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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PERRY DAVIS HAMM,

Defendant and Appellant.

H036137

(Monterey County

Super. Ct. No. SS061279)

This is the second appeal for defendant Perry Davis Hamm, who was convicted by jury of two counts of continuous sexual abuse of a child under the age of 14 (Pen. Code, § 288.5)¹ in a case involving the sexual abuse of sisters M.B. and J.B.² The court

¹ All further statutory references are to the Penal Code unless otherwise stated.

² This opinion, although unpublished, may be publicly accessible into the indefinite future. We have therefore taken special care to honor this state's policy against identifying " 'living victims of sex crimes' " to " 'prevent the publication of damaging disclosures' " regarding such persons. (Cal. Style Manual (4th ed. 2000) § 5:9, pp. 179-180.) To protect anonymity in such cases, "a party must be referred to by first name and last initial in all filed documents . . . and opinions; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the party's initials may be used." (Cal. Rules of Ct., rule 8.401(a)(2) & former rule 8.400(b)(2); see also California Style Manual, *supra*, § 5:9, at pp. 179-180 & § 5:10, at pp. 180-181.) Since this case involves sisters, use of their first names and their last initial may defeat the objective of anonymity. We shall therefore refer to them by their initials only.

originally sentenced defendant to prison for 15 years to life on the first count and imposed a concurrent sentence of 15 years to life on the second count pursuant to the “One Strike” law based on the jury’s finding that there was more than one victim (§ 667.61, subs. (b), (e)(5)).

In the first appeal (*People v. Hamm*, (Jul. 21, 2010, H033927) [non pub. opn.]), we rejected defendant’s contention that his trial counsel was ineffective and his claims of instructional and cumulative error. However, we questioned the propriety of sentencing defendant under the One Strike law, since his offenses were completed years before continuous sexual abuse of a child was added to the One Strike statute as a triggering offense. We therefore asked the parties to brief the question whether punishing a violation of section 288.5 that was completed before that offense was added to the One Strike law violated constitutional prohibitions against ex post facto laws. After reviewing the parties’ supplemental briefs, we concluded that sentencing defendant pursuant to the One Strike law violated the prohibition against ex post facto laws, reversed the judgment, and remand for resentencing.

On remand, the court sentenced defendant to the upper term of 16 years for the first count of continuous sexual abuse of a child and the full middle term of 12 years, consecutive on the second count (§ 667.6, subd. (c)), for a total of 28 years in prison.

In this appeal, defendant argues that the trial court erred because it changed the sentence on count 2 from concurrent to consecutive, which resulted in a longer sentence on remand. He contends that imposing a longer sentence violates his federal and state due process rights because it penalizes him for exercising his appeal rights and violates the double jeopardy clause of the California Constitution. He also asserts that imposition of a greater sentence on resentencing creates a presumption of improper vindictiveness by the prosecutor. Defendant acknowledges that he did not raise these issues in the trial court, but argues that there was no forfeiture because his counsel advocated imposition of lower term concurrent sentences and that after the court refused to impose the sentence he

suggested, any further argument would have been futile. Alternatively, he contends that his trial counsel was ineffective.

In addition to responding to each of defendant's contentions, the Attorney General challenges the basic premise behind defendant's arguments and asserts that defendant's second sentence for a fixed term is not greater than his first indeterminate sentence with a life maximum. We agree with the Attorney General on this threshold question and hold that an indeterminate sentence with a life maximum is always greater than a determinate sentence for a fixed term of years. We also address and reject defendant's contentions that the court violated state double jeopardy prohibitions when it change his sentence on count 2 from concurrent to consecutive after remand and that consecutive sentencing on remand was the result of prosecutorial vindictiveness. We will therefore affirm the judgment.

FACTS³

M.B. and J.B. (jointly "the Girls") were raised by their father (Father). The family moved to Monterey County from Pennsylvania. After Father lost his job, he and the Girls moved in with defendant and lived with him for an extended period of time. While the Girls lived with defendant, defendant provided child care when Father looked for work or went out. In late 1994 or early 1995, Father and the Girls moved to a house in Greenfield. After that, defendant continued to babysit the Girls once or twice a week. Father and the Girls moved back to Pennsylvania in November 1995 and returned to California in April 1996. Upon their return, they lived with defendant for two weeks, then moved to Salinas. Defendant did not babysit when the Girls lived in Salinas. The family moved back to Greenfield in 1998; defendant occasionally took care of the girls between 1998 and 2001.

³ The facts relating to the offense are taken from our previous opinion.

I. Molestation of M.B.

M.B. was seven years old when she moved in with defendant; defendant was 51 years old at that time. Defendant started touching M.B. shortly after she moved in. The first time, he suggested she sit next to him on the couch, put his hand on her leg, moved it toward her genital area, and touched her vagina over her clothes. This occurred almost daily when she was seven. While she was still seven, defendant started touching her under her clothes. He slid his hand down her pants, slid his finger over her vagina, touched her labia, but did not penetrate.

In April 1996, when M.B. was nine and living with defendant again, defendant exposed his penis, masturbated in front of her, ejaculated into a tissue, and said, “ ‘[T]his is how babies are made.’ ” He did not touch her; she did not touch him. During this time frame, he touched her vagina several times under her clothing. Once, when she was about nine, defendant put his hand down her pants and fondled her while she was trying to sleep on the living room floor at his house.

M.B. recalled two incidents of inappropriate touching after August 1996. One occurred when she was 11. After that, although defendant tried, she did not give him the opportunity to touch her. When M.B. was 13, defendant came over one day while Father was at work, stood behind her, stuck his tongue in her ear, and jiggled it around. M.B. told Father about the molestations when she was 13 and reported them to the police when she was 18.

II. Molestation of J.B.

J.B., who was three years younger than M.B., could not recall how old she was when defendant first molested her. However, she testified that he molested her before the family moved back to Pennsylvania in November 1995. She was six years old when they moved.

Defendant touched J.B.'s chest and her genitals over her clothing. Defendant also took her hand and made her touch his penis over his clothing. Sometimes his penis was soft and sometimes it was hard; sometimes he ejaculated and his clothing got wet. Defendant touched her inappropriately and had her touch him inappropriately almost the entire time she knew him, off and on for four or five years.

J.B. testified that defendant continued to touch her genitals and her chest on occasion after 1998 (when she was eight to 10 years old) and that he made her touch his penis, through his clothes, at least once during that time. By that time, he had stopped touching M.B., except for the two incidents when M.B. was 11 and 13.

At trial, defendant denied molesting the Girls or touching them in a sexual way; he specifically denied each type of conduct the Girls described. Defendant said he touched the Girls in nonsexual ways: he roughoused with them, kissed them on the forehead or the top of the head, touched their arms or back, and tickled their shoulders; they sat on his lap when he brushed their hair.

PROCEDURAL HISTORY ON REMAND

Prior to the sentencing hearing after remand, both parties filed briefs with the court and the probation department provided an updated report. The probation department recommended the court deny probation and sentence defendant to prison "for the term prescribed by law."

