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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR R. GUTIERREZ, Defendant and Appellant.	D073103 (Super. Ct. No. SCE338332)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed.

Nancy J. King and Laura G. Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Alana Butler and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Salvador R. Gutierrez of nine counts of committing lewd and lascivious acts upon a child (Pen. Code,[1] § 288, subd. (a)). In a bifurcated proceeding, the court found true that defendant had been convicted of two serious felonies (§§ 667, subd. (a)(1), 668 & 1192.7, subd. (c)) and two prior strike offenses (§§ 667, subds. (b)-(i), 668 & 1170.12), and found one of defendant's prior convictions brought him within the One Strike law (§ 667.61, subds. (a), (c), and (d).) The court thus sentenced defendant to 205 years to life in state prison.

Defendant appealed, arguing (1) his counsel was ineffective for failing to object to the use of an Arizona conviction for impeachment purposes because it was not a crime of moral turpitude, and (2) the court violated his Sixth Amendment right to a jury trial when it determined that this child molestation conviction constituted a serious felony and strike prior under California law because the court had made factual findings regarding the underlying offense. As set forth in *People v. Gutierrez* (May 22, 2017, DO69706 [nonpub. opn.] (*Gutierrez I*)), we rejected defendant's first argument, but agreed with his second, finding a lack of substantial evidence to support the court's finding that his Arizona conviction constituted a serious felony or strike prior under California law. We remanded the case for resentencing, and affirmed the judgment in all other respects.

At resentencing, the court imposed on defendant a revised term of 35 years plus 100 years to life in prison, as explained *post*.

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1 All further statutory references are to the Penal Code.

In the instant appeal, defendant contends for the *first* time that his new sentence constitutes cruel and unusual punishment because at the age of about 69 (when he filed his opening brief), the court's sentence means "he will die in prison before he even complet[es] the determinate part of his sentence." Defendant contends his sentence " 'shocks the conscience and offends fundamental notions of human dignity' [citation]" because he committed the offenses for which he is being punished about "10 to 15 years" ago, which punishment "was enhanced due to an offense [he] committed in 1988."

As we explain, we conclude defendant forfeited this claim by his failure to raise it either in connection with *Gutierrez I* or in the trial court following remand. However, to forestall a claim of ineffective assistance of counsel, we further conclude defendant's sentence does not violate either the federal or state constitutional prohibition on cruel and/or unusual punishment. Affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's Sexual Abuse of his Granddaughter

Defendant's daughter, Paula H., had a daughter, victim Raquel G., born in 1993. Raquel testified that when she was young she spent very little time with her own father, as her parents had separated when she "was really little." In fact, Raquel could not even remember a time when her parents were together. As a result, Raquel was close to her mother and older brother, and to defendant, whom she described as a "father figure."

Raquel testified that growing up, she and her family spent a great deal of time with her grandparents, including defendant and her grandmother Gloria, as they were "always at their house," which also was located in San Diego. Raquel recalled being cared for by defendant when her mother Paula was at work. When she was about eight years old and in third grade, Raquel recalled defendant sometimes would come in the morning to their family home, stay with them after Paula left for work, and then either walk or drive her and her brother to school, which was located a few blocks away. Defendant also sometimes picked Raquel up from school. It was around this time period that defendant started doing "inappropriate" things to Raquel.

Raquel testified the first incident, like all others, took place in a "tuxedo shop" located in Lemon Grove, California, that defendant owned and operated. She testified, "I can't remember if he took off my clothes or if he told me to, but I was — I had my clothes off. And he made it seem like it would be fun if I let him touch me. He made me touch his penis and — and he would — I think he took his pants off and made me touch him." During this incident, defendant touched, but did not insert his fingers inside, Raquel's vagina. Defendant also put his "mouth on [her] vagina." Raquel recalled during this particular incident defendant also hoisted her up onto the copier located in the back of the shop and made copies of her naked bottom.

Raquel testified during this incident she shook her head "no" as defendant grabbed her hand and placed it on his penis. Defendant then "manipulated" her hand while it was on his penis and made her "jack him off." When Raquel tried to remove her hand from his penis, defendant made her "put it back on there." Raquel was "pretty sure" defendant

ejaculated during this first incident. At the time, Raquel did not know what it meant to ejaculate, nor did she understand "what was happening" at the time or whether it was "right or wrong." After this incident, and all others, defendant made her go to the bathroom and "clean" herself. Once inside the bathroom, Raquel looked in the mirror and "started crying." Defendant also instructed Raquel not to tell anybody about the incident.

Raquel recalled the next incident with defendant "got a little worse" than the first. She testified, "He [i.e., defendant] did the same things that he did the first time, but then the second time he asked me if I would be okay if he put his fingers in me, and I said no. And he just kind of was, like, 'Oh, it will be okay.' So he did it and then I screamed." Raquel recalled this incident took place after school near the front door of the tuxedo shop.

During this second incident, Raquel was naked. As before, defendant "made [her] masturbate him." Also as before, defendant "put his mouth on [her] vagina." When Raquel pulled her hand away from defendant's penis, "he finished" by masturbating himself, ejaculated, then instructed Raquel to clean herself in the bathroom.

Raquel recalled another incident that took place around the time of defendant's birthday. There was a party for defendant with much of the family in attendance. During the party, defendant claimed he needed to take care of "some business at the tuxedo shop." Defendant asked Raquel to accompany him to the shop. Raquel refused, as she "had a feeling" defendant again would sexually abuse her. Defendant insisted, and Raquel reluctantly went with him.

During this incident, defendant took off Raquel's clothes. Raquel recalled there was a "church service going on next door," "so it was pretty loud, and he — he was playing — he was, like, touching [her] vagina. And he had me, like, reaching over to masturbate him. And then he stopped and he said what if I try to — he said, 'What if I try this time,' and he like, pulled out his penis and tried to stick the tip of it in." Raquel testified that this incident took place on the floor; that when he tried to put his penis in her vagina, she said "no really loud"; that his penis touched, but did not penetrate, her vagina; that he in response put his hand over her mouth and told her, "I need it to be quiet because there [were] people walking back and forth outside"; and that she "was traumatiz[ed]" by this incident.

