

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

J.I.A.,

Defendant and Appellant.

G040625

(Super. Ct. No. 04NF4197)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
James A. Stotler, Judge. Affirmed as modified.

Richard Power, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and
Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

J.I.A. appeals from a judgment after a jury convicted him of two counts of
sodomy by force, two counts of kidnapping to commit robbery, two counts of dissuading

a witness by force, two counts of second degree robbery, kidnapping to commit a sexual offense, forcible oral copulation, and attempted second degree robbery, and found true numerous enhancements. He argues his sentence of 50 years to life plus two consecutive life terms constitutes cruel and unusual punishment under the federal and state Constitutions.¹

As we explain below more fully, J.A. was 14 years old at the time of the offenses and 18 years old at the time of sentencing. His minimum period of actual confinement is 56 and one-half years, which with credits makes him eligible for parole when he is approximately 70 years old. Although J.A. committed violent sexual offenses against four separate victims who suffered great trauma, J.A.'s punishment was unconstitutional based on his age at the time he committed the offenses. The judgment is affirmed as modified; as so modified, J.A. will be eligible for parole at age 56.

FACTS

Victim No. 1-A.R.

In October 2004, 12-year-old A.R. was walking home from school when 14-year-old J.A., armed with a screwdriver, told A.R. to get on his bike. A.R. complied, and J.A. took him to a nearby building and led him to the roof. J.A. told A.R. to kneel, which he did, and J.A. pulled out his penis and told him to “suck it.” A.R. refused, and J.A. told him to “drop [his] pants.” A.R., fearing for his life, took off his pants. J.A. sodomized A.R. “for a long time[.]” After J.A. stopped, he searched A.R.'s backpack and left. A.R. went home, told his mother what happened, and called the police. A sexual assault examination revealed small hemorrhages and redness in A.R.'s anal area. His injuries were consistent with forcible anal penetration.

¹ We invited the parties to file supplemental briefs on three recent cases: *Graham v. Florida* (2010) ___ U.S. ___, [130 S.Ct. 2011] (*Graham*), *People v. Caballero* (2011) 191 Cal.App.4th 1248 (*Caballero*), and *People v. Mendez* (2010) 188 Cal.App.4th 47 (*Mendez*).

Victim No. 2-P.J.

About three weeks later, 13-year-old P.J. was walking to school when J.A. asked him for \$1. P.J. replied he had only \$1 and needed it for the bus. J.A. took out a knife and demanded \$1, and P.J. complied. J.A. told P.J. to walk with him. J.A. asked P.J. if he had any more money, and P.J. took out his wallet and gave him \$40. J.A. led P.J. to an apartment complex, but when they saw people, they left. J.A. led P.J. to a secluded area where he again pulled out the knife and threatened him. J.A. told P.J. that if he told anybody what happened, J.A. would kill him, and if J.A. was “locked up,” J.A. knew people who would kill him. P.J. reported the incident to the police.

Victim No. 3-R.V.

The next month, 12-year-old R.V. was walking to school when J.A. asked him for the time. J.A. left and then came back and asked R.V. for \$1. R.V. said he did not have any money, and J.A. pulled out a knife, held it against R.V.’s back, and led him across the street to an apartment building, where J.A. took his compact disc player. J.A. led R.V. back across the street to another apartment building, where J.A. found an open door. J.A., armed with a knife, told R.V. to suck his penis or go outside naked. J.A. forced him to his knees and put his penis in R.V.’s mouth. J.A. told him to take off his clothes, get on the bed on his side, and hold on to the bed frame. J.A. sodomized R.V. for five to 10 minutes. When he was done, J.A. got dressed and threatened to kill R.V. if he told anyone what happened. When R.V. got to school, he told the principal someone had pulled a knife on him. He later told the police the entire story. A sexual assault examination revealed bleeding, bruises, and redness in R.V.’s anal area. His injuries were consistent with sexual assault.

Victim No. 4-A.M.

Later the same day, 12-year-old A.M. was walking to school when J.A. asked him for \$1. A.M. told him that he did not have any money. J.A. pulled out a knife and told A.M. to give him something or he was going to “shank” him. J.A. told A.M. to walk to the alley. A.M. dropped his backpack and ran to school. A.M. told the principal what happened.

