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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PRECIOUS JOHNSON,

Defendant and Appellant.

F061010

(Super. Ct. No. F08901095)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Leanne Le Mon, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Precious Johnson and others assaulted Elaine Neal over an approximately 24 hour period to try to get Neal to reveal the whereabouts of her son, Joseph Jynes, who was a

suspect in the killing of Precious's uncle, Jamal Johnson.¹ Precious and two other women thereafter drove Neal to a canal, where they attempted to kill her. Neal survived, however, by acting as if she were dead when the three women tried to drown her and allowing the current to carry her away.

While most of the other perpetrators of the crimes against Neal pled guilty pursuant to plea agreements, Precious, who was 16 years old when the crimes were committed but charged as an adult, and codefendant Markel Shar Hollman stood trial. The jury convicted Precious of torture, attempted murder, assault with a deadly weapon, kidnapping, battery with serious bodily injury, assault by means likely to produce great bodily injury, false imprisonment by violence and second degree robbery. The jury also found that she personally inflicted great bodily injury. Precious was sentenced to a determinate 10-year term plus an indeterminate term of life with the possibility of parole.²

On appeal, Precious contends (1) her sentence constitutes cruel and unusual punishment under the state and federal Constitutions because she was a minor at the time she committed the charged offenses, and (2) the trial court abused its discretion when it denied a defense request for juror contact information. We reject the contentions and affirm the judgment.

¹ Because Jamal and Precious share the same last name, we will refer to them by their first names to avoid any confusion to the reader.

² Hollman was convicted of torture, assault with a firearm, assault with a deadly weapon, assault by means likely to produce great bodily injury, and false imprisonment by violence, and sentenced to a life term on the torture count and a seven year determinate term on the other counts. We affirmed his conviction in *People v. Hollman* (Jan. 21, 2010, F056701) [nonpub. opn.].

FACTUAL AND PROCEDURAL SUMMARY

At about 1:00 a.m. on June 17, 2007,³ Neal was walking in her neighborhood when a silver car pulled up and, after Jarmaine Doubs and Hollman got out of the car, Hollman ordered her to get inside. The two men drove Neal to a nearby hospital where Jamal, Doubs's brother, had been taken after being shot. Neal was told that her son, Joseph Jynes, shot Jamal.

Once Neal was forced to enter the hospital, three young women, Precious, Lashanda Wilkerson, and Joaquinna McCoy, prevented her from leaving by watching her and following her around. Doubs and Hollman told her she could not leave until her son was located. Neal became tired, so Nakima Whitley, Doubs's girlfriend, told her to get in the car and sleep. Precious, McCoy and Wilkerson went outside with Neal and threatened Neal while she sat on a curb in front of the emergency room. Wilkerson and McCoy told her they would get her and do something to her if she ran. Neal slept in the car; when Whitley woke her up, she was in the back seat of the car in front of the Diana Street apartments. Precious was also in the car.

Whitley and Precious made her go upstairs to apartment 202; as they climbed the stairs, Whitley was in front of Neal while Precious was behind her. Whitley told Neal to get inside the apartment. They told Neal not to do anything stupid and they were going to keep her until they found her son.

Neal was pushed into the apartment. Other people in the apartment threatened Neal's life and told her she would not be allowed to leave. Precious was one of the people who told Neal they were going to kill her. Doubs gave Neal a cell phone and told her to call her daughter, Tavita Jynes.⁴ Tavita received the call from Neal around

³ References to dates are to dates in 2007 unless otherwise noted.

⁴ Tavita Jynes and her brother, Joseph Jynes, will be referred to by their first names to avoid any confusion to the reader.

10:30 a.m. on June 17. Neal was crying, said she had been kidnapped, and asked for Joseph's address. Tavita asked where she was, but Neal could not say and someone hung up the phone. Tavita could not call back because the number was blocked. When Neal did not call again, Tavita called the police.

After the phone call, Doubs began hitting Neal in the face; the beating splayed her blood on an apartment wall. The others in the apartment then joined in the beating, using a hammer. Precious and Tamika Anderson beat Neal with a hammer until Neal took her rings off. Precious told Neal if she did not take her rings off, they would do something; Precious took Neal's diamond ring and money, while Anderson took Neal's other ring.