Like the two other incidents, defendant ejaculated, this time on Raquel's stomach. Also as before, defendant instructed Raquel to clean herself and not to tell anyone what he had done.

In addition to these three incidents, Raquel recalled defendant sexually abused her on other occasions as well. With respect to these other incidents, she testified, "I remember them, but it's just like he — he did the same things every time. I don't really remember how far they were apart when he did it or what . . . ." Raquel recalled that all of these incidents took place "over a long period of time, like, months" or perhaps over a year.

Raquel further testified that she was "sure" that there were at least four incidents of sexual abuse by defendant, but there "were probably more than that"; and that with respect to all four incidents, there were at least two occasions when he: (1) used his

fingers and touched her vagina; (2) placed his mouth on her vagina; (3) forced her hand to touch his penis; (4) and ejaculated on her stomach. Also during the four incidents, defendant at least one time tried to put his penis inside Raquel's vagina.

When asked if there were any incidents of abuse away from the tuxedo shop, Raquel recalled an incident when defendant came to their home to watch her and her brother and take them to school. After Paula left for work and as her brother slept, defendant asked Raquel "to touch him." She refused, and "nothing ever happened."

Before she disclosed the abuse, Raquel testified her mother "often" asked her if " 'anyone ever touched [her]? Has grandpa [i.e., defendant] ever [done] anything to [her],' " to which Raquel would always lie and respond "no." Raquel further testified she denied any inappropriate touching by defendant because she "was a kid" who felt "scared" and "ashamed," thinking she was "wrong" for what had happened.

Raquel told Paula about the abuse by defendant a "couple years later," after her mother made plans to have defendant watch the children so that she and a friend could travel to Colorado for a wedding. Raquel testified that she then "begged" her mother not to leave them in defendant's care; that her mother became concerned and suspicious because she had "never seen [Raquel] . . . that scared before, and panicky"; and that

because her mother kept asking what was wrong, Raquel finally disclosed she had been sexually abused by defendant.[2]

Raquel, however, never gave her mother the "details" about the abuse. After her disclosure, Raquel recalled her mother "talked to someone" about the abuse and then told her, "It's taken care of," or words to that effect. Raquel testified her mother then did not tell Raquel that defendant had a prior conviction for child molest, or that her mother also had been sexually abused by defendant when she was a child.

Once she disclosed the abuse, Raquel testified that "things" changed, as her grandmother moved north and Raquel's family "stopped talking to that side of the family a little bit"; and that it was a "hard transition" for her because it "felt like everyone was just kind of leaving [her], like it was [her] fault."

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[2] The record shows the People called Catherine McLennan to testify as an expert witness. McLennan, who estimated she had conducted over 3,000 forensic interviews (as of 2015), opined there was "pretty universal agreement" among experts that the "majority" of children "most commonly delay disclosing when they have been sexually abused." McLennan further opined that it was "unusual" in child sexual abuse cases for there to be an "immediate" report; and that on one end of the spectrum, children are much more likely to disclose immediately if they have been abused by a stranger. In that instance, there "are few repercussions, fewer possible negative outcomes for that child in telling. They don't know the person. They're not bonded to them. They're not telling on somebody that they care about. It's not likely to have a big impact on that child's life to tell." On the other end of the spectrum, McLennan noted that if the child is abused by a caretaker, a parent, or a "parent figure, there's a huge bond. There's a huge possible allegiance or loyalty to that individual. There is a perception on the child's part that if they tell on this person, who's very close to them, there's very likely to be some changes in their lives, and some of those are viewed by the child as not necessarily positive."

Raquel further testified she was interviewed multiple times by a child welfare agency when she was young, before defendant abused her, and twice after the abuse occurred. She was interviewed on October 16, 2002, when she was nine years old. On that occasion, the agency was investigating a report of physical abuse by Raquel's father against her brother. Raquel denied any inappropriate touching by defendant or anyone else during this interview, and during another interview on April 22, 2004, when she was 10 years old, despite the fact defendant had sexually abused her. Although Raquel did not tell the agency social workers about the abuse, she did tell a friend. The family subsequently moved to Temecula after Raquel finished seventh grade.

While in ninth grade, Paula insisted her daughter see a counselor, as Raquel was not doing well in school or at home. Raquel testified she then "wanted to kill [herself]" because "of what [defendant] did to [her]." During a counseling session, Raquel opened up and disclosed the abuse by defendant.

Thereafter, law enforcement became involved. Raquel spoke to a police officer, perhaps by telephone, and then was interviewed at her school by two officers and a social worker. Although Raquel could not recall the date of the school interview, an agency report noted it took place on September 24, 2008. Raquel recalled during this interview she disclosed that defendant had "raped [her], that he touched [her]." After making this disclosure, according to Raquel "nothing" happened and "[n]o one ever contacted [the family] again about it." The family subsequently moved to South Carolina.

After the move, Raquel and her mother in 2013 contacted the Riverside and/or San Diego Police Departments to follow up on the status of the investigation of defendant. Raquel recalled speaking with an officer on the telephone. When asked why she wanted to make that call, Raquel stated, "I wanted to have justice for myself." At some point, law enforcement had Raquel attempt to contact defendant by telephone, with the hope he would confess to sexually abusing Raquel. Defendant, however, did not answer or return her calls. When asked how she felt about testifying against her own grandfather, Raquel stated she no longer considered defendant to be her grandfather because "people who love you wouldn't do that to you, what he did to me."