Later that day, Officer Joseph Faria found J.A. in an alley armed with a Swiss Army knife that had several blades and different instruments. J.A.’s DNA was found in sperm recovered during A.R.’s and R.V.’s physical examinations.

Trial Court Proceedings

An amended information charged J.A. with the following: (1) John Doe No. 1/A.R.-sodomy by force (Pen. Code, § 286, subd. (c)(2))² (count 1); (2) John Doe No. 2/P.J.-kidnapping to commit robbery (§ 209, subd. (b)(1)) (count 2), dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) (count 3), and second degree robbery (§§ 211, 212.5, subd. (c)) (count 4); (3) John Doe No. 3/R.V.-kidnapping to commit a sexual offense (§ 209, subd. (b)(1)) (count 5), kidnapping to commit robbery (§ 209, subd. (b)(1)) (count 6), sodomy by force (§ 286, subd. (c)(2)) (count 7), forcible oral copulation (§ 288a, subd. (c)(2)) (count 8), dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) (count 9), and second degree robbery (§§ 211, 212.5, subd. (c)) (count 10); and (4) John Doe No. 4/A.M.-attempted second degree robbery (§§ 664, 211, 212.5, subd. (c)) (count 11).

As to counts 7 and 8, the information alleged J.A. kidnapped the victim in violation of sections 207, 209, and 209.5 (§ 667.61, subs. (b) & (e)), and the movement of the victim substantially increased the risk of harm to him (§ 667.61, subs. (c) & (d)(2)). With respect to counts 1, 7, and 8, the information alleged J.A. personally used a dangerous and deadly weapon, a knife (§§ 12022, 667.61, subs. (a),

² All further statutory references are to the Penal Code, unless otherwise indicated.

(b), (c), & (e)(4)), and he committed the offenses against multiple victims (§ 667.61, subd. (e)(5)). Finally, the information alleged J.A. personally used a dangerous and deadly weapon, a knife (§§ 12022, subd. (b)(1), 1192.7), as to counts 2, 3, 4, 5, 6, 9, 10, and 11. The jury convicted J.A. on all counts and found true all the enhancements.

In preparation for the sentencing hearing, the Orange County Probation Department filed a Presentence Report. After the prosecutor filed his sentencing brief, J.A. filed a sentencing brief pursuant to *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), arguing multiple life sentences is cruel and unusual punishment as applied to him, and the prosecutor responded. Meanwhile, Dr. Martha Rogers submitted a “Report of Psychological Evaluation” and “Summary of Case Records.” Although Rogers’s submissions and the Presentence Report are confidential, we will provide some of their general contents to provide context for J.A.’s claims.

With respect to his unstable and abusive upbringing, J.A.’s mother neglected him, and his father and stepfather, who both had substance abuse problems, were physically and emotionally abusive. When he was five or six years old, he was visiting family in Mexico when a family friend took J.A. into the woods and forced J.A. to suck his penis. He first had sexual intercourse when he was 13 years old (with a 14-year-old female) and when he was 14 years old, he had sexual intercourse with a 30-year-old woman. He experimented with alcohol and marijuana at the age of 12 or 13, and when he was arrested for the instant offenses, he smoked two packs of cigarettes per day.

As to his behavior, J.A. began misbehaving when he was in sixth grade—he could not follow rules, bullied other students, and fought. He was first suspended and then expelled from school. He started on a course of progressively more serious crimes—he stole, trespassed, and robbed.

With respect to his psychological assessments, at the age of eight years old, J.A.’s intelligence quotient (IQ) tests indicated he was in the mentally retarded range. He

had “significantly low cognitive ability with commensurate adaptive behavior deficits.” He was identified for special education classes by the time he was eight years old. At the age of 12, achievement scores indicated he was in “the mentally deficient range.” Although a school psychologist reported 13-year-old J.A.’s assessment scores placed him in the “*borderline to low average range*,” Rogers opined “[h]e was still functioning at the level of mental retardation.”