According to defendant's sentencing memorandum, there were three issues before the court: (1) whether to impose the lower, middle or upper term (6, 12, or 16 years) on count 1; (2) whether to sentence concurrently or consecutively on count 2; and (3) if the court sentenced consecutively, whether to impose one-third the middle term (§ 1170.1) or a full-term consecutive sentence (§ 667.6, subdivision (c)). Defendant recommended the court impose the lower term of six years on count 1 and a concurrent term of six years on count 2, for a total of six years. Alternatively, he suggested that if the court was not

inclined to sentence concurrently, that it impose the lower term of six years on count 1 plus one-third the middle term (one-third of 12 years is four years) on count 2, for a total of 10 years.

The prosecutor asked the court to exercise its discretion to sentence defendant to consecutive sentences pursuant to former section 667.6, subdivision (c),⁴ which permitted full term consecutive sentences for certain enumerated offenses, including continuous sexual abuse of a child. The prosecutor suggested the court impose a consecutive full

⁴ In cases involving certain sex crimes, including continuous sexual abuse of a child, subdivisions (c) and (d) of the section 667.6 authorize the trial court to impose a fully consecutive sentence for a subordinate term, rather than the usual one-third the middle term formula in section 1170.1. The offenses that are subject to the sentencing under section 667.6 are listed in subdivision (e) of the statute. Subdivision (c) of the statute is discretionary. It provides that a full, separate and consecutive sentence “*may be imposed*” for each violation of an offense listed in subdivision (e) “if the crimes involve that same victim on the same occasion.” (Italics added.) Subdivision (d) of the statute is mandatory. It provides that a “full, separate, and consecutive term *shall be imposed* for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions.”

The second amended information alleged that defendant’s offenses occurred between December 1994 and October 2001. Section 667.6 has been amended three times since 2001. (See Historical and Statutory Notes, 49 West’s Ann. Penal Code (2010 ed.) foll. § 667.6, pp. 377-380 (hereafter Historical Notes).) At the time of defendant’s offenses, the offenses that were subject to the sentencing provisions of section 667.6 were listed in former subdivisions (a), (c), and (d) of the statute and former subdivision (e) addressed fines. (Historical Notes, at p. 378.) In addition, while continuous sexual abuse of a child was subject to section 667.6 sentencing, it was only listed under the discretionary provision in former subdivision (c) of the statute and was not listed under the mandatory provision in former subdivision (d). (Historical Notes, at p. 378.) At the time of defendant’s offenses, former subdivision (c) of section 667.6 provided in relevant part: “In lieu of the term provided in Section 1170.1, a full separate , and consecutive term may be imposed for each violation of . . . Section 288.5 . . . whether or not the crimes were committed during a single transaction.” (Historical Notes, at p. 378.) Thus, the parties were correct when they told the court it had the discretion to impose full-term, consecutive sentences under section 667.6. If defendant’s offenses had occurred after the 2006 amendments to section 667.6, full-term consecutive sentencing would be mandatory since his crimes involved separate victims and the mandatory provisions of subdivision (d) now apply to continuous sexual abuse of a child.

term sentence on count 2 because this case involved two separate victims, the abuse continued for a prolonged period spanning six years, and defendant did not molest the Girls at the same time, but moved to the younger sister after M.B.'s resistance became resolute. He asserted that defendant exhibited a pattern of predatory behavior with a calculated effort to maintain access to his victims and that he continued to molest J.B. after the girls moved to their own home. He also stated that defendant's sole mitigating factor ("prior performance on probation . . . was satisfactory") was "less impressive," since defendant committed the instant offenses while on probation for his prior theft and drug offenses. The prosecutor observed that the court has wide latitude in fashioning an appropriate sentence and set forth seven options available to the court, ranging from six to 32 years. The prosecutor urged the court to treat each victim equally and sentence defendant to the 12-year middle term on count 1 plus 12 years consecutive on count 2 or the 16-year upper term on count 1 plus 16 years consecutive on count 2.

At the sentencing hearing, defense counsel reminded the court that it had sentenced defendant concurrently the first time and argued against consecutive sentencing. He argued that the longevity of the activity is inherent in the crime of continuous sexual abuse of a child, so nothing more can be derived from the duration of the conduct that is not inherent in the offense.

The court imposed the upper term (16 years) on count 1 and a fully consecutive middle term (12 years) on count 2, for a total 28 years.

DISCUSSION

I. Parties' Contentions

Defendant contends that his sentence after remand violated the double jeopardy clause of the California Constitution in two ways. First, he argues that his new sentence (28 years) is greater than his original sentence (15 years to life) and that the court violated

California double jeopardy prohibitions by imposing a longer sentence after remand. Second, he asserts that the court violated California double jeopardy law after remand when it changed his sentence on count 2 from concurrent to consecutive. Defendant contends that his new sentence violated his federal and state due process rights because it penalized him for exercising his right to appeal. Finally, he argues that his new sentence should be reversed because the court's decision to change his sentence from concurrent to consecutive on count 2 was the result of improper prosecutorial vindictiveness.

The Attorney General challenges the basic premise underlying some of defendant's arguments and asserts that defendant's new sentence (28 years) is not greater than his first sentence (15 years to life). He contends that an indeterminate life term is always greater than a determinate term. We begin by addressing this question.

II. Relative Severity of First and Second Sentences

The parties advocate two different methods for determining the relative severity of defendant's first and second sentences. Defendant argues that his new sentence (28 years) is greater than the original sentence (15 years to life) because under the original sentence, he would have been eligible for parole after serving 12.75 years (85 percent of 15 years), and under the new sentence, he is not eligible for parole until he serves 23.8 years (85 percent of 28 years). The Attorney General argues that defendant's second sentence is not more severe than the first because his first sentence (15 years to life) subjected him to life imprisonment and carried no promise of parole, while his second sentence guaranteed his release from prison after 28 years. To summarize, defendant urges us to base our analysis of the relative severity of the sentences on the initial parole eligibility dates for each sentence, while the Attorney General argues that the relative severity of the sentences is determined by comparing the maximum potential period of confinement to be served under each sentence.

The Attorney General cites *People v. Norrell* (1996) 13 Cal.4th 1 (*Norrell*) (superseded in part by statute as stated in *People v. Kramer* (2002) 29 Cal.4th 720, 722). Defendant does not cite any authority on point, but argues that *Norrell* does not stand for the proposition for which it was cited by the Attorney General and is no longer good law because its main holding has been superseded by statute.

The question whether an indeterminate sentence is greater than a determinate sentence is a question of law, which we review de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894 & fn. 1.) Before discussing *Norrell*, we review cases addressing this question in a variety of contexts under both the indeterminate sentencing law that applied between 1917 and 1977 and the determinate sentencing scheme currently in place. We begin our historical inquiry with a brief, general discussion of the differences between the two sentencing schemes.