Paula testified after having two children, including Raquel, she went back to work. She estimated she began working when Raquel was in the first grade. Paula typically worked four days a week, all day long. After about three years, Paula changed jobs, which sometimes required her to go to work at 6:30 a.m. Being a single mother, Paula had to rely on various family members to help with childcare. At one point, Paula's mother Gloria suggested defendant could help with the children. Paula testified she asked Gloria if this was a good idea "due to his background." Gloria reassured her daughter, stating defendant was "fine" and "had recovered from his previous actions involving molesting."

Paula testified that defendant left Gloria in about 2002 and that she and the children moved to Temecula in about 2005, when Raquel was in 8th grade. Paula recalled she and her boyfriend (now husband) were going to a wedding in early September 2004. Paula had asked her mother to watch the children while they were

away. Gloria agreed, but was going to be a day "late" arriving to San Diego. Gloria suggested defendant as an alternative. Paula told Raquel that her grandfather was going to watch her and her brother for a day. Raquel in response stated she "wasn't comfortable" with that arrangement. Based on "motherly instinct," Paula began questioning Raquel.

Initially, Raquel refused to tell her mother about the abuse. As Paula prodded, Raquel finally disclosed the sexual abuse by defendant. Raquel did not give her mother many details, other than disclosing the abuse had been "years before." Paula testified she immediately set up a conference call involving Gloria, Paula's aunt, who was defendant's sister, and defendant, to make sure they were "all on the same page."

During this call, Paula disclosed what Raquel had just told her, and instructed defendant to "stay the heck away from [her] daughter and not to come around [her family]." Paula testified that during this call, defendant (in Spanish) said, "I'm sorry, mija, I'm sorry, mija," noting that "mija" in Spanish meant daughter. Paula refused to accept defendant's apology, telling him at one point, "How dare you." Paula ended up taking Raquel with her to Colorado. On their trip (and despite Raquel's recollection to the contrary), Paula testified she told her daughter that defendant also had molested her when she was a child.

Paula did not contact law enforcement after Raquel's disclosure. Paula testified, "When I was a child and these type of instances would happen, such as when I was molested, it was usually resolved in the family, so when I mentioned it to my mom, my mom spoke with the same sister that I had called when it happened to Raquel, and at that

time when — so that's basically how it was — that is basically the way it was resolved when I was a child, is you talked to the family, they talk to the person, the person stops; so I believed that I would speak to my family, let them know, that they would — that they would deal with the situation the same way."

After moving to Temecula, Paula noticed "something was bothering" Raquel. After Raquel repeatedly said, "Mom, you don't understand," Paula urged her daughter to see a counselor because if Raquel was not going to speak with her mother, or her stepdad, she needed to talk to someone. Raquel finally agreed, and met with a counselor when she was in the 10th grade. The day after Raquel started counseling, law enforcement from Riverside became involved. During an interview with law enforcement, Paula also disclosed that defendant had molested her when she was a child.

Because the abuse occurred in San Diego, law enforcement from San Diego also became involved.[3] Several years passed and the family, who had since moved to South Carolina, never heard back from any law enforcement agency. After leaving quite a few

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[3] San Diego Police Department detective Wendy Valentin testified that she worked in the sex crimes unit in 2008; that she received a "courtesy report from the Riverside Sheriff's Department and a CPS referral" about a "late disclosure that a victim at the age of 15 had reported that her maternal grandfather had molested her"; that Detective Valentin first spoke to Paula, then to Raquel, on the telephone; that Raquel was unsure if she wanted the police involved; and that as she was starting her investigation she learned the alleged abuse did not take place in the City of San Diego, but instead within the jurisdiction of the San Diego County Sheriff's Department. Detective Valentin thus forwarded her October 2008 report and the information she had received from Riverside to the sheriff's department in the City of Lemon Grove, for it to continue the investigation. In 2011, Detective Valentin transferred to the homicide unit. Sometime thereafter she spoke to Paula, who wanted to know the status of the case involving her daughter. Detective Valentin instructed Paula to call the sheriff's department, as the detective then knew nothing about the status of the case.

messages, Paula finally called "archives in San Diego County to see what [had] happened" to her daughter's case. The family was then required to "refile" the case with the sheriff's department in Lemon Grove.

Defendant's Past Acts of Sexual Abuse, Including of Paula

Paula testified that while she was growing up, defendant — her biological father — sexually abused her. Defendant was never charged in connection with this abuse. Paula estimated the abuse started when she was about six, and ended when she was about nine years old. Paula recalled the abuse typically occurred in her parents' bedroom. Defendant would make Paula take off her clothes and touch his "weaner" while he too was naked. Defendant would then force her to "stroke" his penis to the "point of ejaculation." He also put candy on his penis so that Paula "could lick or suck the candy off."

Paula estimated that defendant abused her in this way about 20 times; that he tried to "make it fun and games" so she would not be afraid; and that he also touched her labia, after demanding she "[o]pen [her] legs." Paula described for the jury the sounds defendant would make as she stroked his penis, including when he ejaculated.

Although Paula could not remember the "first" time defendant abused her, she could remember the last time. As was the case with Raquel (and others, as discussed *post*), defendant instructed Paula not to tell anyone about the abuse. At some point, however, Paula began to feel "ashamed" and knew "there was something wrong." Paula testified Gloria saw a change in her, and asked Paula if she was okay. It was then Paula disclosed to her own mother that "dad had touched [her]."

As a result of this disclosure, defendant was prohibited from picking up Paula after school. Paula also noticed the disclosure "took a lot out of her [mother]." After the disclosure, Paula testified her relationship with defendant was "a little standoffish," but got better as she became a teenager, then abruptly ended when she was about 15 years old.

The record shows defendant stipulated that on February 24, 1988, he pleaded guilty to a violation of "section 288(a), lewd act on a child" under 14 years of age, in San Diego County Superior Court case number CR91480, which led to a six-year prison term. Victoria D. was the victim in the 1988 conviction, which served as a strike prior and serious felony prior in the instant case.

