resentencing unless it is not reasonably probable the court would impose a different sentence, because to do so would be an idle act. (*People v. Coelho, supra*, 89 Cal.App.4th at p. 889.)

C. Analysis

Here, the court gave several reasons for the sentence it imposed in this case. Specifically, the court stated that "the nature and circumstances" of Bollinger's crimes were "serious," and noted the young ages and vulnerability of his victims." Stating that Bollinger, in taking "sexual advantage" of his sisters, also took advantage of his "position of trust and confidence within [his] family dynamic," the court noted the physical and emotional injuries he inflicted on them. Noting also that Bollinger "[did] not have a prior record of criminal behavior," the court then stated it would "still . . . sentence [him] appropriately for [his] conduct in this case."

However, we are unable to determine from the record whether the court understood it had discretion under the One Strike law to impose a *concurrent*, rather than a consecutive, 15-year-to-life sentence for each of his four section 288(b)(1) convictions (see *People v. Rodriguez, supra*, 130 Cal.App.4th at p. 1262); and, if it did, whether it exercised that discretion. The probation report did not mention the One Strike law, and, thus, did not address the fact that the court had discretion to impose concurrent indeterminate sentences under that sentencing scheme. As to counts 3 through 6, the probation report recommended that Bollinger be sentenced to consecutive upper determinate terms of eight years each under section 667.6.

The court stated it had reviewed the probation report and noted that it had corrected "errors" in that report. However, nothing the court said during the sentencing proceeding indicated it understood it retained discretion to impose concurrent sentences under the One Strike law. The People's sentencing brief incorrectly asserted that "[section] 667.61 *requires* consecutive terms of 15 years to life for each count the allegation was found true." (Italics added.)

Based on the foregoing record, we are unable to determine whether the court understood it had discretion under the One Strike law to impose a concurrent 15-year-to-life sentence for each of his convictions of counts 3 through 6; and, if it did, whether it exercised that discretion. Accordingly, we must reverse this portion of the sentence and remand the matter to the trial court for resentencing solely on the issue of whether, in the exercise of the court's discretion, Bollinger must serve those four indeterminate terms concurrently or consecutively. (See *People v. Coelho*, *supra*, 89 Cal.App.4th at p. 889; *People v. Rodriguez*, *supra*, 130 Cal.App.4th at p. 1262.)

IV

CRUEL AND UNUSUAL PUNISHMENT

Last, Bollinger claims he is entitled to reversal and a remand for resentencing because his sentence of a determinate term of 12 years plus four consecutive indeterminate terms of 15 years to life violates both the federal and state constitutional prohibitions against cruel and unusual punishment in that the sentence is tantamount to a sentence of life without the possibility of parole. Noting the Attorney General's objection that Bollinger forfeited these claims by raising them for the first time on appeal, we

conclude that, in light of our remand, we need not reach the merits of these claims at this time.

DISPOSITION

The portion of the sentence imposing *consecutive* terms of 15 years to life for Bollinger's convictions of counts 3 through 6 is reversed, and the matter is remanded for resentencing solely on the issue of whether, in the exercise of the court's discretion, Bollinger must serve those four indeterminate terms concurrently or consecutively. In all other respects, the judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.