At the sentencing hearing, the trial court indicated it had considered the presentence report, the sentencing briefs, J.A.’s juvenile record report, and Rogers’s submissions. After hearing counsels’ arguments, the court denied J.A.’s *Dillon* motion. The court explained it had considered the nature of the offenses and the offender, including J.A.’s age, criminal record, personal characteristics, and state of mind. The court stated J.A.’s “age is a significant focus in this case. And I have searched my soul on this one because of the age of [J.A.], but age coupled with everything else in this case, does not indicate that a *Dillon* motion should be granted, either on the basis that the sentencing provisions that apply to this case constitute cruel and unusual punishment in the abstract or that the sentencing provisions in this case as applied to [J.A.] are cruel and unusual. The Legislature has spoken in terms of terms involved and the mandatory provisions of this sex offender law. And when you look at the big picture here, on neither of those grounds can I grant a *Dillon* motion. And so the *Dillon* motion to reduce the sentencing, that is to somehow avoid the mandatory sentencing provisions in this case and the terms involved in this case is simply not well-taken.”

The trial court sentenced 18-year-old J.A. to prison as follows: count 1-25 years to life (§§ 667.6, subd. (d), 667.61); count 2-consecutive term of life with the possibility of parole (§§ 667.6, subds. (c) & (d)); count 6-consecutive term of life with the possibility of parole (§§ 667.6, subds. (c) & (d)); and count 7-consecutive term of 25 years to life (§§ 667.6, subd. (d), 667.61). The court imposed concurrent sentences on counts 8 and 11. The court imposed and stayed sentences on counts 3, 4, 5, 9, and 10.

The court either struck or stayed sentencing on all enhancement allegations. J.A.’s total term in state prison is 50 years to life plus two consecutive life terms with the possibility of parole terms.

DISCUSSION

I. Graham v. Florida

The Eighth Amendment to the United States Constitution states:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” In *Graham, supra*, 130 S.Ct. at page 2021, the United States Supreme Court stated, “To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to “the evolving standards of decency that mark the progress of a maturing society.” [Citations.]” The Court explained that generally “[its] precedents consider punishments challenged . . . as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution’s ban on cruel and unusual punishments is the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’ [Citation.]” (*Ibid.*)

The *Graham* court instructed “[t]he Court’s cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty. [¶] In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. [¶] . . . [¶] The controlling opinion in [*Harmelin v. Michigan* (1991) 501 U.S. 957] explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant’s crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. [Citation.] ‘[I]n the rare case in

which [this] threshold comparison . . . leads to an inference of gross disproportionality’ the court should then compare the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [Citation.] If this comparative analysis ‘validate[s] an initial judgment that [the] sentence is grossly disproportionate,’ the sentence is cruel and unusual. [Citation.]” (*Graham, supra*, 130 S.Ct. at pp. 2021-2022.) The Court said that in the second classification of cases, death penalty cases, the court used categorical rules to define Eighth Amendment standards. (*Id.* at p. 2022.) The Court stated the issue was one it had not previously considered—a categorical challenge to a sentencing practice as it applied to an entire class of offenders who have committed a range of crimes. (*Id.* at pp. 2022-2023.)

The Court ruled: “A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants . . . some *meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation*. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence (LWOP) on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.” (*Graham, supra*, 130 S.Ct. at p. 2030, italics added.)