After Neal fell to the floor, Precious, McCoy and Anderson tied Neal's hands and ankles with an electrical cord and a belt. Neal managed to undo the bindings more than once; when she did, she would be beaten and tied back up. Hollman, Doubs, Precious, Anderson and three others beat Neal with "boards, guns, buckets, feet, fists, whatever they could get their hands on." Hollman stuck a gun in Neal's mouth and asked the others if he should shoot her. Doubs told him to wait until they had Joseph's address. Hollman continued to beat Neal with a board, hitting her on the ankles and legs, saying, "bitch, your legs are not broken yet, they're not broken yet." Neal screamed, but the people in the apartment hit her more. Precious hit Neal's shoulder and head with a board and slapped her face, and asked Neal if Neal wanted her to kill her.

When it became dark, Neal was taken to the apartment's bathroom where Hollman, Precious and another person ordered her to climb into the bathtub. Up to 15 people took turns coming into the bathroom and beating Neal. Both Hollman and Precious came into the bathroom several times and beat Neal. Precious hit her with a stick and a gun, and asked for a knife to cut her. Hollman hit Neal in the head, burned her face with cigarettes and poured salt into her wounds. Precious also put a cigarette out on Neal's head. Precious came in, put plastic on the floor, and asked Doubs whether they should cut up Neal and put her in the plastic or shoot her and drop her in a canal

somewhere. Eventually, Precious brought clothes into the bathroom and turned on the cold water in the tub. Precious told Neal to wash off the blood and put on the clothes. Precious then put a pillowcase over Neal's head, and she and two other girls pushed Neal out of the bathroom.

Neal was taken out of the apartment and placed in the trunk of a car. Wilkerson drove the car, with Precious and Shakeenah Packard as passengers, to a canal near Kerman. The girls forced Neal out of the trunk, onto the ground and onto her knees. Wilkerson pointed a gun at Neal's head. When she attempted to shoot Neal, Wilkerson exclaimed "fuck I forgot the bullets" and instead began beating Neal in the head with the gun. Precious and Packard also began beating Neal, saying, "Bitch, you going to die." Neal fell into the water and attempted to swim away while screaming for help. The three women jumped in the car, drove a short distance and jumped into the canal. Packard grabbed Neal's throat and Precious grabbed her head; the two held Neal's head underwater, trying to drown her. When Neal would surface, Wilkerson beat her head with the gun. Neal acted as if she were dead and let the current carry her away.

After the three women who attacked Neal left the area, Neal managed to crawl out of the canal and make her way to a house, where she fell asleep on the porch as no one answered her knocks on the door. The next morning, residents of the home found Neal and summoned help. One of those present noticed a number of wounds on Neal's face.

Fresno County Sheriff's Deputy Pete Garcia responded to the residents' call, arriving at 9:43 a.m. He noticed that Neal's lips were swollen and she had lacerations to her face, around her eyes, and on her cheeks and forehead. Her clothing and person were very dirty. She appeared to be in pain. Neal was able to give only limited responses to Garcia's questions, but stated she had been kidnapped and beaten in Fresno and dumped in the canal.

Neal was taken to the hospital, where she was treated. She had multiple lacerations and bruises on various parts of her body. About 20 minutes after her arrival,

Fresno City Police Officer Keith Kobashi interviewed Neal, who drifted in and out of consciousness, said she was in pain and had difficulty articulating responses. She told Kobashi two males picked her up and took her to the hospital, where they checked on the status of a man who had been shot. Later, she was taken to an apartment on North Diana Street, where she was told to disclose her son's whereabouts or be killed. She called her daughter but, when Neal told her captors she did not have her son's address, they began beating her. Neal told of being beaten in the bathroom and then taken to the canal, and described the events there.

Detective William Andrews arrived at the hospital around 11 a.m. and attempted to interview Neal, but she did not respond except to moan. Neal was released later that day after she was given morphine and her lacerations sutured. Andrews attempted to interview Neal that evening, but she was in a great deal of pain, was exhausted and kept dozing off.

Around 3:30 p.m. on June 18, Officer Keith Dooms and others began a surveillance of the apartments on North Diana Street while waiting for a search warrant. The officer saw Precious, Paulette Carter and another woman enter and leave apartment 202 several times. After exiting the apartment, they would head to an area of the apartment complex that was out of the officers' view. Shortly after 6:30 p.m., the officers saw Carter enter apartment 202 and then exit carrying a white bleach bottle. Carter walked out of the officers' sight. She emerged a few minutes later, pushing a shopping cart with the two other women behind her, who were wearing plastic gloves. Dooms drove into the alley where the three women had headed; he detained Carter, but the other women fled. The shopping cart smelled strongly of bleach. In the cart were bloodstained pillows, several items of bloodstained clothing, bloodstained shoes, a bloodstained wash cloth, a board that appeared to have blood stains and a broken piece of a walking cane. In the trash can were a bloodstained bottle, a cloth gun case and an envelope addressed to Doubs.