Victoria D. testified that she was 10 years old in the summer of 1986; that defendant and his family had a swimming pool and lived about two doors away from her home; and that during summer in 1986 and 1987, she would play with defendant's children, including Paula, and go swimming in their pool. Victoria estimated Paula then was about 16 years old.

Victoria and neighbor Tina often went on weekdays to defendant's home to swim. Usually they were alone with defendant, as Paula was rarely at home. Victoria described for the jury the "many times" defendant was "completely naked" and "touched himself" in front of the two girls. Victoria recalled one instance inside defendant's home when he masturbated in front of the girls, and his semen went "onto the floor." Defendant also showed the girls "nude magazines" and praised them for resembling the individuals

pictured in the magazines. Defendant also had a "sex toy" and "there was touching of both [her] and Tina."

Regarding the touching, Victoria testified defendant used his hand to touch her vagina, both outside and inside — skin to skin — of her bathing suit. Victoria also saw defendant touch her friend Tina in the same manner. Defendant also told both girls to close their eyes and then he separately grabbed their hands and placed them on his penis. Victoria saw Tina touch defendant's penis, and Victoria also touched his penis, even after she had told him "no, no, no." Defendant sometimes offered the girls "a dollar or a soda or a candy bar" as an enticement to touch his penis. Defendant also told both girls that they were to tell nobody about the touching, as it was "strictly" between them.

In addition to the 1988 conviction, the record shows defendant in 1974 was convicted in Arizona of lewd and lascivious acts, case number CR76640. As described in his October 24, 2017 supplemental probation report, "defendant, by his own admission, went to [a grammar s]chool and saw three girls, one, [including] Terri B[.], who was nine years old. He talked to them about a sexual matter and became aroused. He kept their attention by asking if they would help him look for his dog. He masturbated in front of the three girls, and while doing so, felt . . . one of the girls over her pants. The defendant ejaculated and then cleaned himself with a newspaper. He walked the girls most of the way home, and then got into his car and went home. In his written statement, he indicated, 'I feel I need help, so this will never happen again.' "

In 1979, defendant was arrested after he exposed himself and masturbated in the presence of two five-year-old girls who lived in his neighborhood. Defendant pleaded

nolo contendre to one count of annoying or molesting a child (former § 647, subd. (a)) and was placed on formal probation.

Resentencing

As noted, defendant in *Gutierrez I* was convicted of nine counts of lewd and lascivious acts upon a child under 14 years of age. Counts 1 and 2 involved defendant touching Raquel's vagina with his finger with the intent of arousing, appealing to, and gratifying his lust, passions and sexual desires; counts 3 and 4 involved defendant putting his mouth on Raquel's vagina; counts 5 and 6 involved defendant forcing Raquel to use her hand to touch his penis; count 7 involved defendant touching his penis to Raquel's vagina; and counts 8 and 9 involved defendant ejaculating on Raquel. As summarized *ante*, each such act of abuse by defendant was set forth in two different counts — with the exception of count 7 — because Raquel recalled each happened on (at least) two different occasions.

At resentencing, the court carefully summarized the breakdown of defendant's sentence as follows: "Count 1, Penal Code Section 288(a), with the [section] 667.61(a)(c)(d), Penal Code Section 667(b) through (i), and Penal Code Section 667(a)(1), the defendant is to serve 25 years to life. That is doubled by virtue of the strike prior to 50 years to life, adding a five-year consecutive for the serious felony prior.

"Count 2, which is Penal Code Section 288(a), and Penal Code Section 667.61(a)(c)(d), and Penal Code Section 667(b) through (i), plus Penal Code Section 667(a)(1), the defendant is sentenced to 25 years to life. That is doubled by operation of

law to 50 years to life consecutive, with an additional five years consecutive based upon the serious prior. This total indeterminate term is 10 years, plus 100 years to life.

"Sentencing under Penal Code Section 1170.1, which is the determinant sentencing, Count 3, Penal Code Section 288(a), under Penal Code Section 667(b) through (i), the Court had previously selected the upper term of eight years. The Court is doubling that by operation of law to 16 years.

"Count 4, Penal Code Section 288(a), 667(b) through (i), again that will be upper term of eight years, doubled by operation of law to 16 years. That will run concurrent to Count 3. [¶] Count 5 also will be 16 years under the same analysis, and it also will run concurrent to Count 3. [¶] Count 6, and again these are all violations and convictions under Penal Code Section 288(a) and Penal Code Section 667(b) through (i), upper term eight, doubled by operation of law to 16, to run concurrent with Counts 3, 4, 5. [¶] Count 7, Penal Code Section 288(a), under Penal Code Section 667(b) through (i), again will be 16 years, and that's the upper term doubled.

"In addition to that, the Court is selecting one-third the mid[-]term, which is 12 years consecutive, doubled, for a total term of four years. That four years will be consecutive to the 16 years under Count 3.

"Count 8, Penal Code Section 288(a), Penal Code Section 667(b) through (i), is again the upper term, eight years, doubled by operation of law to 16 years. That will run concurrent with Count 3 and 4, 5 and 6. [¶] Count 9, Penal Code Section 288(a), Penal Code Section 667(b) through (i), 16 years. Same analysis. And that will run concurrent.

"Penal Code Section 667(a)(1), the serious felony prior conviction is five years, and that will run consecutive to the 16 years as Counts 3 and Count 7, which is the four years consecutive.

"So the total determinant sentence will be 25 years. The total exposure therefore is 35 years, plus 100 years to life."

DISCUSSION

The People assert, and we agree, that defendant forfeited any challenge to his sentence based on a cruel and/or unusual punishment claim by not raising that issue either in *Gutierrez I* (see *People v. Senior* (1995) 33 Cal.App.4th 531, 538 (*Senior*) [noting that when a "criminal defendant could have raised an issue in a prior appeal, the appellate court need not entertain the issue in a subsequent appeal absent a showing of justification for the delay"]) *or* in the trial court, both before and after remand (see *People v. Russell* (2010) 187 Cal.App.4th 981, 992–993 (*Russell*) [concluding the defendant forfeited his claim of cruel and unusual punishment based on impairment, which were issues that should have been addressed by the trial court, but nonetheless reaching the merits of his claim in the " 'interest of judicial economy' "]).