Two published California appellate court cases, both from the Second District, have addressed the issue of whether *Graham* applies to a juvenile sentenced to a term-of-years sentence as opposed to an LWOP sentence. In *Mendez, supra*, 188 Cal.App.4th at page 50, a jury convicted minor, who was 16 years old when he committed the offenses of one count of carjacking, one count of assault with a firearm, and seven counts of second degree robbery, and found he used a firearm during the commission of the offenses and he committed the offenses for the benefit of a criminal street gang. The trial court sentenced him to prison for 84 years to life. The *Mendez* court found that although “*Graham* expressly limited its holding to juveniles actually sentenced to [life without parole],” it noted the *Graham* decision “require[d] that a state ‘must’ give a juvenile ‘some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’” (*Mendez, supra*, 188 Cal.App.4th at p. 63.) The *Mendez* court acknowledged the *Graham* court stated some juveniles who commit certain crimes may turn out to be deserving of incarceration for the rest of their lives but such a determination could not be made at the outset because it denies the juvenile offender an opportunity to show he or she has learned from past mistakes. (*Mendez, supra*, 188 Cal.App.4th at p. 64.) The *Mendez* court recognized the trial court concluded the minor deserved the sentence he received, but the court reasoned: “The trial court may turn out to be correct in its implied assessment that [the minor] is a sociopath, or at the very least that [the minor] should be separated from society for the duration of his life, but *Graham* makes clear that a sentence based on such a judgment at the outset is unconstitutional.” (*Ibid.*) The *Mendez* court also concluded the minor’s sentence was grossly disproportionate to his crimes and culpability under traditional federal and state “‘proportionality’” tests. (*Id.* at pp. 64-68.) The *Mendez* court remanded to the trial court for a new sentencing hearing. (*Id.* at p. 68.)

Months later, the court in *Caballero, supra*, 191 Cal.App.4th 1248, disagreed with *Mendez, supra*, 188 Cal.App.4th 47. The *Caballero* court concluded *Graham* did not apply to a juvenile offender who receives a term-of-years sentence that results in the functional equivalent of a life sentence without the possibility of parole. (*Caballero, supra*, 191 Cal.App.4th at p. 1257.) However, the California Supreme Court recently granted review in *Caballero, supra*, 191 Cal.App.4th 1248 (Apr. 13, 2011, S190647). The court in *People v. Ramirez* (2011) 193 Cal.App.4th 613, 626, adopted the *Caballero, supra*, 191 Cal.App.4th 1248, court's reasoning.

A literal reading of *Graham* compels the conclusion *Graham* is not dispositive here because the trial court did not sentence J.A. to LWOP. (*Graham, supra*, 130 S.Ct. at p. 2052, fn. 11 (dis. opn. of Thomas, J. [noting the majority's analysis involved "only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years imprisonment)"].) But because J.A.'s sentence does not make him eligible for parole until he is 70 years old, the *Mendez* court's interpretation of *Graham* is instructive where the effect of a term-of-years sentence is a de facto LWOP sentence.

The *Mendez* court, quoting *Graham*, opined the "state 'must' give a juvenile 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" (*Mendez, supra*, 188 Cal.App.4th at p. 63; see *Graham, supra*, 130 S.Ct. at p. 2030.) There was no expert testimony provided in this case to the trial court on life expectancy.

Very recent case authority states the life expectancy of an "18-year-old American male[]" is 76 years. (*Mendez, supra*, 188 Cal.App.4th at p. 63.) The Center for Disease Control published a report in 2010 entitled "Health, United States, 2010" that indicates the life expectancy of a male born in 1990 ranges from 64.5 to 72.7 years of age

depending on race.³ In 1997, the Center for Disease Control and Prevention, National Center for Health Statistics published, “U.S. Decennial Life Tables for 1989-1991. At the time that report was published, J.A. was 6 to 7 years old. The report predicted his remaining life expectancy to be 62.36 years. (See Centers for Disease Control, U.S. Decennial Life Tables for 1989-1991 (1997), Table 8 (“Life table for males other than white”) <http://www.cdc.gov/nchs/data/lifetables/life89_1_1.pdf>.) J.A.’s life expectancy is anywhere from 64 to 76 years of age, without accounting for the impact of his incarceration. Life expectancy within prisons and jails is considerably shortened. (See The Commission on Safety and Abuse in America’s Prisons, Confronting Confinement (June 2006) [discussing persistent problems in United States penitentiaries of “prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases”], p. 11, <http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf>.) Therefore, it is certainly reasonable to conclude J.A.’s life expectancy in prison is considerably shorter than 76 years of age.