In a search of the apartment, officers found a white T-shirt with reddish stains in the living room. In the bathroom, they found a nylon belt, an extension cord and a stained damp blue towel. The nylon belt was tied in a knot and had reddish marks. An analysis of the reddish substances and blood found on the board, bottle, blue towel and T-shirt matched Neal's genetic profile. A search of the car used to transport Neal uncovered a claw hammer.

On June 19, Andrews interviewed Neal at her daughter's apartment. Neal was emotional, exhausted and in pain, but apparently understood and responded to Andrews's questions. Neal provided the names of a number of her attackers, including Precious and "Shoot 'em." Andrews conducted a recorded interview of Neal on July 10, in which she identified two of her attackers as Tyren Grays and Wilkerson. Grays was arrested on July 11. Wilkerson was arrested on August 30 and gave a lengthy statement, in which she named Hollman as the person Neal knew by the nickname, "Shoot 'em." Neal was later shown a photographic lineup, in which she identified Hollman as "Shoot 'em." Hollman was arrested on November 13.

On November 28, Andrews received Neal's toxicology report. Andrews and the prosecutor spoke to Neal about her drug use and Neal reported using \$20 to \$30 worth of cocaine a day in the time leading up to the attack.

The police had difficulty locating a photograph of Precious. While they had an address for her, it was an old one and it appeared Precious had moved. Eventually a photograph of Precious was located. On January 3, 2008, Neal identified Precious as one of her attackers from a photographic lineup that included Precious's picture. Precious was arrested on January 9, 2008.

During a police interview, Hollman stated Neal had been kidnapped and identified several people he had seen at the apartment the day Neal was assaulted. He did not identify Neal from a photographic lineup and repeatedly denied being involved in the assault. At trial, Hollman testified in his own defense. He claimed that while he saw

Neal at the apartment, no one prevented her from leaving and she “could have gotten up and walked off any time she wanted.” Hollman did not see or hear anyone threaten, beat or assault Neal. Hollman also testified, however, that he did not help Neal because “it wasn’t my place” and he did not want anyone to “turn on me for helping her.”

The jury returned its guilty verdicts on June 12, 2008, against both Precious and Hollman. On December 23, 2008, the trial court sentenced Precious to an indeterminate term of life with the possibility of parole on the torture count and a determinate 10-year term on the remaining counts, with credit for 380 days in custody.

DISCUSSION

I. Cruel and Unusual Punishment

Precious asserts that her sentence violates the principles stated in *Graham v. Florida* (2010) 560 U.S. ____ [130 S.Ct. 2011] (*Graham*), in which the United States Supreme Court held that the Eighth Amendment prohibition against cruel and unusual punishments does not permit a juvenile offender to be sentenced to life in prison without the possibility of parole for a nonhomicide crime. While Precious acknowledges she has a theoretical possibility of parole, she asserts her release on parole is unlikely as prison will significantly reduce her life expectancy and subject her to risks that will give her little or no chance of rehabilitation. Precious alternatively argues that even if her sentence does not violate the categorical rule announced in *Graham* it is nevertheless unconstitutionally cruel and unusual because it is grossly disproportionate to her offenses.

A. Constitutionality under *Graham*

In *Graham*, the defendant committed armed burglary and another crime when he was 16 years old. The prosecutor elected to charge him as an adult. Under a plea agreement, the Florida trial court sentenced him to probation and withheld adjudication of guilt. (*Graham, supra*, 130 S.Ct. at p. 2018.) A year after entering his plea, the defendant violated his probation by committing additional crimes. (*Id.* at p. 2019.) The trial court found him guilty of the earlier charges and sentenced him to life in prison for

the burglary, which left him with no possibility of release except executive clemency since Florida had abolished its parole system. (*Id.* at p. 2020.) The defendant challenged his sentence under the Eighth Amendment’s cruel and unusual punishments clause. (*Id.* at p. 2018.) The United States Supreme Court held the Eighth Amendment “prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” (*Graham*, at p. 2034.)