A. Differences Between Determinate Sentencing and Indeterminate Sentencing Schemes

From 1917 until 1977, California law provided for indeterminate sentencing. (*People v. Jefferson* (1999) 21 Cal.4th 86, 94-96 (*Jefferson*); *People v. Yates* (1983) 34 Cal.3d 644, 648 (*Yates*)). “Under that sentencing scheme, penal statutes specified a minimum and a maximum sentence for felonies, often ranging broadly from as little as one year in prison to imprisonment for life.”⁵ (*Jefferson*, at p. 94.) The trial court would simply sentence a defendant to prison for “ ‘the term prescribed by law,’ ” or “ ‘no less than X years’ ” or “ ‘X years to life,’ ” while the actual length of the defendant’s term, within the statutory maximum and minimum, was determined by the parole board, which was known as the “Adult Authority.” (*Ibid.*; *Yates*, at p. 648.) Under the indeterminate sentencing law, the Legislature established minimum and maximum terms for felony

⁵ Some indeterminate sentences were for as little as six months to life. (See *People v. Wingo* (1975) 14 Cal.3d 169, 172-173.)

offenses, the courts sentenced defendants to prison “for the term prescribed by law,” and the Adult Authority ultimately determined the length of the sentence. (*In re Lynch* (1972) 8 Cal.3d 410, 413-415, 419 (*Lynch*).

On July 1, 1977, the Legislature replaced California’s indeterminate sentencing scheme with the Determinate Sentencing Act. (*Jefferson, supra*, 21 Cal.4th at p. 95.) Under the Determinate Sentencing Act, most felony criminal statutes specify three possible terms of imprisonment (the lower, middle, and upper terms). For example, continuous sexual abuse of a child is punishable by 6, 12, or 16 years in prison (§ 288.5, subd. (a).) After weighing any aggravating and mitigating circumstances, the trial court imposes one of the three terms. (*Jefferson*, at p. 95.)

Under the Determinate Sentencing Act, “[s]ome particularly serious crimes, however, remain punishable by indeterminate sentences of life in prison with the possibility of parole.” (*Jefferson, supra*, 21 Cal.4th at p. 95.) “Some indeterminate sentences expressly include a minimum prison term.” (*Id.* at p. 92.) For example, the punishment for second degree murder is ordinarily “a term of 15 years to life” (§ 190, subd. (a)), and punishment under the One Strike statute is either “15 years to life” or “25 years to life,” depending on the number and type of aggravating circumstances that apply in the particular case (§ 667.61). “Other statutes specifying indeterminate sentences do not mention a minimum term, describing the sentence simply as ‘imprisonment in the state prison for life with the possibility of parole’ or ‘imprisonment in the state prison for life.’” (*Jefferson, supra*, 21 Cal. 4th at p. 93 [listing several examples].) In such cases, the minimum term of imprisonment for an indeterminate sentence is defined by section 3046 as “at least seven calendar years” or a “term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole.” (§ 3046; *Jefferson*, at p. 99.)

B. Survey of Relevant Case Law

Over the years, the California Supreme Court has reviewed the question whether an indeterminate sentence with a life maximum is a life sentence in a variety of contexts. To inform our analysis, we review a number of those cases in chronological order.

In *People v. Clough* (1881) 59 Cal. 438, 441-442, the court held that an indeterminate sentence of “not less than one year” (one year to life) for robbery was not a life sentence for the purpose of determining the number of peremptory challenges the defendant received at trial. Former section 1070 provided that where the offense was punishable by death or life imprisonment, the defendant was entitled to 20 peremptory challenges. Otherwise, the defendant was entitled to only 10 challenges. (*Clough, supra*, 59 Cal. at p. 441.) Interpreting former section 1070, the court held that defendants were entitled to 20 challenges only in capital cases and “cases in which a life sentence is *in terms* affixed by the Legislature,” meaning cases with express life terms or mandatory life sentences, but not those involving indeterminate terms. (*Clough*, at p. 441; *Yates, supra*, 34 Cal.3d. at pp. 647-648.) The court distinguished an express life term from the defendant’s indeterminate sentence and stated with regard to the indeterminate sentence that “[i]t is true that the maximum punishment is not designated by the statute, but the minimum is, and that need not be for a longer time than one year.” (*Clough*, at pp. 441-442; *Yates*, at pp. 647-648.) *Clough* and the cases that followed it concluded that an indeterminate sentence was not the same as a life term. (*Yates*, at pp. 647-648, citing *Clough, People v. Harris* (1882) 61 Cal. 136, 137, and other cases.)

Subsequently, a contrary line of cases developed that held that an indeterminate life sentence should be considered the equivalent of a life term. (*Yates, supra*, 34 Cal.3d at pp. 649-650.) Citing cases from other jurisdictions, the court in *In re Lee* (1918) 177 Cal. 690, 693 held that an indeterminate sentence was not void for vagueness because it “has uniformly been held that an indeterminate sentence is in legal effect a

sentence for the maximum term.” Years later, the Supreme Court utilized the *Lee* premise in *People v. McNabb* (1935) 3 Cal.2d 441, 444, 456-457 and held that a prisoner who was undergoing a sentence of “not less than five years” for first degree robbery was a “life prisoner.” As such, the prisoner was subject to the death penalty after being convicted of assault with a deadly weapon or by force likely to produce great bodily harm while in prison under former section 246⁶. The court explained, “The authorities of this and many sister states which have an indeterminate sentence law similar to ours hold that a statute which prescribes a minimum sentence of not less than five years and with no maximum is in law a life sentence until and unless a court or executive board charged with the duty of fixing prison terms remits a portion of the life term.” (*McNabb* at pp. 456-457.)

In *People v. Ralph* (1944) 24 Cal.2d 575 (*Ralph*), the Supreme Court considered “whether a youthful offender subject to an indeterminate life sentence could be committed to the Youth Authority. The controlling statute, Welfare and Institutions Code section 1731.5, authorized commitment for any youthful offender ‘convicted of a public offense who . . . is not sentenced to death [or] life imprisonment.’ ” (*Yates, supra*, 34 Cal.3d at p. 650.) The defendants in *Ralph* had been convicted of armed robbery and sentenced to not less than five years in prison. (*Ralph*, at p. 578.) In *Ralph*, the court “recognized the inconsistent pattern of judicial decisions—the *Clough* line of cases holding that an indeterminate life sentence is not a life term, and the contrary line of cases” that followed *Lee* holding that an indeterminate sentence is a life sentence. (*Yates*, at p. 650, citing *Ralph*, at p. 580.) The court questioned whether “either line need be

⁶ Former section 246 defined the offense of assault with a deadly weapon by a person undergoing a life sentence. It was repealed and reenacted as section 4500 in 1941. (See Historical and Statutory Notes, 47C West’s Ann. Pen. Code (2008 ed.) foll. § 246, p. 371.) The death penalty required by former sections 246 and 4500 was declared unconstitutional in *Graham v. Superior Court* (1979) 98 Cal.App.3d 880.

overruled” and observed that “[e]ach line has become established over a long period of years as defining the law in the particular matters to which it respectively relates.” (*Ralph*, at p. 580.) The court observed that neither line of cases had addressed the question presented in *Ralph* and concluded that in such cases it was proper “to consider the purpose of the particular statute” at issue, as well as certain fundamental rules governing the construction of criminal statutes. (*Ibid.*) The court observed that the purpose of a Youth Authority commitment was rehabilitation and concluded that in view of the large number of offenses that carried indeterminate life sentences, holding such offenders ineligible for commitment to the Youth Authority would undermine the purpose of the program. The court therefore held that the *Clough* line of cases, which classified an indeterminate life sentence as less than a life term, governed its interpretation of Welfare and Institutions Code section 1731.5. (*Yates*, at pp. 650-651.)