Although we conclude defendant has forfeited this claim of error on appeal (*Senior*, *supra*, 33 Cal.App.4th at p. 538; *Russell*, *supra*, 187 Cal.App.4th at pp. 992–993), we nonetheless reach the merits to "prevent the inevitable ineffectiveness-of-counsel claim." (*People v. Norman* (2003) 109 Cal.App.4th 221, 229–230; *Russell*, at p. 993.)

A. *Federal Constitution*

The Eighth Amendment of the United States Constitution, which applies to states under the due process clause of the Fourteenth Amendment, prohibits cruel and unusual punishment. (*Graham v. Florida* (2010) 560 U.S. 48, 58 (*Graham*).) In general, punishment is cruel and unusual under the Eighth Amendment if it is "grossly disproportionate" to the crime committed. (*Id.* at p. 60.) In considering a proportionality challenge to a defendant's sentence, a court should consider "all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." (*Id.* at p. 59.) The court begins "by comparing the gravity of the offense and the severity of the sentence." (*Id.* at p. 60.) " 'In the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should *then* compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [Citation.] If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual. [Citation.]" (*Ibid.*, italics added.)

Here, comparing the gravity of his offenses against the severity of his sentence, we conclude defendant has not met the initial threshold showing of "gross disproportionality" under the Eighth Amendment. (See *Graham*, *supra*, 560 U.S. at p. 60.) As noted by the trial court in reviewing defendant's supplemental probation report, there were no circumstances in mitigation within the meaning of California Rules

of Court, rule 4.423[4] in connection with defendant's sentencing. There were, however, myriad circumstances in aggravation pursuant to rule 4.421, as further noted by the trial court.

Indeed, the trial court found that count 7 involved a "high degree of callousness" when defendant "tried to insert his penis into the victim's vagina." (See Rule 4.421(a)(1).) The court noted Raquel in response "cried, and the evidence came out that [defendant] covered her mouth to prevent anyone from hearing her," as summarized *ante* when Raquel testified that while she was being sexually abused, she could hear a church service next door.

The court also found that "defendant had been convicted of other crimes for which consecutive sentences could have been imposed" (see rule 4.421(a)(7)); that the crime "carried out indicates planning," as the record evidence showed defendant sexually abused Raquel at the tuxedo shop he owned and operated, where he took her knowing they would be alone (*id.* at (a)(8)); that defendant "took advantage of a position of trust to commit the offense," as confirmed by the record evidence showing Raquel at one point viewed defendant as a "father figure" (*id.* at (a)(11)); that "defendant's prior convictions as an adult were of increasing seriousness," as evidenced by his "first sex-related conviction in Arizona" in 1974, his misdemeanor conviction for a sex offense in 1979, and his 1988 conviction under former section 288, subdivision (a), all of which crimes involved girls of tender age, as summarized *ante* (*id.* at (b)(2)); that "defendant denied

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4 Further references to rules are to the California Rules of Court.

during the trial he committed any of the acts, which may contribute to any emotional trauma this victim may have suffered, not only by the acts, but by reliving the incidents during multiple interviews and her subsequent testimony in court" (rule 4.408(a)); and that "during the investigation the defendant's own daughter admitted to police that [defendant] had molested her from the ages of 6 or 9 or 10 years old, and this was never reported to law enforcement," as also summarized *ante* (*ibid*).

" 'There exists a strong public policy to protect children of tender years.' (*People v. Olsen* (1984) 36 Cal.3d 638, 646.) Along a spectrum ranging from murder, mayhem and torture on one end to petty theft on the other, 'lewd conduct on a child may not be the most grave of all offenses, but its seriousness is considerable.' (*People v. Christensen* (2014) 229 Cal.App.4th 781, 806; see *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244 ['sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people'].)" (*People v. Baker* (2018) 20 Cal.App.5th 711, 724–725 (*Baker*).) As such, the One Strike law (§ 667.61),[5] on which a part of defendant's

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[5] Section 667.61 was amended effective January 1, 2019. (Stats. 2018, ch. 423 (S.B.1494), § 68, eff. Jan. 1, 2019.) The amendment made no substantive changes to subdivisions (a), (c), and (d) of former section 667.61, which were the provisions relied on by the trial court in resentencing defendant. Former section 667.61, subdivision (a) of the One Strike law provides in relevant part that any person "convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) . . . shall be punished by imprisonment in the state prison for 25 years to life." Subdivision (c) applies to offenses including "(4) Lewd or lascivious act, in violation of subdivision (b) of [former] Section 288." Subdivision (d) sets out various "circumstances" that "shall apply to the offenses specified in subdivision (c)" including in part "(1) The defendant has been previously convicted of an offense specified in subdivision (c) . . . ."

sentence was based, "sets forth an alternative, harsher sentencing scheme for certain forcible sex crimes." (See *People v. Mancebo* (2002) 27 Cal.4th 735, 738 (*Mancebo*).)

In cases *not* involving violence or sexual offenses, the United States Supreme Court has upheld sentences not unlike defendant's. (See, e.g., *Harmelin v. Michigan* (1991) (*Harmelin*) 501 U.S. 957, 994–995 [life without the possibility of parole for nonviolent possession of large quantity of cocaine]; *Ewing v. California* (2003) 538 U.S. 11, 18, 20, 30–31 (*Ewing*) [25 years to life in prison under Three Strikes law for felony petty theft]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 68, 77 (*Lockyer*) [two consecutive terms of 25 years to life in prison under Three Strikes law for two counts of petty theft].)

