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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TELLEY TYRONE ALLEN, Defendant and Appellant.	B260165 (Los Angeles County Super. Ct. No. GA090152)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stanley Blumenfeld, Judge. Affirmed with directions.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Stacy S. Schwartz, Deputy Attorney General, for Plaintiff and Respondent.

On August 1, 2014, a jury convicted Telley Tyrone Allen (Allen) of committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)).[1] In a bifurcated proceeding, the trial court found that Allen had been previously convicted for forcible rape (§ 261, subd. (a)(2)). On November 12, 2014, the court sentenced Allen to 55 years to life in state prison.

On appeal, Allen advances two principal arguments. First, he contends that the trial court committed reversible error by instructing the jury with CALCRIM No. 1110, which states that a reasonable mistake as to the victim's age and consent are not valid defenses. Second, he argues that his 55 years to life sentence violates his federal and state constitutional right to be free from cruel and/or unusual punishment. We disagree with both contentions and, accordingly, affirm the judgment.[2]

BACKGROUND

A. THE CRIME

On May 8, 2013, the victim was 13 years old and in the seventh grade. On that day, after school, the victim visited a friend's house. After leaving her friend's house, the victim began walking home. As she walked by the intersection of Summit and Painter Streets in Pasadena, Allen pulled his car up next to her. Allen opened his door and asked her how old she was; when she said 13, he drove away. A short while later, as she approached the intersection of Raymond and Painter, the victim once more encountered

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Allen also argues that the trial court improperly imposed a sentence enhancement under both section 667, subdivision (a)(1) and section 667.51, subdivision (a) based on his prior conviction for forcible rape. Although the court stayed the five-year enhancement imposed pursuant to section 667, subdivision (a)(1), it was nonetheless improper for the court to base both enhancements on the same prior conviction. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1149–1153.) Accordingly, while we affirm the judgment, as discussed below, we also remand this matter to the trial court for the limited purpose of striking the section 667, subdivision (a)(1) enhancement and correcting the abstract of judgment.

Allen in his car. Again, Allen opened his car door, but this time he did not ask her age; instead he asked if she needed a ride. The victim told him no. Allen persisted, asking again if she needed a ride and offering to take her "wherever" she needed to go. This time, the victim said yes.

As they began driving in the general direction of her home, which was near the Rose Bowl, Allen offered to smoke a "blunt" or marijuana cigarette with the victim and she agreed. As they were driving and smoking, Allen asked the victim whether she was really only 13 years old and she confirmed that as her age.

Instead of taking the victim directly to her house, Allen drove up a dirt road—a "trail with nothing but trees"—into a deserted and wooded area above the Rose Bowl. When the victim asked where he was taking her, Allen told her that he would take her home after they finished the blunt. After Allen parked the car in a dirt patch near some tall bushes, and after he finished a phone call, the victim again asked when he would take her home. Allen told her that he would take her home after he "fucked" her. Allen then took off his clothes and put on a condom. After the victim took off her jeans, Allen told her to "climb on top of him." The victim complied and the two had sexual intercourse for approximately 10 to 15 minutes. Allen then drove the victim home. On that day, Allen was on parole for a 2003 conviction for forcible rape and was wearing a GPS ankle bracelet.

When the victim eventually spoke to the police about her encounter with Allen, she lied, telling the police that Allen had forced her into his car at gun point and that he had been on top of her during the sexual intercourse. Before the preliminary hearing, however, the victim told police the truth—that is, there was no gun and she was on top. At the preliminary hearing, the court found that the victim was "credible," "articulate," and "specific"—"She admits when she's lying. She admits why she's lying." As a result, the court found that there was sufficient cause that Allen had engaged in lewd conduct with a child under the age of 14.