The court explained that the Eighth Amendment prohibits two types of punishments – those that are inherently barbaric and those that are disproportionate to the crime – and cases addressing the proportionality of sentences fall within two general classifications: (1) challenges to the length of term-of-years sentences based on the circumstances in a particular case; and (2) cases in which the Supreme Court implements the proportionality standard by certain categorical restrictions on the death penalty. (*Graham*, *supra*, 130 S.Ct. at p. 2021.) The court determined the case before it was unusual because it involved an issue it had not considered previously: “a categorical challenge to a term-of-years sentence.” (*Id.* at p. 2022.) The court concluded that in that type of case, the appropriate analysis is that utilized in cases that involve the categorical approach, rather than a threshold comparison between the penalty’s severity and the crime’s gravity. (*Id.* at pp. 2022-2023.)

While the court found that a national consensus had developed against sentencing juvenile offenders who commit nonhomicide crimes to life without parole, it recognized this was not determinative of whether a punishment is cruel and unusual, and it also was required to consider the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. (*Graham*, *supra*, 130 S.Ct. at pp. 2023-2026.)

With respect to the culpability of the offenders at issue, the court recognized it had established in a previous decision that juvenile offenders are less deserving of the most severe punishments because they have lessened culpability. (*Graham*, *supra*, 130 S.Ct. at

p. 2026.) The court saw no reason to reconsider the observations it made in the prior case about the nature of juveniles, which included a recognition that, as compared to adults, juveniles have a ““lack of maturity and an underdeveloped sense of responsibility””; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed’”; all of which makes it difficult even for expert psychologists to differentiate between juveniles whose crimes reflect transient immaturity and those rare juveniles whose crimes reflect irreparable corruption. (*Ibid.*) In addition, the court’s precedents recognized that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.” (*Id.* at p. 2027.) From this the court concluded that “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.” (*Ibid.*)

With respect to punishment, the court recognized that life without parole is the second most severe penalty the law permits and is an “especially harsh punishment for a juvenile” since a juvenile offender would serve, on average, more years and a greater percentage of his life in prison than an adult offender. (*Graham, supra*, 130 S.Ct. at pp. 2027-2028.) The court also considered the penological justifications for a life without parole sentence for juvenile nonhomicide offenders and concluded that none of the legitimate goals of penal sanctions, such as retribution, deterrence, incapacitation, and rehabilitation, provided an adequate justification for such a sentence. (*Id.* at pp. 2028-2030.)

The court thus created a categorical rule: “In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice

under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment.” (*Graham, supra*, 130 S.Ct. at p. 2030.)

The court, however, did not foreclose the possibility that a juvenile offender could actually serve a life sentence in prison: “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 like Graham 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 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.)

In adopting a categorical rule, the court rejected an approach that would require courts to take the offender’s age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the crime’s seriousness, because (1) it is difficult for a trial court to accurately distinguish the few incorrigible juvenile offenders from the many who have the capacity for change, and (2) it does not take into account special difficulties encountered by counsel in juvenile representation. (*Graham, supra*, 130 S.Ct. at pp. 2031-2032.) The court concluded that a categorical rule avoids the risk

that a court or jury will conclude erroneously that “a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide.” (*Id.* at p. 2032.)

The court further justified a categorical rule on the basis that it “gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform” (*Graham, supra*, 130 S.Ct. at p. 2032.) The court remarked, “The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual. . . . A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term.” (*Id.* at pp. 2032-2033.) The court concluded that the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide, and while a state need not guarantee the offender eventual release, if it imposes a life sentence it must provide him or her with some realistic opportunity to obtain release before the end of that term. (*Id.* at p. 2034.)⁵

Here, Precious argues her sentence falls within the rubric of *Graham*, as the underlying principles enunciated therein “compel the conclusion that life *with* the possibility of parole still should not have been imposed here.” Precious was sentenced on

⁵ The issue of whether the imposition of a life without parole sentence on a juvenile offender convicted of homicide violates the Eighth Amendment is currently before the United States Supreme Court in *Miller v. Alabama* (2010) 63 So.3d 676, cert. granted Nov. 7, 2011, No. 10-9646, ___ U.S. ___ [132 S.Ct. 598], and *Jackson v. Norris* (2011) 2011 Ark. 49 [__ S.W.3d __], cert. granted Nov. 7, 2011, No. 10-9647 ___ U.S. ___ [132 S.Ct. 548].