Moreover, it is not cruel and unusual punishment to enhance the penalty for a crime because a defendant is a recidivist (*People v. Jameson* (1986) 177 Cal.App.3d 658, 661–662, citing *Rummell v. Estelle* (1980) 445 U.S. 263, 265), so long as the ultimate punishment, all facts considered, is not disproportionate to the crime. (*Solem v. Helm* (1983) 463 U.S. 277, 284–288; *Harmelin*, *supra*, 501 U.S. at p. 997 (conc. opn. of Kennedy J.).)

Based on the United States Supreme Court decisions of *Harmelin*, *Ewing*, and *Lockyer*, which found that lengthy prison sentences were not "grossly disproportionate" to the nonviolent and/or petty theft crimes of recidivists in those cases, and our Legislature's determination that forcible sex crimes by a recidivist shall be harshly punished (*Mancebo*, *supra*, 27 Cal.4th at p. 738), we conclude the sentence of 35 years

plus 100 years to life imposed on defendant is not grossly disproportionate under the Eighth Amendment.[6]

That defendant likely will spend the rest of his life in prison as a result of his age does not persuade us that his sentence is grossly disproportionate to his offenses, particularly when viewed in light of his prior sexual misconduct spanning many decades. We thus reject his claim that his sentence constitutes cruel and unusual punishment under the Eighth Amendment.

B. *State Constitution*

Article I, section 17, of the California Constitution prohibits the infliction of cruel or unusual punishment. Punishment is cruel or unusual under the California Constitution 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.' " (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*); see also *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).)

Lynch analyzed three factors in determining whether a sentence is cruel or unusual under the California Constitution: (1) the nature of the particular offense and offender, with particular regard to the degree of danger which both present to society; (2) a comparison of the challenged penalty with the punishment prescribed in the same

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6 The record shows defendant's sentence could have been even longer, inasmuch as the court adopted probation's "cautious[]" recommendation not to sentence defendant under the One Strike law with respect to count 7 — when defendant touched Raquel's vagina with his penis — because of the lack of both a "specific . . . time frame" and "information" with respect to this count.

jurisdiction for other more serious offenses; and (3) a comparison of the challenged penalty with the punishment prescribed for the same offense in other jurisdictions. (*Lynch*, at pp. 425–427.) When determining the nature of the offender, courts consider "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Dillon*, *supra*, 34 Cal.3d at p. 479.)

Applying the first *Lynch* factor here, as noted *ante* the record shows defendant's offenses in the instant case involved serious sexual misconduct occurring on at least four different occasions with an eight- or nine-year-old victim, who saw defendant — her grandfather — as a "father figure." The misconduct included at least two acts of defendant touching Raquel's vagina with his hand (counts 1 and 2); him putting his mouth on Raquel's vagina (counts 3 and 4); him forcing Raquel to use her hand to touch his penis (counts 5 and 6); and him ejaculating on Raquel (counts 8 and 9). The misconduct also included an instance when defendant put his own penis on top of Raquel's vagina (count 7), and the uncharged misconduct of hoisting naked Raquel onto a copier located in the tuxedo shop and making copies of her buttocks and genitalia.

As also noted *ante*, the record shows that defendant by design took Raquel to the tuxedo shop because he knew they would be alone; that after each incident of sexual abuse, he made Raquel go to the bathroom and clean herself, after he had ejaculated on her; that also after each incident, he specifically instructed Raquel not to tell anybody about the abuse; and that in many if not all of the incidents, he overcame Raquel's will

and forced her to participate in the inappropriate touching, even after she had said no and/or had removed her hand from his penis.

In addition, the record shows since 1974, defendant has engaged in sexual misconduct with multiple young victims. The 1974 conviction involved three grammar school girls, one of whom was nine years old. As noted, in that instance, defendant masturbated in front of the girls, touched one of them over their pants, and then ejaculated, using a "newspaper" to clean himself. In the 1979 incident, defendant entered a plea of nolo contendre for annoying/molesting a child under the age of 18, after he "exposed himself and masturbated in the presence of two five-year-old girls who were his neighbors."

And of course, in the incident that led to his prior serious felony conviction under former section 288, subdivision (a), defendant engaged in sexual misconduct with 10-year-old Victoria (and 15-year-old Tina) that was similar to the offenses involving Raquel. This misconduct, as noted, occurred "many times" when Victoria and Tina went to defendant's home to swim during the summer of 1986 and 1987. It included defendant touching Victoria's vagina, both over and inside her bathing suit, and Tina's vagina; him masturbating and ejaculating in front of the girls; him giving the girls money or a "soda" as an inducement to touch his penis; him showing the girls "nude magazines" and a "sex toy"; and him telling them they were not to tell anyone about the abuse, as it was "strictly" between them.

Moreover, the record shows Raquel suffered significant emotional trauma as a result of being victimized by defendant. Specifically, the record shows Raquel in or about the 9th grade was not doing well in school or at home. Raquel testified that she then wanted to "kill herself" as a result of the abuse by defendant; that she also felt abandoned after her disclosure, including when her grandmother moved away; and that she felt guilty and ashamed, despite the fact *she* was the victim of such abuse.

Raquel and Paula both testified to the strain placed on the family because of the sexual abuse by defendant and Raquel's subsequent disclosure. Whereas, before her family often participated in family gatherings and parties, after the disclosure Raquel's family understandably avoided events if defendant was in attendance, and ultimately, stopped going to them altogether because it was just too uncomfortable. Ultimately, Raquel and her family moved away from San Diego, in part to distance themselves from defendant and his side of the family.