B. ALLEN'S TRIAL, CONVICTION, AND SENTENCING

At trial, the People, inter alia, offered into evidence two tape recorded conversations involving Allen—the first was a conversation among Allen, the victim, and the victim's mother, which Allen had surreptitiously recorded; the second was a recording of the police's interview of Allen. In both recordings, Allen made a number of admissions, both direct and implied, that he did in fact have sexual intercourse with the victim. For example, in both recordings, Allen stated that he did not "force" himself on the victim. In both recordings, Allen stated that he had picked up the victim to give her a ride, that the two of them smoked marijuana together, and that the victim got on top of him and started "freaking" on him. In addition, Allen repeatedly stated that he was "wrong," wrong "for thinking with [his] dick" and that what made it "so bad is she a child and I didn't know she was 13. I thought she was at least, like 18. And[,] . . . looking at the ass. You know me. I'm—I'm not gonna lie, you know. I'm a—I'm a man and when I see somebody that, you know, thick, then you react."

On July 31, 2014, the trial court, inter alia, instructed the jury over defense counsel's objection with CALCRIM No. 1110, which, in pertinent part, provides: "It is not a defense [to the charged offense of committing a lewd act on a child under 14] that the other person may have consented to the act. Nor is it a defense that there may have been a reasonable mistake as to the child's age." On that same day, after less than an hour of deliberation, the jury returned a guilty verdict.

With regard to sentencing, the People recommended that the court impose an indeterminate sentence of 60 years to life. The People based its recommendation on the following analysis: under the "One Strike" law (§ 667.61), the court was required to sentence Allen to 25 years to life[3]; because Allen had previously suffered a prior

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[3] The "'One Strike' law" (*People v. Rayford* (1994) 9 Cal.4th 1, 8, overruled on other grounds in *People v. Acosta* (2002) 29 Cal.4th 105, 118–120 & fn. 7) provides that a defendant convicted of a specified sex offense "shall be punished by imprisonment in the state prison for 25 years to life" if he or she had been previously convicted of one of the specified sex offenses. (§ 667.61, subds. (a), (c) & (d)(1); *Acosta*, at p. 111.) Both

serious/violent felony conviction, the court was further required, pursuant to sections 667, subdivision (d) and 1170.12, subdivision (b), to double the 25-years-to-life sentence to 50 years to life; the People further believed that Allen's sentence should be enhanced by 10 years—an additional five years pursuant to section 667.51[4] and a further five years pursuant to section 667, subdivision (a)(1).[5] In contrast, Allen argued that the One Strike law was unconstitutional and urged the court to sentence him instead to a determinate prison term of 17 years—that is, impose a midterm sentence of six years for his lewd conduct conviction, doubled for his prior rape conviction, plus a five year enhancement for his prior serious felony conviction.

On November 12, 2014, having previously found that Allen had been convicted of forcible rape, the court sentenced Allen to 55 years to life in state prison. The court, in effect, adopted the People's sentencing recommendation, but stayed the five-year enhancement imposed pursuant to section 667, subdivision (a). At the time of his sentencing, Allen was 39 years old.

DISCUSSION

A. THE CALCRIM NO. 1110 INSTRUCTION WAS PROPER

Allen argues that a mistake of fact defense is available for section 288, subdivision (a). As discussed below, we disagree.

1. Standard of review

We review jury instructions de novo to determine "whether the jury was fully and fairly instructed on the applicable law." (*People v. Partlow* (1978) 84 Cal.App.3d 540, 558.) In this case, the decision not to give a mistake of fact instruction was based on the

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rape (§ 261) and lewd acts committed against a child under 14 years of age (§ 288, subd. (a)) are among the specified sex offenses under the One Strike law. (See § 667.61, subds. (c)(1) & (4).)

[4] Section 667.51 imposes a five-year enhancement for any person convicted of, inter alia, rape.

[5] Section 667, subdivision (a)(1) imposes a five-year enhancement for a prior conviction of a serious felony.

trial court's understanding that section 288, subdivision (a) does not allow for a mistake of fact defense. The proper interpretation of a statute and its application to undisputed facts is a question of law (*Smith v. Rae–Venter Law Group* (2002) 29 Cal.4th 345, 357, superceded by statute on another point as acknowledged in *Sonic-Calabasas A., Inc. v. Moreno* (2011) 51 Cal.4th 659, 673, fn. 2.) and thus also subject to de novo review (e.g., *Pollak v. State Personnel Bd.* (2001) 88 Cal.App.4th 1394, 1404). Therefore, we are not bound by the trial court's interpretation of section 288, subdivision (a) as forbidding a mistake of fact defense, but instead must make an independent judgment as to the proper statutory interpretation of section 288, subdivision (a). (See *Union Bank of California v. Superior Court* (2004) 115 Cal.App.4th 484, 488.) As we explain below, Allen's claim regarding CALCRIM No. 1110 lacks merit.