the torture count (count one) to a life term with the possibility of parole. (Pen. Code, § 206.1 [torture is punishable by a life term].)⁶ On the remaining counts, she was sentenced to seven years on the attempted murder conviction (count two), plus three years for the personal infliction of great bodily injury section 12022.5, subdivision (a), enhancement, for a total determinate term of 10 years.⁷

Precious's sentence does not preclude the possibility of parole, as she could be eligible for release on parole after serving the minimum number of required years in prison. The Attorney General states, and Johnson does not dispute, that she will be eligible for parole in 17 years less applicable time credits.⁸ Johnson was 16 and a half years old when she committed the crimes and 18 years old at the time of sentencing, when she received 380 days of presentence credit. Without taking future credits into consideration, she will be eligible for parole when she is 34 years old.

Precious's situation is thus different from that of the defendant in *Graham*, whose sentence denied him at the outset any "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham, supra*, 130 S.Ct. at p. 2030.) Her minimum parole eligibility period does not, as in some cases, exceed Precious's life expectancy.⁹ (See, e.g., *People v. Mendez* (2010) 188 Cal.App.4th 47, 62-63 (*Mendez*) [sentence of 84 years to life exceeds life expectancy for an 18-year-old male of 76 years,

⁶ Subsequent references are to the Penal Code unless otherwise noted.

⁷ The sentences imposed on the other counts were either concurrent to the determinate sentence or stayed pursuant to section 654.

⁸ Section 3046, subdivision (a)(1) prescribes the minimum parole eligibility period for a life term as at least seven calendar years. When added to the 10-year determinate sentence, Johnson is eligible for parole after 17 years. (§ 669.)

⁹ In 2006, life expectancy was 80.9 years for an 18-year-old American female and 77.8 years for an 18-year-old black American female. (National Center for Health Statistics, Centers for Disease Control, National Vital Statistics Reps. (June 28, 2010) Tables 2 and 9, Vol. 58, No. 28.)

resulting in a sentence “materially indistinguishable” from life without parole].) Even if Precious is correct that prison will shorten her life expectancy, since she will be eligible for parole in her 30’s, she still will have a realistic opportunity to obtain release.

The California Supreme Court currently is reviewing the issue of whether a sentence that is the functional equivalent of life without the possibility of parole for a juvenile convicted of a nonhomicide offense constitutes cruel and unusual punishment under the Eighth Amendment in *People v. Caballero* (2011) 191 Cal.App.4th 1248, review granted Apr. 13, 2011, S190647 (sentence of 110 years to life for three counts of attempted murder). Our Supreme Court also has granted review in other cases involving the same issue. (See *People v. Ramirez* (2011) 193 Cal.App.4th 613, review granted June 22, 2011, S192558 [sentence of 120 years to life]; *People v. Nunez* (2011) 195 Cal.App.4th 414, review granted July 20, 2011, S194643 [eligible for parole after 175 years]; *People v. J.I.A.* (2011) 196 Cal.App.4th 393, review granted Sept. 14, 2011, S194841 [sentence of 50 years to life plus two consecutive life terms; eligible for parole at age 70, after 56.5 years of confinement].) Unlike the sentences in these cases, however, which utterly preclude the juvenile offender from reaching the point of parole eligibility before exhausting his anticipated life expectancy, Precious is not so precluded.

Precious asserts she will have a reduced chance of rehabilitation while in prison. But, unlike the defendant in *Graham*, at least she will have a such a chance, which is what *Graham* requires. The trial court recognized this chance when imposing sentence, stating that Precious has the eligibility and possibility of being paroled, and while she “dug herself into a deep hole,” it was confident Precious had the wherewithal and ability to “dig herself out of that hole” and would be eligible for parole as soon as possible. While release on parole is not guaranteed, Precious will have, during the minimum parole eligibility period, a meaningful opportunity to demonstrate maturity and rehabilitation,

and to show she is sufficiently rehabilitated to be able to live a substantial portion of her life outside of prison.¹⁰

B. The Proportionality Tests under the Federal and State Constitutions

Even if her sentence does not violate the categorical rule announced in *Graham*, Johnson argues her sentence was nevertheless unconstitutionally cruel and unusual because it is grossly disproportionate to her offenses.

The Eighth Amendment prohibits the imposition of punishments that are grossly disproportionate to the severity of the crimes. (*Ewing v. California* (2003) 538 U.S. 11, 20-21.) “[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.’” (*Id.* at p. 22.)