The defendant in *People v. Jefferson* (1956) 47 Cal.2d 438 was convicted of assault with a deadly weapon by a prisoner undergoing a life sentence and sentenced to death under former section 4500. The defendant had been sentenced to five years to life in a prior matter and the question on appeal was whether he was serving a life sentence for the purpose of former section 4500. (*People v. Jefferson, supra*, 47 Cal.2d at pp. 442-443.) The court observed that although the Adult Authority had the power to fix the defendant’s sentence for his first offense at less than a life term, it had not acted prior to the assault. Citing *McNabb* and other cases, the court held that since the Adult Authority had not acted, the defendant was undergoing a life sentence when he committed the assault in prison. (*Ibid.*)

In 1972, the Supreme Court followed the *Lee* line of cases in *Lynch, supra*, 8 Cal.3d 410, the seminal case that established the three-step analysis for cruel or unusual

punishment claims under the California Constitution.⁷ The petitioner in *Lynch* was convicted of indecent exposure with a prior and sentenced to prison “for not less than one year” under former section 314. (*Lynch*, at pp. 413-415, 419.) The issue in *Lynch* was whether the “aggravated penalty for second-offense indecent exposure . . . violates the prohibition of the California Constitution against cruel or unusual punishments.” (*Id.* at p. 413.) Since the defendant in *Lynch* was sentenced to 1 year to life, the first issue the court addressed was “what . . . is the ‘sentence’ . . . to be measured against the constitutional yardstick.” (*Id.*, at p. 415.) The court concluded that a “defendant under an indeterminate sentence has in effect been sentenced to the maximum term provided by law, that the constitutional validity of the sentence must be judged by that maximum,” and that the defendant should be deemed to be serving a life sentence for the purpose of analyzing whether the punishment is cruel or unusual. (*Id.* at pp. 415-416, 419.)

The court cited three reasons for its conclusion. First, the theory of the indeterminate sentencing law permitted shortening of a defendant’s sentence on a showing of rehabilitation. The goal of the “proponents was to individualize the rehabilitation process, and to use the power to shorten sentences as an incentive to reformation.” (*Lynch, supra*, 8 Cal.3d at p. 416.) The purpose of the law was to mitigate punishment and the emphasis was on reform. (*Ibid.*) Second, in administering the law, the Adult Authority not only determined the length of any “lesser term” the offender might serve, but also had the power to “redetermine” the term when appropriate to do so up until the time of final discharge. (*Id.* at p. 417.) “Viewed realistically, a defendant’s liability is to serve the maximum term, and he is therefore entitled to know that the maximum in his case is lawful.” (*Ibid.*) Third, the court relied on case law upholding the

⁷ Under that test, courts must consider (1) the nature of the offense and the offender, (2) the punishment for other offenses, and (3) punishment in other jurisdictions for the same offense. (*Lynch, supra*, 8 Cal.3d at pp. 425-439.)

indeterminate sentencing law against various constitutional challenges, including separation of powers and due process challenges. (*Id.* at pp. 417-418 citing *Lee, supra*, 177 Cal. at p. 693 and *People v. Sama* (1922) 189 Cal. 153, 156-157.) Regarding the separation of powers rationale, the court stated, “the constitutionality of the indeterminate sentence law is thus upheld by deeming that the ‘sentence’ prescribed by the Legislature and imposed by the court is the term declared by the statute rather than later ameliorated by the administrative agency, . . .” (*Lynch*, at p. 418.) The court explained that the claim that the indeterminate sentencing law violates due process has “often been refuted with the explanation that . . . ‘the indeterminate sentence is in legal effect a sentence for the maximum term.’ ” (*Ibid.*)

The *Lynch* court held that “when a defendant under an indeterminate sentence challenges that sentence as cruel or unusual punishment . . . , the test is whether the maximum term of imprisonment permitted by the statute punishing his offense exceeds the constitutional limit, regardless of whether a lesser term may be fixed in his particular case by the Adult Authority.” (*Lynch, supra*, 8 Cal.3d at p. 419.)

However, in a footnote, the court acknowledged the contrary line of cases and stated: “For certain other purposes, however, an indeterminate sentence with a life maximum should not be treated as the equivalent of a sentence of life imprisonment. (See, e.g., *In re Quinn* (1945) 25 Cal.2d 799 . . . (power of trial court to order consecutive sentences); . . . *Ralph*, [*supra*,] 24 Cal.2d 575 . . . (eligibility for commitment to Youth Authority): *People v. Shaw* (1965) 237 Cal.App.2d 606, 612-616 . . . , and cases cited (right to additional peremptory challenges)).” (*Lynch, supra*, 8 Cal.3d at pp. 419-420, fn. 10.) *Lynch* qualified its holding further by stating: “This is the rule to be applied when the minimum term prescribed by the statute [(one year in *Lynch*)] does not violate the cruel or unusual punishment clause. If an analysis such as we undertake herein demonstrates that the minimum term does violate that clause, the defendant will be

entitled to relief without regard to the constitutionality vel non of the maximum.” (*Id.*, at p. 419, fn. 9.)

In 1975 in *People v. Wingo, supra*, 14 Cal.3d 169 (*Wingo*) and *People v. Romo* (1975) 14 Cal.3d 189 (*Romo*), the Supreme Court modified its approach to the analysis of cruel or unusual punishment challenges in cases involving indeterminate sentences. The defendant in *Wingo* was convicted of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)); the defendant in *Romo* was convicted of assault with a deadly weapon (§ 245, subd. (a)). Both defendants were “sentenced to prison for the term prescribed by law,” which was six months to life under former section 245, subdivision (a). (*Wingo*, at pp. 172-173; *Romo*, at p. 192.)

Rather than deem their sentences life terms as it had in *Lynch*, the court observed that there was a “fundamental distinction” between *Lynch* and the cases at issue. (*Wingo, supra*, 14 Cal.3d at p. 176; *Romo, supra*, 14 Cal.3d at p. 193.) The court explained that *Lynch* was “concerned with whether the maximum term of life imprisonment was ever permissible for the crime of second-offense indecent exposure. The statute proscribed a single mode of behavior, and [the court] held that under no circumstances could that behavior justify a potential life maximum. By contrast, in [*Wingo* and *Romo*, the court was] called upon to determine the constitutionality of a statute which prohibits a wide range of culpable conduct, with a correspondingly wide range of punishment. Thus, unlike *Lynch*, [in *Wingo* and *Romo* the court was] concerned with a maximum penalty which might be permissible in some circumstances but excessive in others.” (*Wingo* at p. 176; see *Romo* at p. 193.) The court concluded that “If a statute proscribes a single, narrowly delineated mode of behavior—as in *Lynch*—it is appropriate in considering the constitutionality of the penalty to look only to the maximum in order to determine whether under any circumstances the crime would justify the punishment. But this analytic proves inconclusive when applied to a statute regulating a broad variety of conduct, since by definition there is no single ‘offense’ to measure against the subject

penalty. Accordingly in this context a consideration of only the maximum is fruitless, leaving as our sole alternative a determination whether in light of the individual offense the actual penalty imposed is excessive.” (*Wingo*, at p. 182.) Consequently, the court held that “when a defendant convicted under a section encompassing a wide range of conduct challenges the statute as imposing cruel or unusual punishment, judicial review must await an initial determination by the Adult Authority of the proper term in the individual case.” (*Id.* at p. 183.) In that situation, an indeterminate sentence would not be deemed a life term. But, “[i]f the Authority, either by omission or by the exercise of its discretion, fails or declines within a reasonable time to set a term, the particular conduct will be measured against the statutory maximum.” (*Ibid.*) Since the Adult Authority had not fixed the defendants’ terms in either *Wingo* or *Romo*, the court held that it was premature to decide whether their terms would be disproportionate to their offenses. (*Id.* at p. 184; *Romo*, at p. 193.) Notably, the court did not elect to follow the *Clough* line of cases and hold that the indeterminate sentence at issue was either not a life term or something less than a life term.