Thus, in considering the nature of the offenses and the offender in this case, with particular regard to the degree of danger he presents to society (see *Lynch*, *supra*, 8 Cal.3d at p. 425; see also *Dillon*, *supra*, 34 Cal.3d at p. 479), and evaluating the "totality of the circumstances surrounding the commission of the offense[s] . . ., including such factors as [their] motive, the way [they were] committed, the extent of the defendant's involvement, and consequences of his acts" (see *Dillon*, at p. 479), we conclude that defendant's sentence is not shocking or disproportionate to the offenses he committed. (Contra, *In re Rodriguez* (1975) 14 Cal.3d 639, 644, fn. 6, 654–655 [concluding a defendant's sentence was unconstitutional as applied, after the defendant served 22 years

of an indeterminate life sentence under former section 288, because the defendant had a low IQ, was functionally illiterate and unskilled, his crime involved only one incident where he fondled the private parts of a six-year girl for a "few minutes," and no recidivist statute (i.e., One Strike law) was involved in sentencing the defendant], superseded by statute as stated in *People v. Jefferson* (1999) 21 Cal.4th 86, 95].)

Defendant nonetheless contends his punishment is cruel or unusual because he allegedly is not a "threat" to society. We note, however, the court at resentencing found otherwise, noting the offenses at issue were of "increasing seriousness" as compared to his earlier offenses, a finding we conclude is supported by ample record evidence. (See *People v. Powell* (2018) 5 Cal.5th 921, 944 [noting that in " 'considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt' [citation]"].) In any event, the record evidence belies this contention, as it shows defendant engaged in sexually deviant behavior with multiple young girls over the course of decades.

Relying in part on *In re Nunez* (2009) 173 Cal.App.4th 709 (*Nunez*), defendant also contends his sentence is allegedly disproportionate because he had "no history of violence and no criminal history at all for more than 10 years before his arrest in the instant case."

First, this contention is belied by defendant's 1988 conviction under former section 288, subdivision (a), which as noted, constitutes a serious *violent* felony. (See former[7] § 667.5, subd. (c)(6) [defining a "violent felony" to include "[l]ewd or lascivious act as defined in subdivision (a) or (b) of Section 288"].)

Second, *Nunez* is inapposite, as that case involved a 14-year-old defendant who suffered from a posttraumatic stress disorder and who was sentenced to life in prison without the possibility of parole (LWOP) for kidnapping for ransom under former section 209, which has since been amended. The court in *Nunez* concluded that the defendant's severe sentence was "so freakishly rare" (*Nunez*, *supra*, 173 Cal.App.4th at p. 715), inasmuch as he was the "only known offender under age 15 across the country and around the world subjected to an LWOP sentence for a nonhomicide, no-injury offense" (*ibid*.), as to constitute cruel and unusual punishment under the Eighth Amendment (*ibid*.). Unlike the "freakish[]" facts of *Nunez*, in the instant case defendant was sentenced as a recidivist for nine counts of sexual misconduct over the course of about a year with an eight- or nine-year-old victim who sustained substantial injury.

Third, the fact Raquel was abused in or about 2001 or 2002, but did not disclose that abuse until about 2008, and the fact that the investigation of law enforcement into the abuse was delayed for years thereafter as a result of a problem or miscommunication in the transfer of the investigation from the San Diego Police Department to the sheriff's department, in no way excuses or mitigates defendant's misconduct. As noted *ante*,

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[7] Section 667.5, like section 667.61, was amended effective January 1, 2019. (Stats.2018, c. 423 (S.B.1494), § 68, eff. Jan. 1, 2019.)

defendant instructed Raquel after each incident of sexual abuse not to tell anyone. As also noted *ante*, expert testimony showed children in the majority of sexual abuse cases often wait to disclose, or never disclose, such abuse, particularly if the abuser is a parent, or "parent figure," which is how Raquel viewed defendant before he molested her. We thus conclude defendant's sentence falls far short of being one which is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity," as set forth under the first *Lynch* factor. (See *Lynch*, *supra*, 8 Cal.3d at p. 425.)

A determination of whether a punishment is cruel or unusual may be resolved solely under the first *Lynch* factor. (See, e.g., *Graham*, *supra*, 560 U.S. at p. 60; *Dillon*, *supra*, 34 Cal.3d at pp. 479, 482–488.) However, turning to the second *Lynch* factor, we conclude a comparison of defendant's punishment for his current crimes with the punishment for other crimes in California is inapposite because it was defendant's recidivism — in combination with his current crimes — that placed him under the One Strike law.

Indeed, because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals, we decline to compare defendant's punishment for his "offense," which includes his recidivist behavior, to the punishment of others who perhaps have committed more serious crimes, but have not qualified as repeat felons. (See e.g., *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136 [rejecting the defendant's comparison of his punishment to that of a murderer because that comparison "ignores that the three strikes law punishes not only his current offenses, but also his

recidivism"]; *People v. Karsai* (1982) 131 Cal.App.3d 224, 242 [holding the sentence enhancements imposed on defendant for his conviction of the crimes of false imprisonment with force, oral copulation by force, and rape by force or violence, did not constitute cruel and/or unusual punishment because (former) section 667.6 is "directed at recidivism by providing for longer enhancements for prior convictions of the same type of offense," and because "defendant's sentence is not the product of an isolated conviction for a single offense but is the result of conviction for multiple violent sex offenses after having previously been convicted of multiple violent sex offenses"], overruled on another ground as stated in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.)

Finally, defendant fares no better when comparing California's punishment scheme to those of other states, including Oregon and New York on which he specifically relies. "That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' (*People v. Wingo* (1975) 14 Cal.3d 169, 179 [(*Wingo*)].) Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.)

Although defendant contends the maximum sentence in Oregon for a single offense would be 20 years (Or. Rev. Stat., § 161.605 et seq.), his contention ignores the fact he also was punished in the instant case for his recidivism and for nine counts of sexual misconduct, not one.