2. A reasonable mistake of fact is not a defense to section 288, subdivision (a)

Allen argues that because "'mens rea is the rule, rather than the exception,'" a mistake of fact defense should have been available to him. The principle of mens rea or wrongful intent is reflected in sections 20 and 26. Section 20 provides, "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"; and section 26 provides, "Persons who committed the act or made the omission charged under an ignorance or mistake of fact . . . disproves any criminal intent." Allen relies, in principal part, on *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 (*Hernandez*), in which the California Supreme Court, based on sections 20 and 26, held that the defendant's good faith, reasonable belief that a defendant's sex partner was 18 or older (but was actually underage) can be a defense in statutory rape prosecutions under former section 261, subdivision (1) (now section 261.5). Allen's reliance on *Hernandez* is misplaced.

In *People v. Olsen* (1984) 36 Cal.3d 638, 644–649 (*Olsen*), our Supreme Court held that a good faith, reasonable mistake of age is not a defense to a prosecution under section 288, subdivision (a) when the victim is under 14 years old. In so holding, the court expressly declined to extend the rule in *Hernandez*, *supra*, 61 Cal.2d 529 that a

reasonable but mistaken belief that the victim was at least 18 years old could provide a defense to statutory rape. In distinguishing *Hernandez*, the *Olsen* court explained: "There exists a strong public policy to protect children of tender years. . . . [S]ection 288 was enacted for that very purpose. [Citations.] Furthermore, even the *Hernandez* court recognized this important policy when it made clear that it did not contemplate applying the mistake of age defense in cases where the victim is of 'tender years.'" (*Olsen*, at p. 646.) The *Olsen* court cited a number of legislative provisions demonstrating "[*t*]*ime and again, the Legislature has recognized that persons under 14 years of age are in need of special protection.* This is particularly evident from the provisions of section 26. That statute creates a rebuttable presumption that children under the age of 14 are incapable of knowing the wrongfulness of their actions and, therefore, are incapable of committing a crime. A fortiori, when the child is a victim, rather than an accused, similar 'special protection,' not given to older teenagers, should be afforded. By its very terms, section 288 furthers that goal." (*Olsen*, at pp. 647–648, fn. omitted, italics added.)

Allen's argument focuses on the fact that he believed that the victim was 19 years old, which would make his actions "innocent" since having sex with a 19-year-old person is not a crime. In *Olsen, supra,* 36 Cal.3d 638, the perpetrator believed the victim to be 16 years old; however, having sex with a 16 year old would still have constituted a crime. (*Id.* at p. 641.) Allen's argument misses the central point of *Olsen*. In *Olsen*, the court did not focus on the perpetrator. Rather, the court focused on the public policy of protecting those under the age of 14. (*Id*. at p. 646.) As noted, the *Olsen* court focused on "a strong public policy to protect children of tender years." (*Ibid*.) The fact remains, as *Olsen* acknowledged, "[t]ime and again, the Legislature has recognized that persons under 14 years of age are in need of special protection." (*Id*. at p. 647.)

In *People v. Paz* (2000) 80 Cal.App.4th 293, the defendant raised a similar argument. There, the defendant argued that notwithstanding *Olsen*, *supra*, 36 Cal.3d 638 he was entitled to present a mistake of age defense to a prosecution under section 288, subdivision (c)(1), on the ground that a victim who is 14 or 15 years old "does not warrant the same public policy child protection given by the law to victims under the age

of 14." (*Paz*, at p. 295, italics omitted.) After reviewing the legislative history of subdivision (c)(1), the Court of Appeal disagreed and concluded that a mistake of age defense would undermine the Legislature's objective "to protect 14- and 15-year-olds from predatory older adults to the same extent children under 14 are protected by subdivision (a) of section 288." (*Id.* at p. 297.) The *Paz* court concluded that "the public policy rationale of *Olsen* for rejecting a good faith mistake of age in section 288 cases involving victims under age 14 holds true for victims of ages 14 and 15 as well—'to protect children against harm from amoral and unscrupulous [adults] who prey on the innocent.'" (*Paz*, at p. 298.) The *Paz* court also noted, "The courts have regularly refused to extend . . . *Hernandez*, *supra*, 61 Cal.3d at page 529, to section 288 crimes." (*Paz*, at p. 300.)