J.A.’s sentence makes him ineligible for parole until he is 70 years of age. Although J.A.’s sentence is not technically an LWOP sentence, it is a de facto LWOP sentence because he is not *eligible* for parole until about the time he is expected to die. The trial court’s sentence effectively deprives J.A. of any meaningful opportunity to obtain release regardless of his rehabilitative efforts while incarcerated. Should J.A. spend the next half century attempting to atone for his crimes through education, rehabilitation, and introspection into why he committed the offenses knowing there is virtually no chance he will be released? Again recognizing J.A. was not sentenced to LWOP, his sentence nevertheless effectively “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future

³ <<http://www.cdc.gov/nchs/data/hus/10.pdf#022>>.

might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.” (*Graham, supra*, 130 S.Ct. at p. 2027.) Although the Parole Board may one day conclude J.A. should be separated from society for the remainder of his life, the trial court’s decision at the outset that J.A. is irredeemable is premature rendering his sentence unconstitutional under the Eighth Amendment.

II. Federal and California Proportionality Tests

Although we conclude J.A.’s sentence is cruel and unusual punishment under *Graham, supra*, 130 S.Ct. 2011 and *Mendez, supra*, 188 Cal.App.4th 47, we conclude his sentence is also cruel and unusual under federal and California proportionality tests. “[T]hree factors may be relevant to a determination of whether a sentence is so disproportionate that it violates the Eighth Amendment: ‘(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.’ [Citation.]” (*Ewing v. California* (2003) 538 U.S. 11, 22.)

Under the California Constitution, a punishment is excessive if “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*)). The *Lynch* factors include: (1) “the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society” (*Lynch, supra*, 8 Cal.3d at p. 425); (2) a “compar[ison of] the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses* which, by the same test, must be deemed more serious” (*id.* at p. 426); and (3) “a comparison of the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* having an identical or similar constitutional provision” (*id.* at p. 427).

“Although articulated slightly differently, both standards prohibit punishment that is ‘grossly disproportionate’ to the crime or the individual culpability of the defendant. [Citations.] . . . [Citations.] Any one of these three factors can be

sufficient to demonstrate that a particular punishment is cruel and unusual. [Citation.]” (*Mendez, supra*, 188 Cal.App.4th at pp. 64-65.) J.A. bears the burden of establishing the punishment is unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572 (*King*.) For purposes of this appeal, we will address the factors in reverse order.

Same Offense in Different Jurisdictions

J.A. has offered no analysis of the third *Lynch* factor (i.e., punishment is excessive when compared with punishments for similar crimes in other jurisdictions), other than to say “the penalty here appears to be the most serious meted out anywhere in this country for such an offense by a 14[-]year[-]old boy.” J.A. has therefore failed to meet his burden of establishing that the punishment was excessive when compared with punishments for similar crimes in other jurisdictions. (*King, supra*, 16 Cal.App.4th at p. 572.)

Different Offenses in Same Jurisdiction

Applying the second *Lynch* factor—comparison with different and possibly more serious offenses—J.A.’s argument his punishment is vastly greater than for those who commit murder, manslaughter, and other violent felonies similarly fails. He ignores that his one strike sentence is the result of committing more than one type of offense (multiple counts of sodomy by force and kidnapping to commit robbery), and the commission of one offense for the purpose of committing another. (*People v. Crooks* (1997) 55 Cal.App.4th 797, 807.) Although J.A.’s sentence means he will spend the majority of his life in prison, similar sentences for multiple sex offenses have been routinely upheld when challenged as unconstitutionally disproportionate. (See, e.g., *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1222, 1231 [135 years to life for multiple sexual offenses against multiple victims]; *People v. Wallace* (1993) 14 Cal.App.4th 651, 666-667 [283 years and eight months for multiple sex offenses against multiple victims]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 531-532 (*Bestelmeyer*) [129 years for multiple sex crimes against one victim].)

“Whether a particular punishment is disproportionate to the offense is a question of degree. The choice of fitting and proper penalty 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. [Citation.] Punishment is not cruel or unusual merely because the Legislature may have chosen to permit a lesser punishment for another crime. Leniency as to one charge does not transform a reasonable punishment into one that is cruel or unusual. [Citation.]” (*Bestmeyer, supra*, 166 Cal.App.3d at pp. 530-531.) “Because 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. [Citation.]” (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.) Having failed on the first two factors, we will now address the remaining factor mindful of the fact one factor is sufficient to demonstrate a particular sentence is cruel and unusual punishment. (*Mendez, supra*, 188 Cal.App.4th at pp. 64-65.)