In any event, under Oregon law the "presumptive sentence for a sex crime that is a felony is life imprisonment without the possibility of release or parole *if* the defendant has been sentenced for sex crimes that are felonies at least two times prior to the current sentence." (Or. Rev. Stat., § 137.719(1), italics added.)[8]

Similarly, in New York when a person is found to be a "persistent violent felony offender," the court "must impose an indeterminate sentence of imprisonment, the maximum term of which shall be life imprisonment." (N.Y. Pen. Law, § 70.08, subds. (1)(a) & (2).) A "persistent violent felony offender" is defined to include a person convicted under New York Penal Law section 130.96. (N.Y. Pen. Law, § 70.08, subd. (1)(a).) Section 130.96 of the New York Penal Law in part provides that a person "is guilty of predatory sexual assault against a child when, being eighteen years old or more, he or she commits the crime of . . . course of sexual conduct against a child in the first degree, . . . and the victim is less than thirteen years old." (N.Y. Pen. Law, § 130.96.)

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8 Although we concluded in *Gutierrez I* that defendant's Arizona conviction could not be used as a prior serious felony strike in California, it appears that conviction could potentially qualify as a "sex crime" within the meaning of section 137.719(1) of the Oregon code. (See Or. Rev. Stat., § 163A.005, subd. (5) [defining "sex crime" to include (d) "[s]exual abuse in any degree," (g) "[e]ncouraging child sexual abuse in any degree," and/or (n) "[s]exual misconduct if the offender is at least 18 years of age"].)

A person is guilty of the crime of "course of sexual conduct against a child in the first degree" in New York "when, over a period of time not less than three months in duration: [¶] (a) he or she engages in two or more acts of sexual conduct, which includes at least one act of . . . oral sexual conduct . . . or [¶] (b) he or she, being eighteen years old or more, engages in two or more acts of sexual conduct, which include at least one act of . . . oral sexual conduct . . ., with a child less than thirteen years old." (N.Y. Pen. Law, § 130.75, subds. (1)(a) & (b).)

Turning to the instant case, if defendant was convicted in New York of the nine offenses of sexual misconduct against Raquel, he would meet the definition of a "persistent violent felony offender" under section 130.96 of the New York Penal Law, as the offenses would qualify as a "course of sexual conduct against a child in the first degree" under section 130.75 of that same law. Indeed, the record shows that defendant committed the nine offenses "over a period of time not less than three months in duration" (New York Pen. Law, § 130.75, subd. (1)); and that over about a year period, he engaged in "two or more acts of sexual conduct," one of which involved "oral sexual conduct" with "a child less than eleven years old." (*Id.*, subd. (1)(a).)

Defendant also meets the alternate definition of "course of sexual conduct against a child" set forth in subdivision (1)(b) of this statute, as he was "eighteen years or more" when he engaged over about a year period in "two or more acts of sexual conduct, which include at least one act of . . . oral sexual conduct . . . with a child less than thirteen." (New York Pen. Law, § 130.75, subd. (1)(b).) Thus, defendant would face an

"indeterminate sentence of imprisonment" in New York, which includes as an option "life imprisonment." (New York Pen. Law, § 70.08, subd. (2).)

Moreover, as we noted in *Baker*, myriad states impose harsh penalties for sexual misconduct of a child, including life in prison. (*Baker*, *supra*, 20 Cal.App.5th at p. 731.[9]) Although defendant's punishment on *nine* counts is no doubt severe, based on the three *Lynch* factors we conclude it is not so disproportionate to the punishment he could have faced in other states, particularly in light of his recidivism, to render his sentence constitutionally infirm. (See *Wingo*, *supra*, 14 Cal.3d at p. 179; *Lynch*, *supra*, 8 Cal.3d at p. 424; *Baker*, 20 Cal.App.5th at p. 731.)

Finally, defendant contends his sentence is even more cruel and/or unusual because it is largely mandatory. We rejected a similar argument raised by the defendant in *Baker*: " '[t]here can be no serious contention . . . that a sentence which is not

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9 We noted in *Baker* that California, among other states, was not an "outlier[]" when it came to imposing a harsh punishment on a defendant for engaging in serious sexual misconduct of a child under the age of 14 (i.e., oral copulation with a minor): "Fla. Stat. Ann. §§ 800.04(5)(b) & 775.082(3)(a)4 [life or 25-year minimum for lewd act on child under 12]; Kan. Stat. Ann. §§ 21–5506(b)(3)(A), 21–6627(a)(1)(C) [25 years to life for fondling or touching of a child under 14]; Nev. Rev. Stat. Ann. §§ 201.230(2) [10 years to life for a lewd act on a child under 14], 200.366(1)(b) & (3) [35 years to life for sexual penetration of a child under 14 if no substantial bodily harm; else, life without parole]; Ariz. Rev. Stat. §§ 13–705(A) [life sentence for dangerous crimes against children including sexual conduct with a child under 12]; Mich. Comp. Laws Serv. § 750.520b (1)(a) & (2)(b) [25 years to life for sexual penetration of a child under 13]; Miss. Code Ann. §§ 97–3–101(3), 97–3–95(1)(d) [20 years to life for sexual penetration of a child under 14]; Neb. Rev. Stat. Ann. § 28–319.01(1)(a) & (2) [15-year minimum for sexual penetration of a child under 12]; R.I. Gen. Laws §§ 37–8.1, 37-8.2 [25 years to life for sexual penetration of a child under 14]; S.C. Code Ann. §§ 16–3–651(h), 16–3–655(A)(1), (D)(1) [25 years to life for oral copulation of a child under 11]; Utah Code Ann. § 76–5–403.1(1) & (2)(a) [25 years to life for oral copulation of a child under the age of 14.]" (*Baker*, at p. 731.)

otherwise cruel and unusual becomes so simply because it is "mandatory." ' (*Harmelin*[, *supra*,] 501 U.S. [at p.] 995 [upholding mandatory life sentence without parole for first-time offender for possession of 672 grams of cocaine]; see *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1214 [same principle applies to state constitutional challenge].)" (*Baker*, *supra*, 20 Cal.App.5th at p. 731.) We thus reject defendant's claim he was subjected to cruel and/or unusual punishment because his sentence was largely mandatory.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

DATO, J.