In California, 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 (*Lynch*)). The formulation under *Lynch* requires consideration of a number of factors, including: (1) “the nature of the

¹⁰ The Attorney General argues that Precious’s sentence also does not contravene the *Graham* categorical rule because attempted murder should not be considered a nonhomicide offense. This argument is based on the following from *Graham*: (1) where the court noted the nation of Israel’s life without parole sentences for juveniles were not for “nonhomicide crimes” because they were all “convicted of homicide or attempted homicide” (*Graham, supra*, 130 S.Ct. at p. 2022); (2) the court listed Hawaii as one of the jurisdictions that permits life without parole for juvenile offenders convicted only of homicide crimes, citing Hawaii statutes prescribing that sentence for juveniles convicted of first degree murder or attempted first degree murder (*Id.* at p. 2035); and (3) the court’s reliance on a study that states that nonhomicide does not include convictions for attempted homicides. (*Id.* at pp. 2023-2034.) Since we have concluded that Precious’s sentence is not the equivalent of a life without parole sentence, however, we do not reach this issue.

offense and/or offender, with particular regard to the degree of danger both present to society” (*id.* at p. 425); (2) a comparison of the challenged penalty with the punishments prescribed for different, more serious, offenses in the same jurisdiction (*id.* at p. 426); and (3) “a comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions” (*id.* at p. 427). The *Lynch* analysis was reaffirmed in *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*).

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.” (*Mendez, supra*, 188 Cal.App.4th 47, 64-65.)

Precious contends her sentence is disproportionate given her age, troubled background, minimal criminal history, and the sentences other participants in the crimes received. We cannot agree. As to the nature of the offense, Precious’s crimes were particularly heinous. She, with others, systematically tortured Neal over many hours, took her rings and money, transported her to a remote location and attempted to kill her, first by shooting and then, when that failed, by drowning. The offenses were extremely serious, as serious as they could be for nonhomicide offenses.

As to the circumstances of the offender, Precious was a minor and therefore not as culpable for the same conduct as an adult would be, and her judgment was not as sophisticated as an adult’s. Her criminal record encompassed comparatively minor offenses. She claimed she committed the instant offenses because Doubs instructed her to express her love for Jamal by attacking Neal and she was determined to please and prove her love to her family. She also points to her childhood background. Her mother gave birth to her in prison in November 1990. She first was raised by her uncle, who was also raising 10 to 12 nieces and nephews. By the time she was four, she had been sexually, mentally and physically abused. After her uncle’s death, she was sent to live with her aunt, who kept her in school and often disciplined her for her verbal outbursts

and trauma. The aunt found “suicide letters,” in which Precious wrote that she hated her life and questioned why she had to be molested, why she had to live without her mother, and why she could not have a “normal” life. When Precious was 16, she was removed from her aunt’s home after complaining the aunt struck her when disciplining her and sent to live with Doubs, where she began using marijuana and alcohol.

Under the test for cruel and unusual punishment, however, the primary focus is not on the defendant’s life history, but on the defendant’s character and conduct. “This branch of the inquiry . . . focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant’s individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.” (*Dillon, supra*, 34 Cal.3d at p. 479.) Precious’s history is relevant only for the light it sheds on these questions.

We find little to mitigate Precious’s culpability given her age, prior criminality, personal characteristics, and state of mind. Her difficult past notwithstanding, she was not an unusually immature person. The trial court recognized that Precious was a “bright, young lady,” with a lot of potential, and while she was denied a proper upbringing and given the wrong guidance by parental substitutes, she had the ability to steer herself away from the activities that evening and refuse to participate, as others who were present were able to do. Instead of withdrawing, Precious actively, and apparently willingly, participated in the crimes for which she was convicted. As the trial court noted, Precious chose to associate with Hollman during the torture Neal suffered, and to get into the car with the two other women to take Neal to the canal and “finish her off[,]” and her actions were as serious as any adult could commit and more serious than the actions of most of the adults who were present.