Nature of the Offense and the Offender

As to the first *Lynch* factor, when evaluating the offense we look at “the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant’s involvement, and the consequences of his acts.” (*Dillon, supra*, 34 Cal.3d at p. 479.) When evaluating the particular offender, we focus on “individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.” (*Ibid.*)

With respect to the nature of the offenses, J.A. claims they “were not typical forcible oral copulations or sodomies[,]” or “typical kidnappings.” We agree they were not typical; they were particularly heinous. With each of the victims, J.A., armed with a weapon, either sodomized, kidnapped, or robbed four vulnerable boys over the

course of five weeks. He preyed on boys walking to or from school and forced them to nearby secluded destinations where he sodomized two victims and forced one victim to orally copulate him. The victims who avoided sexual assault were led by J.A. to secluded areas but either by chance or through escape were spared the pain and humiliation of being the victim of a sexual assault. The evidence overwhelmingly demonstrated J.A. acted alone, and with planning and deliberation, terrorized young boys to satisfy his perverse desires.

As to the nature of the offender, J.A. focuses almost entirely on this factor. He makes several claims, which we will address in turn.

First, J.A. claims he is not a repeat offender who was previously punished harshly and therefore there is no progression of criminality. The Presentence Report portrays a different picture. As J.A.'s juvenile record is confidential, we cannot divulge its contents. Suffice it to say, it demonstrates a pattern of progressively worse criminal conduct ranging from property crimes to violent crimes against persons. J.A.'s prior offenses, when considered with the offenses here, demonstrate a pattern of increasingly violent criminal activity.

Second, J.A. claims "[h]e is not a homosexual or a pedophile" but only committed the offenses "to scare the victims so they wouldn't tell." J.A.'s apparent suggestion homosexuality is somehow an aggravating factor is unworthy of a response. Never mind his careless linking of homosexuality to pedophilia to suggest sexual orientation is the equivalent of pedophilia. By definition, when he committed the offenses, J.A. was not a pedophile, as a pedophile is generally someone who is 16 years of age or older and who sexually prefers prepubescent children. (Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000 text revision) American Psychiatric Association, p. 571.) With respect to J.A.'s assertion "he was doing what he did in order to scare the victims so they wouldn't tell[.]" we are unsure how this lessens his culpability. Perhaps he threatened to kill P.J. and R.V. to dissuade them from reporting

the incidents to the police, but intimidation does not mitigate or justify commission of any of the other offenses.

Finally, the gravamen of J.A.'s complaint is that he was a mentally retarded juvenile who had an extremely abusive childhood and he was not provided appropriate guidance and supervision. He asserts that as a low-functioning juvenile, he should not be punished as severely as "a normally intelligent adult." As we explain below more fully, we conclude J.A.'s age at the time of the offenses, his poor upbringing, and his substandard intelligence render his sentence unconstitutional under federal and California proportionality tests.

J.A.'s age at the time he committed the offenses, 14 years old, is highly relevant to the analysis. "Petitioner's youth is relevant because the harshness of the penalty must be evaluated in relation to the particular characteristics of the offender." [Citations.] 'The age of the offender and the nature of the crime each bear on the analysis.' [Citation.] As *Graham* noted, *Roper v. Simmons* (2005) 543 U.S. 551 . . . , established that '[a]s compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influence and outside pressures, including peer pressure"; and their characters are "not as well formed."' [Citations.]" (*Mendez, supra*, 188 Cal.App.4th at p. 65.) Here, we can reasonably assume J.A.'s lack of maturity and underdeveloped sense of responsibility contributed to his conduct. There was evidence J.A. was forced to orally copulate an adult male when he was six years old. Thus, the fact 14-year-old J.A. was himself a victim when he was six years old tends to support the conclusion he did not appreciate the gravity of his conduct. As Chief Justice Roberts noted in his concurrence in *Graham*, "There is no reason to believe that [defendant] should be denied the general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders." (*Graham, supra*, 130 S.Ct. at p. 2040.)