Allen tries to distinguish *Olsen*, *supra*, 36 Cal.3d 638, and the cases on which *Olsen* relies, by observing that in those cases the facts were such that the defendant's mistake of fact would not have exonerated him, since the defendant was guilty of other crimes as well. Allen's observation is beside the point. The *Olsen* decision and the earlier decisions on which *Olsen* rests were driven by public policy considerations. As *Olsen* makes clear, it is the public policy rationale and reasoning that is decisive: "The *reasoning* of the *Tober* [*People v. Tober* (1966) 241 Cal.App.2d 66)], *Toliver* [*People v. Toliver* (1969) 270 Cal.App.2d 492] and *Gutierrez* [*People v. Gutierrez* (1978) 80 Cal.App.3d 829] courts is persuasive. *There exists a strong public policy to protect children of tender years.* As *Gutierrez* indicates, section 288 was enacted for that very purpose. [Citations.] Furthermore, even the *Hernandez* court recognized this important policy when it made clear that it did not contemplate applying the mistake of age defense in cases where the victim is of 'tender years.' [Citations.] [¶] . . . [¶] The language in *Hernandez*, together with the *reasoning* in *Tober*, *Toliver* and *Gutierrez*, compel the conclusion that a reasonable mistake as to the victim's age is not a defense to a section 288 charge." (*Olsen*, at pp. 646–647, italics added.)

Allen further claims that in more recent decisions than *Olsen*, *supra*, 36 Cal.3d 638, our Supreme Court "has construed criminal statutes to include a guilty knowledge

requirement, even if only criminal negligence and even if the statutes do not articulate such a requirement." While it may be true that the Supreme Court has applied this principle in a variety of contexts ranging from firearm possession (see *In re Jorge M.* (2000) 23 Cal.4th 866; 887; *People v. King* (2006) 38 Cal.4th 617, 620) to methamphetamine manufacture (see *People v. Coria* (1999) 21 Cal.4th 868), none of the cases cited by Allen involved sex offenses, let alone sex offenses committed against minors. Allen does not and cannot point to any cases or amendments to section 288 showing any weakening in the strong public policy against allowing a reasonable mistake of fact as a defense.[6]

B. THE SENTENCE WAS NOT CRUEL AND/OR UNUSUAL

Allen contends that his sentence of an indeterminate term of 55 years to life in prison is "grossly disproportionate and excessive punishment for the convictions he suffered and thereby contravenes his right to be free from cruel and unusual punishment guaranteed by the Eighth Amendment to the United States Constitution and by Article I, section 17 of the California Constitution." Allen contends further that "[s]ince the Legislature and the voters have failed to bring the California sentencing laws into line with the well-accepted criteria of individual accountability and proportionate punishment, which is constitutionally compelled, this Court should do it for them." We reject his contentions.

1. The sentence was proper under the California Constitution

Under article I, section 17 of the California Constitution, cruel or unusual punishment occurs when a sentence is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*), fn. omitted, superceded by statute on other grounds as stated in *People v. West* (1999) 70 Cal.App.4th 248, 256.)

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[6] It should be noted that courts allow a mistake of fact defense when the charge is that the defendant was *attempting* to commit a lewd act with a child under 14 years of age. (See *People v. Hanna* (2013) 218 Cal.App.4th 455, 461.)