Precious emphasizes the lesser sentences other participants who were charged with crimes received. As the Attorney General points out, however, Hollman also received a lengthy sentence of seven years, plus a life term. The trial court recognized the other

participants had entered pleas and received determinate sentences, and that Precious herself wanted to accept the district attorney's offer of a plea agreement of a determinate sentence of 13 years, eight months, but could not because it was a "package deal" that required Hollman's consent, which he withheld. That other participants received lighter sentences, however, is apparently due to the realities of plea bargaining and does not indicate disproportionality of Precious's sentence. While the trial court stated it was "unfortunate that others who were heavily involved in this case were not punished more severely," it was a "travesty" that Doubs received only the sentence he did, and it seemed that others should have been treated more harshly than they were, the trial court was required to deal with the defendants before it. There is nothing in the record to suggest that Precious's sentence, given the charges of which she was convicted, is disproportionate to sentences the others received on the charges to which they pled guilty.

We believe that Precious's youth, her abusive childhood, and her minor criminal record are all factors to consider here. When balanced against the other very troubling circumstances of the crimes, however, we cannot conclude that this is one of those cases occurring "with exquisite rarity" (*People v. Em* (2009) 171 Cal.App.4th 964, 972 (*Em*)) that warrants a finding of disproportionality. (See *Em* at p. 976 [sentence of 50 years to life imposed on immature 15-year-old convicted of first degree felony-murder as an aider and abettor was not disproportionate when balanced against seriousness of crime, defendant's participation in crime and gang affiliation, and danger defendant presented to society].)

II. Juror Contact Information

Precious contends the trial court erred when it denied her request for juror contact information. Specifically, she asserts she was entitled to juror contact information to determine (1) whether the jury heard and discussed loud cries Neal made in the hallway outside the jury room when medical personnel removed her from the courtroom following a seizure she had on the stand while testifying, and (2) whether Juror No. 6 had

a close relationship with an investigator in the district attorney's office who had attended one day of the trial.

A. Trial Proceedings

On June 3, 2008, during the cross-examination of Neal, who has multiple sclerosis, the prosecutor requested a break because Neal was crying on the stand and having difficulty controlling her emotions. A few minutes after the break was called, Neal began seizing outside the jury's presence. Medical personnel removed Neal from the courtroom. Neal was crying and yelling as she was being transported past the room where the jury was congregated. When Neal resumed testifying two days later, she cried on and off during cross-examination. At one point, when defense counsel began asking a question, Neal began to "convulse and seize." The jury, who observed Neal's seizure, was excused from the courtroom.

After trial, Precious's trial counsel filed a motion for access to juror information, including their names, telephone numbers and addresses. Counsel's supporting declaration stated it had come to his attention that a juror may not have disclosed information regarding whether that juror or the juror's family were neighbors with a current investigator with the district attorney's office, and he wanted the opportunity to determine whether such a relationship existed and, if so, why the relationship was not disclosed. Trial counsel further stated that during trial, the victim broke down on several occasions and actually had a multiple sclerosis attack during her testimony, and he wanted to ask jurors whether sympathy for the victim had a significant impact in coming to their guilty verdicts. Finally, trial counsel asserted it was necessary to conduct further investigation regarding potential juror misconduct to provide the court with adequate information to rule on a motion for new trial. In points and authorities, trial counsel stated that sometime after the trial concluded, the prosecutor told him he "had reason to believe" either a juror or the juror's family may have been a neighbor of a current

investigator with the district attorney's office, but no juror had indicated during voir dire that he or she knew any such investigator.

The trial court denied the motion in a written ruling, as the declaration did not include sufficient facts to establish good cause for the release of any juror identifying information. The trial court explained that on the issue of whether sympathy for the victim impacted any juror's verdict, a juror's reasons for his or her vote are a reflection of the juror's mental processes and barred by Evidence Code section 1150, subdivision (a), and the jurors were instructed, pursuant to CALCRIM No. 200, not to let sympathy influence their decision. With respect to a juror's failure to disclose a potential relationship with an investigator, the trial court found the declaration vague and uncertain regarding whether (1) this even related to a juror in this case, as opposed to a member of a juror's family, and (2) whether the investigator was involved in the current action. The trial court explained that if it was a family member, that would be an insufficient basis to meet the requisite threshold pursuant to Code of Civil Procedure section 237, subdivision (b). The trial court found the declaration to be nothing more than a "fishing expedition."

A month later, Hollman's trial counsel filed a request for disclosure of juror personal information. In the supporting declaration, Hollman's counsel stated that after trial, the prosecutor told him that Juror No. 6 and her family may have a close relationship with an investigator for the district attorney's office, and the prosecutor was given this information after the investigator sat in as a spectator during one of the last days of the trial. The declaration further stated that Juror No. 6 did not disclose this relationship when asked during voir dire about relationships to law enforcement. Hollman's counsel also stated in the declaration that the jurors could have heard Neal's screams when she was transported within 15 feet of the jury room and been prejudiced thereby. The trial court denied the motion by written order for the same reasons and authorities given in the order denying Precious's motion.