Shortly thereafter, in *In re Rodriguez* (1975) 14 Cal.3d 639, 642-643 (*Rodriguez*), the court granted a petition for writ of habeas corpus by a prisoner who had served 22 years of an indeterminate sentence of one year to life for lewd or lascivious conduct with a child (former § 288). During that time, the Adult Authority had never fixed the term of the prisoner’s sentence at less than maximum. (*Rodriguez*, at p. 644.) The court held that a life term was not cruel or unusual on its face, since section 288 encompasses offenses for which a life term may be constitutionally permissible. (*Rodriguez*, at pp. 646-648.) But in the petitioner’s case, his continued imprisonment was cruel or unusual as applied, since the term already served was disproportional to his offense under each of the *Lynch* factors. (*Id.* at pp. 651-656.) The court also held that “[f]or the purposes of assessing the constitutional proportionality of an inmate’s terms, the court

will deem it to have been fixed at maximum if the Authority does not act promptly to fix” a prisoner’s term of imprisonment. (*Id.* at p. 654, fn. 18.)

Under the indeterminate sentencing law, a great number of penal statutes prescribed an indeterminate life term. (*Yates, supra*, 34 Cal.3d at p. 649.) When the Legislature passed the Determinate Sentencing Act in 1977, few indeterminate sentences remained. Initially, murder without special circumstances (former § 190 [25 years to life for first degree; 15 years to life for second degree]) and conspiracy to commit murder (former § 182 [25 years to life]) were the only crimes that carried an indeterminate sentence. (*Yates, supra*, 34 Cal.3d at p. 649.) In *Yates*, the court held that in light of this change, it was no longer plausible to adhere to the *Clough* line of cases, which had reasoned that an indeterminate life sentence is not a life term and had denied additional peremptory challenges in cases involving indeterminate life sentences. The court reasoned that the additional challenges should be reserved for more serious cases, those in which the defendant was likely to receive the most severe penalties. (*Yates*, at pp. 649-652.) The court therefore construed the phrase “imprisonment for life” in former section 1070 “to include an indeterminate life sentence equal to or more severe than a determinate life term.” (*Yates* at p. 653.)⁸

⁸ In *Yates*, for the purpose of determining the number of peremptory challenges a murder defendant is entitled to under section 1070, the court evaluated the relative severity of sentences imposed on a defendant charged with kidnapping for ransom (§ 209) and a defendant charged with murder (§ 190). As part of its analysis, the court examined the potential parole term each would be subject to when evaluating equal protection and constitutional issues related to its interpretation of section 1070. (*Yates, supra*, 34 Cal.3d at p. 652 [kidnapping defendant (who gets 26 peremptory challenges) is eligible for parole after seven years, but murder defendant (who only gets 10 challenges under *Clough* line of cases) is not eligible until 16 years 8 months].)

C. Norrell

We turn next to *Norrell*, the case the Attorney General relies on. Both of the defendants in *Norrell* were convicted of kidnapping for robbery (§ 209, subd. (b)), robbery (§§ 211, 212.5), and reckless driving. The jury found true enhancement allegations that defendant Lau had personally used a gun and defendant Norrell was armed with a gun. (*Norrell, supra*, 13 Cal.4th at pp. 3-4.) It was undisputed that the kidnapping for robbery and the robbery were incident to one objective. (*Id.*, at p. 4.) Kidnapping for robbery was punishable by life imprisonment with the possibility of parole, whereas robbery was punishable by a determinate term of two, three, or five years. (*Id.* at p. 5.) At sentencing, the court imposed the five-year upper term for robbery and stayed the life sentence for kidnapping pursuant to former section 654.⁹ (*Norrell, supra*, at p. 4.) The court acknowledged the seriousness of the defendants' crimes but chose to sentence on the " 'lesser offense' of robbery" because of the defendants' youth and the opportunity for them to rehabilitate themselves. (*Id.* at p. 5.)

The Attorney General appealed, arguing that the court had imposed an unauthorized sentence by staying the sentence on the " 'greater offense' " and imposing the sentence on the " 'lesser offense.' " (*Norrell, supra*, 13 Cal.4th at p. 5.) He argued that the greater offense was the one that imposed the longest potential term of imprisonment and that kidnapping for robbery was the greater offense because it was punishable by life in prison, and that robbery was the lesser offense because it was punishable by a determinate term of two, three, or five years. (*Ibid.*) The Supreme Court found no error. It held that the sentencing court had the discretion to punish the

⁹ Former section 654 provided in part: "An act or omission which is made punishable in different ways by different provisions of this code *may be punished under either of such provisions*, but in no case can it be punished under more than one;" (*Norrell, supra*, 13 Cal.4th at pp. 2-3; italics added.)

defendants for either offense under former section 654 and was not required to “mechanically [add] together penalties and enhancements to arrive at the greatest overall potential prison sentence.”¹⁰ (*Norrell*, supra, 13 Cal.4th at pp. 3, 5, 8.)

With regard to the question of the relative severity of the sentences, the court observed “that the trial court acted within its discretion . . . in staying the punishment for kidnapping for robbery. It does so, however, *only* because the trial court imposed a greater overall sentence than that which *might have* been imposed for the latter crime—punishable by life imprisonment with the possibility of parole—which in *Norrell*’s case *might have* resulted in probation, i.e., no prison term at all, and in *Lau*’s case, because he was ineligible for parole, *could have* resulted in a prison sentence shorter than ten years, eight months, *if he were paroled* after the minimum period of confinement of seven years (see. . . § 3046). The approach is unduly formalistic: as the People pointed out at oral argument, the mere fact that defendants requested, and the People opposed, a stay of the sentence for kidnapping for robbery—and that defendants waived their right to appeal imposition of the sentence for robbery—demonstrates that life imprisonment with possibility of parole was, in any real sense, the *greater*, not the lesser, punishment.” (*Norrell*, supra, 13 Cal.4th at pp. 9-10.)¹¹ Thus, *Norrell* rejected an analysis based on initial parole eligibility dates (which is the same analysis defendant proposes in this case)

¹⁰ In response to *Norrell*, the Legislature amended section 654 in 1997. (*People v. Kramer*, supra, 29 Cal.4th at p. 722.) Section 654 now provides in pertinent part: “An act or omission that is punishable in different ways by different provisions of law *shall be punished under the provision that provides for the longest potential term of imprisonment*, but in no case shall the act or omission be punished under more than one provision.” (Italics added.)