The *Lynch* court identified a three-pronged test for courts to use when reviewing disproportionality claims: "First, they examined the nature of the offense and the offender. [Citation.] Second, they compared the punishment with the penalty for more serious crimes in the same jurisdiction. [Citation.] Third, they compared the punishment to the penalty for the same offense in different jurisdictions." *(People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.)[7]

"In examining 'the nature of the offense and the offender,' we must consider not only the offense as defined by the Legislature but also 'the facts of the crime in question' (including its motive, its manner of commission, the extent of the defendant's involvement, and the consequences of his acts); we must also consider the defendant's individual culpability in light of his age, prior criminality, personal characteristics, and state of mind." (*People v. Crooks* (1997) 55 Cal.App.4th 797, 806.)

"Whether a particular punishment is disproportionate to the offense is . . . a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible." (*Lynch*, *supra*, 8 Cal.3d at p. 423.) Mere length of imprisonment is insufficient to demonstrate the punishment is so disproportionate "that it shocks the conscience and offends fundamental notions of human dignity." (*Id*. at p. 424, fn. omitted.)

In other words, this "inquiry commences with *great deference* to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494, italics added.) Indeed, California sentencing statutes imposing "severe punishment on

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[7] Allen does not make any showing on the second and third prongs of the *Lynch*, *supra*, 8 Cal.3d 410 test, limiting himself to argument only on the first prong.

habitual criminals have long withstood constitutional challenge." (*People v. Cartwright, supra,* 39 Cal.App.4th at pp. 1136–1137.) "Only in the *rarest of cases* could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*Martinez*, at p. 494, italics added.) In short, "[b]ecause it is the Legislature which determines the appropriate penalty for criminal offenses, defendant must overcome a 'considerable burden' in convincing us his sentence was disproportionate to his level of culpability." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196–1197.) This is not one of those exceptionally rare cases.

a. The nature of the offense and the offender

First, the offense, as noted above, is based on a strong public interest in protecting children against harm from amoral and unscrupulous adults who prey on them. Second, the offender in this case was a convicted sex offender, who was out on parole for forcible rape. When Allen first approached the victim and learned that she was only 13 years old, he drove away. But he did not stay away. Instead, knowing that she was child, he came back and lured her into his car with an offer of a ride to wherever she wanted to go and then the offer of getting her high by smoking a blunt. Instead of driving her home, Allen, after the victim reaffirmed that she was only 13 years old, drove her to a secluded spot so that he could have sex with her. As Allen later explained, when he sees someone as attractive as the victim, he "react[s]." By his actions and his words, Allen showed that he is a predator and a particularly dangerous one at that, one who knowingly and quickly gives into amoral and illegal impulses—despite being told *twice* that the victim was only 13 years old, he nonetheless decided to go forward with his plan to have sex with her.

b. Penalties for more serious crimes in the same jurisdiction

Allen's sentence is not disproportionate when compared to other crimes that do not result in death but have sentences that are substantial or even greater than his. For example, in *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230, the Court of Appeal upheld a 135-years-to-life sentence for 16 sex offenses against four minors. Similarly, in *People v. Wallace* (1993) 14 Cal.App.4th 651, 666, the Court of Appeal rejected a cruel or unusual challenge to a 283 year, eight month sentence for 46 sex offenses against

seven women on four separate occasions. In *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 531–532, the court held a sentence of 129 years upon the conviction of multiple sex offenses was not cruel or unusual punishment.

Even when we consider cases that do not involve multiple offenses, it is clear that Allen's sentence is not cruel or unusual. For example, in *In re Maston* (1973) 33 Cal.App.3d 559, 565, the court upheld a life sentence without the possibility of parole for aggravated kidnapping where the victim was injured but not killed as not being cruel or unusual punishment. In *People v. Crooks*, *supra*, 55 Cal.App.4th at pages 806–808, the court held that a 25-years-to-life sentence for aggravated rape, where the defendant had no prior felonies and caused no great bodily injury, was not disproportionate under the *Lynch*, *supra*, 8 Cal.3d 410 test. In *People v. Estrada* (1997) 57 Cal.App.4th 1270, 1281–1282, the court held that a 25-years-to-life sentence for one forcible rape during a burglary, without use of a weapon and with no prior felonies, did not constitute cruel or unusual punishment.