Precious thereafter brought a motion for a new trial. Precious argued the jurors likely heard extrinsic evidence in the form of Neal's cries and screams as she was taken through the courthouse by emergency medical services, which likely caused the jurors to be extremely sympathetic towards Neal, thereby causing Precious undue prejudice. She asserted the court erred when it failed to admonish the jurors following this incident.

At the hearing on the new trial motion, Precious's trial counsel renewed his request for the personal identifying information of the jurors as an alternative to the new trial motion. The prosecutor responded that the Evidence Code made the jurors' internal thought processes inadmissible in a motion to attack the verdict and Neal's crying in the hallway was not extraneous information since what happened there was less tangible than Neal's outburst in court during the course of her testimony.

In making its ruling, the trial court pointed out the jury was instructed: (1) to not allow anything that happened outside the courtroom affect its decision, pursuant to CALCRIM No. 101; (2) to disregard anything it saw or heard when court was not in session, even when done or said by one of the parties or witnesses, pursuant to CALCRIM No. 222; and (3) not to let sympathy influence its decision, pursuant to CALCRIM No. 200. The court was confident the jury did not hear Neal's cries while they were behind closed doors in the jury room. The court denied the motion for new trial made by both parties, which incorporated its earlier ruling on the requests for juror identifying information.

B. Analysis

Denial of a request for access to confidential juror information is reviewed under the deferential abuse of discretion standard. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 991 (*Carrasco*)). Precious has failed to establish that good cause existed pursuant to Code of Civil Procedure section 237 for the release of juror contact information and therefore has failed to demonstrate the trial court abused its discretion in denying her request.

Precious's request for juror contact information to question jurors on whether they factored into their deliberations Neal's cries as medical personnel took her from the courtroom can best be described as a fishing expedition. Precious had virtually no evidence indicating the jury heard Neal's cries while in the jury room behind closed doors or that it factored this information into its deliberations. The jury was instructed that it was not to consider sympathy for any person or extraneous information in its deliberations, but to decide the case based upon the evidence presented, including Neal's emotional state while testifying. We see nothing in the record before us to indicate the jury did not follow the trial court's instructions. We presume jurors faithfully followed and applied the instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

The request for juror contact information based upon an alleged relationship between Juror No. 6 and an investigator in the district attorney's office also was properly denied. The only information put forth to support the basis for release of juror contact information was Precious's attorney's declaration, in which he stated that it had "come to his attention that a juror may not have disclosed information regarding whether that juror or his/her family were neighbors with a current Investigator at the District Attorney's office[.]" and the points and authorities, which stated that the prosecutor "brought to his attention that he had reason to believe" either a juror or the juror's family "may have been a neighbor of a current Investigator at the District Attorney's Office." Hollman's attorney shed a little more light on the source of the information in his declaration in support of Hollman's motion, i.e. that a prosecutor told him that Juror No. 6 "and her family may have a close relationship" with an investigator, and that the prosecutor "was given" this information after the investigator sat in as a spectator for one day of trial.

Precious's counsel's declaration does not identify the source of the information. While the points and authorities do state that the information came from the prosecutor, it does not reveal the source of the prosecution's belief. At best, the information before the court was double hearsay – the information came from the prosecutor by way of an

unnamed third party. Hearsay does not trigger any duty on the trial court's part to investigate or release juror contact information. (*People v. Avila* (2006) 38 Cal.4th 491, 605.) Because the trial court had before it only hearsay, there was no evidence Juror No. 6 and the investigator had a "close relationship" or the nature of that relationship, e.g., neighbors, family friends, etc. There also was no evidence presented that Juror No. 6 and the investigator had at any time discussed Precious's case or engaged in any conduct that would constitute juror misconduct. Precious could have contacted the investigator to obtain particulars about any alleged relationship or connection to Juror No. 6, but apparently did not. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

Based on the evidence, or lack thereof, before it, the trial court properly denied the request for disclosure of juror contact information. (*Carrasco, supra*, 163 Cal.App.4th at p. 991.)

DISPOSITION

The judgment is affirmed.

Gomes, Acting P.J.

WE CONCUR:

Poochigian, J.

Detjen, J.