J.A.'s family life and upbringing are also highly relevant to the analysis. In *In re Nunez* (2009) 173 Cal.App.4th 709, 738, a different panel from this court held that a 14-year-old's LWOP sentence for kidnapping for ransom was cruel and unusual punishment. The *Nunez* court considered the fact defendant suffered post-traumatic stress disorder at the time he committed the kidnapping as the result of having witnessed his brother's slaying 19 months earlier. (*Id.* at p. 733.) In *Graham, supra*, 130 S.Ct. at page 2018, the Court likewise described defendant's background, noting that his parents were drug addicts, he had been diagnosed with attention deficit hyperactivity disorder in elementary school, and he began drinking at age nine and smoking marijuana at age 13.

Here, as we explain above, six-year-old J.A. was forced to orally copulate an adult male. Additionally, there was evidence his father and his stepfather, who both had substance abuse problems, emotionally and physically abused J.A., and his mother neglected him. Clearly, J.A. had no positive influences in his life, and it is not surprising J.A. began drinking and smoking marijuana when he was 12 or 13 years old. He began having sex when he was 13 years old. Moreover, there was evidence J.A. was in "the mentally deficient range," and he was identified for special education courses as early as eight years old. It is certainly reasonable to conclude that J.A. had no parental guidance, and he was free to behave as he wished without fear of consequence. It is no wonder J.A. became involved in more serious criminal behavior.

Based on J.A.'s age at the time of the offenses, his deficient upbringing, and his inferior intelligence, we conclude *Lynch's* first factor alone, the nature of the offender, requires us to conclude J.A.'s sentence is cruel and unusual punishment under the federal and California proportionality tests. We must now address the appropriate remedy.

III. Remedy

Based on our review of the record, it appears the prosecutor represented to the trial court that section 667.6, subdivision (c), required the court to impose mandatory

consecutive sentences on counts 2 and 6, kidnapping to commit robbery pursuant to section 209, subdivision (b)(1). The trial court imposed mandatory consecutive sentences on counts 2 and 6.

Section 667.6, subdivision (d), authorizes the trial court to impose “[a] full, separate, and consecutive term . . . for each violation of an offense specified in subdivision (e) if the crimes involve separate victims” Section 667.6, subdivision (e), includes violations of section 286, subdivision (c).

Section 667.6, subdivision (c), provides: “In lieu of the term provided in [s]ection 1170.1, a full, separate, and consecutive term *may* be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term *may* be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). *If* the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to [s]ection 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.” (Italics added.)

Although we agree the trial court was required to impose mandatory consecutive sentences on counts 1 and 7 pursuant to section 667.6, subdivision (d), we conclude the court was not required to impose mandatory consecutive sentences on counts 1 and 7 pursuant to section 667.6, subdivision (c). That section authorizes the trial court in its discretion to impose consecutive sentences on crimes listed in section 667.6, subdivision (e), in lieu of a sentence imposed pursuant to section 1170.1. Based on our reading of the subdivision, it did not require the trial court to impose mandatory consecutive sentences on counts 2 and 6. Additionally, section 209, subdivision (b)(1), is not a crime listed in section 667.6, subdivision (e).

We have concluded J.A.'s sentence is cruel and unusual punishment under the Supreme Court of the United States' decision in *Graham, supra*, [130 S.Ct. 2011] and *Mendez, supra*, 188 Cal.App.4th 47, and federal and California proportionality tests. Additionally, we conclude section 667.6, subdivision (c), did not require the trial court to impose mandatory consecutive sentences on counts 2 and 6. Therefore, we order J.A.'s sentences on counts 2 and 6 to run concurrently, instead of consecutively, with his sentences on counts 1 and 7. (§ 1260.) J.A. will be first eligible for parole after serving 42 and one-half years in prison, when he is approximately 56 years old. At that time, the Board of Parole Hearings' evaluation of J.A.'s rehabilitative efforts will not be premature.

DISPOSITION

We order J.A.'s sentences on counts 2 and 6 to run concurrently, instead of consecutively, with his sentences on counts 1 and 7. We affirm the judgment as modified. The superior court clerk is directed to issue an amended abstract of judgment which correctly reflects the sentence imposed and forward it to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.