¹¹ *Norrell* was a plurality opinion; the lead opinion was authored by Justice Mosk, with Justices Lucas and Werdegar concurring. In his separate concurring opinion, Justice Baxter did not disagree with the lead opinion on this point. (*Norrell*, supra, 13 Cal.4th at pp. 10-12 (conc. opn. of Baxter, J.))

as unduly formalistic and reasoned that, based on the parties' arguments at sentencing, an indeterminate sentence with a life term was greater than a determinate sentence.

Following *Norrell*, we shall also reject defendant's contentions based on the initial parole eligibility dates.

D. Analysis and Conclusions

For the following reasons, our historical review of the cases compels the conclusion that an indeterminate sentence with a life maximum is greater than a sentence for a determinate term of years.

First, defendant's challenges in this case are based on alleged constitutional violations of his rights under the double jeopardy and due process clauses of both the California and United States Constitutions. In those cases involving constitutional challenges, the Supreme Court has concluded that an indeterminate sentence with a life maximum is a life sentence. (*Lee, supra*, 177 Cal. at p. 693 [void for vagueness; separation of powers]; *Lynch, supra*, 8 Cal.3d at p. 419 [cruel or unusual punishment]; *People v. Sama, supra*, 189 Cal. at pp. 156-157 [due process]; *Rodriguez, supra*, 14 Cal.3d at p. 654, fn. 18 [cruel or unusual punishment].)

Second, under the indeterminate sentencing law, the Supreme Court had concluded that an indeterminate sentence with a life maximum was a life sentence until the Adult Authority acted to fix the term or granted parole. (*People v. Jefferson, supra*, 47 Cal.2d at pp. 442-443; *Rodriguez, supra*, 14 Cal.3d at p. 654, fn. 18.) But under the Determinate Sentencing Act, the parole board no longer fixes terms of imprisonment separate and apart from its parole function. Extrapolating from the cases under the indeterminate sentencing law, an indeterminate sentence under the Determinate Sentencing Act is in effect a life sentence until the parole board grants parole.

Third, we do not agree that a comparison of initial parole eligibility dates, as suggested by defendant, is the appropriate yardstick for determining the relative severity

of his first and second sentences. As noted, that approach was rejected in *Norrell* as unduly formalistic. (*Norrell, supra*, 13 Cal.4th at pp. 9-10.) In addition, case law supports the conclusion that very few cases involving indeterminate sentences result in grants of parole at the initial parole eligibility hearing. For example, in *In re Lawrence* (2008) 44 Cal.4th 1181, 1195-1200, the parole board recommended that a life inmate be granted parole four times. Each time, the parole board's finding was vetoed by the Governor. The Supreme Court affirmed the Court of Appeal's grant of habeas corpus, which vacated Governor's decision and reinstated fourth grant of parole. In *In re Shaputis* (2008) 44 Cal.4th 1241, 1249-1251, the Supreme Court affirmed the Governor's order vetoing a grant of parole after the third parole board hearing. *In re Prather* (2010) 50 Cal.4th 238, 244-248, 259 reviewed the cases of two defendants, one parole eligible in 1994 and the other in 2000. Each had had at least four parole board hearings. The Supreme Court ordered new hearings, so the defendants were still incarcerated in 2010. (See also, *In re Hare* (2010) 189 Cal.App.4th 1278 , 1282-1283, 1295 [prisoner parole-eligible since 1992; parole board granted parole in 2009, Governor reversed, superior court granted habeas relief; appellate court reversed, so prisoner still in prison in 2010]; *In re Burdan* (2008) 169 Cal.App.4th 18, 23-27 [Governor vetoed parole board's second grant of parole after the prisoner's ninth parole board hearing; appellate court held that Governor's decision was not supported by the record and granted habeas relief].) These cases illustrate that the initial parole eligibility date is not a very accurate yardstick for measuring the relative severity of the sentences here.

Moreover, as in *Norrell*, the parties here acknowledged at the resentencing hearing that a potential life term is greater than a fixed term. Defense counsel told the court, “. . . I think the court had a sense at the [first sentencing hearing], and it sentenced . . . my client to concurrent time, although obviously the stakes were much higher and the sentences were much more—the sentence at the time was much longer than what the court's contemplating here. But I would argue the Court shouldn't take into

consideration the fact that less time is the situation here, and so the Court should somehow increase or enhance its sentence as a result of the reflection of the less possibility of time as compared to before.” This demonstrates that 15 years to life was, to quote *Norrell*, “in any real sense, the *greater*, not the lesser punishment.” (*Norrell*, *supra*, 13 Cal.4th at p. 10.)

For all these reasons, we reject the basic premise underlying some of defendant’s arguments and conclude that his new sentence (28 years) was not greater than his first sentence (15 years to life). In our view, an indeterminate sentence with a life maximum is always greater than a determinate sentence for a fixed term of years.

In light of our conclusion, we shall not reach defendant’s contentions that: (1) the court violated the double jeopardy clause of the California Constitution by imposing a longer sentence after remand; (2) his new sentence violated his federal due process rights because the court penalized him for exercising his right to appeal; and (3) the imposition of a greater sentence creates a presumption of improper vindictiveness by the prosecutor.

III. Changing the Sentence on Count 2 from Concurrent to Consecutive

Separate and apart from his claim that the court violated state double jeopardy prohibitions and his due process rights by increasing the length of his sentence on remand, defendant argues that the court violated state double jeopardy prohibitions when it changed his sentence on count 2 from concurrent to consecutive, irrespective of the relative lengths of the first and second sentences. He also contends that the court’s decision to change his sentence on count 2 from concurrent to consecutive was the result of prosecutorial vindictiveness and hence a due process violation.

A. Changing the Sentence from Concurrent to Consecutive Did Not Violate Double Jeopardy Prohibitions

Citing *People v. Ali* (1967) 66 Cal.2d 277 (*Ali*), defendant argues that “it violates the state double jeopardy clause if, after a successful appeal, the trial court changes a defendant’s sentence on multiple counts from concurrent to consecutive.” Defendant relies on the following language from *Ali*: “When a defendant has been sentenced to concurrent terms, and then upon a retrial is sentenced to consecutive terms for the same offenses, his punishment has been increased by indirect means A defendant should not be required to risk being given greater punishment on a retrial, for the privilege of exercising his right to appeal.” (*Id.* at p. 281.)

The Attorney General argues that *Ali* does not apply because defendant’s “second sentence was not in fact greater than the first” and that defendant’s focus on concurrent versus consecutive sentencing ignores the rationale behind the holding in *Ali*.