c. Penalties for the same or similar offense in other jurisdictions

Other jurisdictions have upheld sentences for similar crimes equal to or greater than Allen's punishment. (See, e.g., *Gibson v. State* (Fla.1998) 721 So.2d 363, 369–370 [mandatory life sentence not cruel or unusual where defendant had no prior record]; *State v. Foley* (La. 1984) 456 So.2d 979, 984 [life sentence for juvenile rape defendant is constitutional]; *State v. Green* (N.C. 1998) 502 S.E.2d 819, 834 [mandatory life sentence for juvenile defendant constitutional], superceded by statute on other grounds as stated in *In re J.L.W.* (N.C.App. 2000) 525 S.E.2d 500; see generally *Edwards v. Butler* (5th Cir. 1989) 882 F.2d 160, 167 [mandatory sentence of life for one aggravated rape constitutional]; *Land v. Commonwealth* (Ky. 1999) 986 S.W.2d 440, 441 [life sentence for rape not cruel and unusual].)

Even if other jurisdictions imposed far lighter sentences than California statutes for lewd acts committed on a child under the age of 14, that would not necessarily mean that Allen's punishment is cruel or unusual. California is not required to conform its

Penal Code to either the majority rule or "'the least common denominator of penalties nationwide.'" (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.)

In short, we hold that Allen's sentence, given his prior forcible rape conviction, was in accord with the statutory scheme designed to protect children from sexual predators and was not so disproportionate to the crime that "it shocks the conscience and offends fundamental notions of human dignity." (*Lynch, supra,* 8 Cal.3d at p. 424, fn. omitted.)

2. *The sentence was proper under the federal constitution*

Despite the similarity in language—the California Constitution prohibits "cruel or unusual punishment," while the Eight Amendment to the United States Constitution prohibits "cruel and unusual" punishment—the hurdles a defendant must surmount to demonstrate cruel and unusual punishment under the federal Constitution are, if anything, higher than under the state Constitution. (See generally *People v. Cooper* (1996) 43 Cal.App.4th 815, 819–824, and cases cited.) Strict proportionality between crime and punishment is not required. "'Rather, [the Eighth Amendment] forbids only extreme sentences that are "*grossly* disproportionate" to the crime.'" (*People v. Cartwright, supra,* 39 Cal.App.4th at p. 1135, italics added; see *Harmelin v. Michigan*. (1991) 501 U.S. 957, 1001 (*Harmelin*); *Rummel v. Estelle* (1980) 445 U.S. 263, 271 (*Rummel*).) "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." (*Rummel,* at p. 272.)

Rummel, supra, 445 U.S. 263 and *Harmelin, supra,* 501 U.S. 957, illustrate the difficulty of Allen's burden here. In *Rummel,* the United States Supreme Court rejected an Eighth Amendment challenge to a life sentence based on the defendant's conviction for credit card fraud of $80, passing a $28.36 forged check, and obtaining $120.75 by false pretenses. (*Rummel,* at pp. 265, 266, 268–286.) Similarly, in *Harmelin,* the high court ruled that a mandatory sentence of life without the possibility of parole for possession of 672 grams of cocaine did not violate the Eighth Amendment. (*Harmelin,* at pp. 961, 995.)

In short, the protection afforded by the Eighth Amendment is narrow. It applies only in the "'exceedingly rare'" and "'extreme'" case. (*Ewing v. California* (2003) 538 U.S. 11, 21.) We are not convinced this is such a case. Allen, while on parole for a serious sexual assault, committed another sexual crime against a vulnerable member of society—a 13 year old girl—and did so in a highly predatory manner. Allen cites no persuasive authority to support his claim that this is one of those rare cases in which a sentence is so grossly disproportionate to the gravity of the offense that it violates the Eighth Amendment's proscription against cruel and unusual punishment. Accordingly, we conclude this is not the exceedingly rare and extreme case that violates the federal Constitution.

DISPOSITION

The trial court is directed to strike the Penal Code section 667, subdivision (a)(1) five-year enhancement. The trial court is further directed to prepare an amended abstract of judgment reflecting this change and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.