To properly address these contentions, we briefly review California double jeopardy principles. In California, the general rule is that the prohibition on double jeopardy in the California Constitution, article I, section 15, protects a criminal defendant from receiving an increased sentence on remand after the defendant has been successful or partially successful on appeal. (*People v. Henderson* (1963) 60 Cal.2d 482, 495 (*Henderson*); *People v. Collins* (1978) 21 Cal.3d 208, 216 (*Collins*).)¹² “California’s double jeopardy rule is designed “to preclude vindictiveness and more generally avoid penalizing a defendant for pursuing a successful appeal.” (*Collins*, at p. 216.) The reason for this rule is that imposition of a greater sentence after retrial would unreasonably impair a defendant’s right to appeal an erroneous judgment. (*People v.*

¹² The double jeopardy clause of the United States Constitution does not necessarily preclude more severe punishment after a reversal on appeal. (*North Carolina v. Pearce* (1969) 395 U.S. 711.) However, *Henderson* continues to be followed in California on state constitutional grounds. (*People v. Hanson* (2000) 23 Cal.4th 355, 365.)

Monge (1997) 16 Cal.4th 826, 843.) “ ‘[A] defendant should not be required to risk being given greater punishment on a retrial for the privilege of exercising his right to appeal.’ ” (*People v. Hanson, supra*, 23 Cal.4th at p. 359, quoting *Ali, supra*, 66 Cal.2d at p. 281.)

In *People v. Serrato* (1973) 9 Cal.3d 753 (*Serrato*), overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, footnote 1, the Supreme Court established an exception to this general rule and held that the trial court may impose a more severe sentence on remand after an appeal if the original sentence was unauthorized by law or illegal. When the original sentence is “an unauthorized sentence,” it “is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement.” (*Serrato*, at p. 764.) The court reasoned that “a defendant who successfully attacks a judgment which is in excess of the court’s jurisdiction is not necessarily entitled to claim the protection of that invalid judgment as an absolute limitation upon what the court may do thereafter.” (*Id.*, at p. 765.) The “holding in *Serrato* vindicates the People’s right to imposition of a proper sentence.” (*People v. Price* (1986) 184 Cal.App.3d 1405, 1409 (*Price*)). Thus, an unauthorized sentence may be set aside judicially and a proper sentence may be imposed by the court even if the second sentence is more severe than the original unauthorized sentence.

An unauthorized sentence is one that has been pronounced in excess of the court’s jurisdiction or in violation of law. “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) The *Serrato* court provided three examples of unauthorized sentences from the case law, including (1) where the trial court imposed a concurrent sentence where the statute required a consecutive sentence; (2) where the trial court granted probation in a murder case; and (3) where the trial court imposed a jail sentence when the statute prescribed a prison sentence. (*Serrato, supra*, 9 Cal.3d at

pp. 764-765, citing *In re Sandel* (1966) 64 Cal.2d 412, *People v. Orrante* (1962) 201 Cal.App.2d 553 (superseded by statute on another ground as stated in *People v. Bailey* (1996) 45 Cal.App.4th 926, 930), & *People v. Massengale* (1970) 10 Cal.App.3d 689.)

To determine whether defendants may be given greater sentences after appeals relating to sentencing error, appellate courts distinguish illegal sentences from sentences that are erroneous for some other reason. (*People v. Brown* (1987) 193 Cal.App.3d 957, 961 (*Brown*)).) For example, “where the sentence imposed is not authorized by the statutes governing sentencing, the sentence is illegal and no bar to subsequent imposition of a greater sentence.” (*Id.* at pp. 961-962, citing *Price, supra*, 184 Cal.App.3d at p. 1409 [failure to impose enhancement under § 12022.3]; *People v. Allen* (1985) 165 Cal.App.3d 616, 630-631 [imposition of consecutive sentence in violation of § 669]; and other cases.) “On the other hand, where a sentence is authorized by statute but the court errs in the manner of sentencing, for example, by failing to state reasons for sentencing choices, the resulting sentence is erroneous but not illegal and is a bar to subsequent imposition of a greater sentence.” (*Brown, supra*, at p. 962.)

With this in mind, we return to defendant’s argument that the court violated state double jeopardy laws when it changed his sentence on count 2 from concurrent to consecutive after remand. We begin by noting that the overall length of defendant’s second sentence did not violate California’s double jeopardy rule because, as we have held, a determinate term of 28 years, is not greater than the indeterminate sentence of 15 years to life the court imposed the first time. In addition, under *Serrato*, defendant’s second sentence could not have violated California double jeopardy principles because his first sentence under the One Strike statute was unauthorized.

As we shall explain, defendant’s reliance on *Ali* is misplaced. The defendant in *Ali* was convicted of three counts of credit card fraud. (*Ali, supra*, 66 Cal.2d at pp. 278-279.) After his first trial, the court sentenced him to prison on each count and ordered

that the terms run concurrently. After a second trial, the defendant was found guilty of the same three offenses and sentenced to prison on each count with the terms to run consecutively. (*Id.* at p. 281.) The Supreme Court stated that “consecutive sentences for separate offenses may not be imposed by a court on retrial when concurrent sentences imposed as a previous trial are vacated on appeal” and modified the judgment to provide that the defendant’s sentences would run concurrently. (*Id.* at pp. 281-282.) But the *Ali* court did not state what the issues were on appeal after the first trial or whether they involved an unauthorized sentence.

Moreover, to apply *Ali* as defendant suggests, would be contrary to the Supreme Court’s holding in *Serrato*, which was decided after *Ali*. In deciding *Serrato*, the court acknowledged its prior holding in *Ali*. The court explained that in *Henderson* and the cases that followed it (including *Ali*) the sentences imposed after the first trials were lawful, within the limits of the discretion conferred by statute for the offenses of which the defendants had been convicted, and that “the judgments pronounced at the first trials were reversed because of errors having nothing to do with the sentences.” (*Serrato, supra*, 9 Cal.3d at p. 764.) Thus, *Serrato* distinguished *Ali* because it did not involve an unauthorized sentence.

In an attempt to distinguish this case from *Serrato*, defendant divides his original sentence into two parts: (1) the imposition of two 15-year-to-life terms, and (2) the decision to sentence concurrently on count 2. He argues that while the first part of the sentence was unauthorized, the decision to sentence “concurrently on the two counts was valid and not ‘unauthorized.’” He contends “the exception to the double jeopardy protection established in *Serrato* for increasing ‘unauthorized’ sentences does not authorize changing the concurrent aspect of [his] original sentence because that component . . . was legal, appropriate, and statutorily authorized.”

We disagree with this approach. “When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not

limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme.” (*People v. Hill* (1986) 185 Cal.App.3d 831, 834 (*Hill*); accord *People v. Craig* (1998) 66 Cal.App.4th 1444, 1449-1452 [reviewing cases that apply this rule].) “The trial court is entitled to rethink the entire sentence to achieve its original and presumably unchanged goal.” (*Hill*, at p. 834) As the court observed in *Hill*, defendant is “trying to keep favorable aspects of the first sentence and to eliminate unfavorable aspects.” (*Id.* at p. 835.) He is “not entitled to such favor.” (*Ibid.*) We hold that the invalidity of defendant’s original One Strike sentence infected the entire sentence and that on remand, the court was entitled to reconsider all of its sentencing choices, including whether to sentence concurrently or consecutively on count 2.

For these reasons, we reject defendant’s claim that the court violated California double jeopardy law when it imposed a consecutive sentence on count 2 after remand.

B. There was No Prosecutorial Vindictiveness

Defendant contends that the judgment should be reversed because the court’s decision to sentence consecutively on count 2 on remand, when it had previously imposed a concurrent term, was the result of improper prosecutorial vindictiveness.

1. General Principles Regarding Presumption of Vindictiveness

This court recently discussed vindictive prosecution in *People v. Puentes* (2010) 190 Cal.App.4th 1480 (*Puentes*). In *Puentes*, we explained, “The concept of a vindictive prosecution applies not only to vindictiveness by a bench officer (*North Carolina v. Pearce*[, *supra*,] 395 U.S. 711 . . . (*Pearce*)), but also to conduct of a prosecutor (*Blackledge v. Perry* (1974) 417 U.S. 21 . . . (*Perry*)). ‘*Pearce* and *Perry* dealt with

postconviction action by the state in response to the defendant’s exercise of statutory rights. The central notion underlying the rule of those cases is that a person who has suffered a conviction should be free to exercise his right to appeal, or seek a trial de novo, without apprehension that the state will retaliate by “upping the ante” with more serious charges or a potentially greater sentence.’ (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1543) ‘To punish a person because he has done what the law plainly allows him to do is a due process violation “of the most basic sort.” [Citation.] In a series of cases beginning with . . . *Pearce* and culminating in *Bordenkircher v. Hayes* [(1978) 434 U.S. 357 . . .], the Court has recognized this basic—and itself uncontroversial—principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.’ (*United States v. Goodwin* (1982) 457 U.S. 368, 372) *Goodwin* distinguished the situation, however, in which a defendant exercises a pretrial right from one in which the prosecutor acts after the defendant has exercised a postconviction right. In the pretrial situation, no presumption of vindictiveness arises. A presumption of vindictiveness arises only if the prosecutor ‘ups the ante’ after exercise of a postconviction right.” (*Puentes, supra*, at p. 1484.)

“ ‘Where the defendant shows that the prosecution has increased the charges in apparent response to the defendant’s exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness. [Citation.] The defendant need not demonstrate that the prosecution in fact acted with a retaliatory motive. [Citation.] Once this prima facie case is made, the prosecution bears a “heavy burden” of dispelling the appearance of vindictiveness as well as actual vindictiveness.’ ” (*Puentes, supra*, 190 Cal.App.4th at p. 1486.)

2. *Applicability of Presumption of Vindictiveness*

Before addressing defendant's arguments, we question whether the presumption of vindictiveness applies in the situation presented here. Our State Supreme court has defined the presumption of unconstitutional vindictiveness as "a legal presumption that arises *when the prosecutor increases the criminal charge against the defendant*" under circumstances that "are deemed to present a 'reasonable likelihood of vindictiveness.'" (*In re Bower* (1985) 38 Cal.3d 865, 879 (*Bower*), italics added.)

Although *People v. Bracey, supra*, 21 Cal.App.4th at page 1543 suggests that prosecutorial vindictiveness occurs when the state "ups the ante" "with more serious charges or a potentially greater sentence," the case it cites for that proposition, *Perry*, involved a prosecutor who "upped the ante" by filing more serious, felony charges against the defendant after the defendant exercised his right to appeal his misdemeanor conviction. Thus, it is the prosecution's exercise of its charging discretion that results in a "potentially greater sentence." Similarly, the California cases that have applied the presumption of vindictiveness all involved prosecutors who "upped the ante" by exercising their charging discretion. (See *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 368; *Bower, supra*, 38 Cal.3d 865, 869, 873; *Barajas v. Superior Court* (1983) 149 Cal.App.3d 30, 32; *Robinson v. Superior Court* (1986) 181 Cal.App.3d 746, 748.)

In this case, there was no change in the criminal charges after defendant appealed. His convictions for two counts of continuous sexual abuse of a child remained unchanged and the case was remanded solely for resentencing. Consequently, the prosecutor did not exercise his charging discretion after remand.

Defendant argues that the presumption applies because the prosecution "upped the ante" by changing its sentencing recommendation to the court after the case was remanded. The parties do not address the question whether the presumption of vindictiveness applies where the alleged vindictiveness is based on the prosecutor's

sentencing recommendation. But we need not address that question, since another analysis disposes of defendant's prosecutorial vindictiveness claim.

3. Analysis

Defendant's prosecutorial vindictiveness claim is based on the following facts. At the first sentencing hearing, the prosecutor argued that consecutive sentencing was mandatory and the court had no discretion to sentence defendant concurrently under the One Strike statute (§ 667.61) and suggested that if the court was considering concurrent sentences, the parties brief the issue. Defense counsel disagreed and argued that subdivision (i) of section 667.61, which provides for mandatory consecutive sentencing when certain enumerated sex crimes "involve separate victims," did not apply because continuous sexual abuse of a child was not one of the offenses listed in subdivision (i) of the statute. The prosecutor reviewed the statute and agreed that the mandatory consecutive sentencing provision in subdivision (i) of section 667.61 did not apply to continuous sexual abuse of a child. When the court asked the prosecutor whether he had "any other position on the question of consecutive versus concurrent, the prosecutor said, "No, your Honor. We'd submit to the Court." Prior to the second sentencing hearing, the prosecutor filed a sentencing memorandum, in which he argued for consecutive sentencing.

Defendant contends that prosecutorial vindictiveness has been established because after the prosecutor acknowledged at the first sentencing hearing that the court had the discretion to sentence either consecutively or concurrently, the prosecutor took no position on the issue and submitted it to the court. Defendant argues that when the prosecutor explicitly urged the court to sentence defendant consecutively after remand, he made a "distinct change in position" that "upp[ed] the ante": (1) by requesting consecutive sentencing after he took no position the first time, and (2) by requesting a term of 32 years.

We are not persuaded. At the first sentencing hearing, the prosecutor said, “I believe the Court has no choice but to sentence Mr. Hamm to 30 years to life; 15 years for each count consecutive.” That the prosecutor later conceded that the decision to sentence defendant consecutively was discretionary, not mandatory, does not mean he was abandoning his recommendation that the court sentence defendant to two consecutive terms of 15 years to life.

In his memorandum for the second sentencing hearing, the prosecutor observed that the court has wide latitude in fashioning an appropriate sentence and set forth seven sentencing options ranging from six to 32 years. The prosecutor urged the court to treat each victim equally and sentence defendant to the 12-year middle term on count 1 plus 12 years consecutive on count 2 or the 16-year upper term on count 1 plus 16 years consecutive on count 2. In our view, urging the imposition of a determinate term of either 24 years or 32 years after previously recommending sentencing defendant to 30 years to life was not “upping the ante.” As we have held, a determinate sentence for a fixed term is not greater than an indeterminate sentence with a life maximum. In addition, the record reflects that at both sentencing hearings, the prosecutor urged the court to sentence defendant consecutively on count 2. The prosecution did not change its position with regard to this point.

For these reasons, we conclude there was no prosecutorial vindictiveness.

DISPOSITION

The judgment is affirmed.

LUCERO, J.*

I CONCUR:

BAMATTRE-MANOUKIAN, ACTING P.J.

I CONCUR IN THE JUDGMENT ONLY:

MIHARA, J.

***Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.**