In The

# Supreme Court of Virginia

**RECORD NO. 150357**

## BRANDON VALENTIN,

***Appellant*,**

**v.**

## COMMONWEALTH OF VIRGINIA,

***Appellee.***

# BRIEF OF APPELLANT

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## GRANTED ASSIGNMENTS OF ERROR

1) The Court of Appeals erred in holding that the trial court did not err by sentencing Appellant to a term of incarceration for nonhomicide offenses committed as a juvenile that constitutes a de facto life sentence and does not provide for a "meaningful opportunity to obtain release," in violation of the Eighth Amendment to the United States Constitution. (App. 34-38, 88-94, 95-100, 580-83, 589-91, 600-14, 628-32.)

2) The Court of Appeals erred in holding that the trial court did not err when it held the evidence sufficient to support Appellant's convictions for break and enter while armed with a deadly weapon with the intent to commit larceny, and conspire to break and enter while armed with a deadly weapon with the intent to commit larceny because there was no evidence showing that Appellant entered or conspired to enter the residence at issue while armed with a deadly weapon. (App. 88-94, 95-100, 408-10, 436, 441, 451-52, 466-68, 472, 476, 487.)

## STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This appeal arises out of the Rockingham County Circuit Court's ("trial court") judgment sentencing Appellant Brandon Valentin ("Valentin") to the functional equivalent of life in prison without parole for nonhomicide offenses committed as a juvenile, in violation of the Eighth Amendment to the United States Constitution's ("Eighth Amendment") ban on cruel and unusual punishments.

Valentin was tried with co-defendant Darien Vasquez ("Vasquez") (together, "the defendants") before the trial court in May 2013 upon numerous indictments arising out of an incident which occurred when

Valentin was sixteen (16) years old. (App. 1-22, 64-80, 112-496.)[1] Following a bench trial, the trial court found Valentin guilty of numerous felonies, including rape by force, threat, or intimidation in violation of Virginia Code § 18.2-61(A)(i) (1950, as amended)[2], abduct with intent to defile in violation of Code § 18.2-48(ii), robbery in violation of Code § 18.2-58, break and enter while armed with a deadly weapon with the intent to commit larceny in violation of Code § 18.2-91, and conspiracy to do the same, and sentenced Valentin to one hundred and forty-eight (148) years in prison with eighty (80) years suspended.[3] (App. 88-94, 487-93, 628-32.) Valentin had no prior criminal record. (App. Vol. II 656-67.)

Valentin subsequently appealed his sentence and multiple convictions to the Court of Appeals of Virginia ("Court of Appeals") arguing

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[1] Unless otherwise noted, all references in this Opening Brief to "App." refer to pages of Volume I – Unsealed Materials of the Consolidated Joint Appendix filed with the Court in this matter.

[2] Unless otherwise noted, all references in this Opening Brief to "Code §" refer to sections of the Code of Virginia.

[3] Valentin was also convicted of grand larceny in violation of Code § 18.2-95, conspiracy to do the same, rape by force, threat, or intimidation as a principal in the second degree in violation of Code §§ 18.2-61(A)(i) and 18.2-18, conspire to abduct with intent to defile in violation of Code §§ 18.2-48(ii) and 18.2-22, wear a mask upon private property without consent of the owner or tenant in violation of Code § 18.2-422, conspire to commit robbery in violation of Code §§ 18.2-58 and 18.2-22, and attempted anal intercourse by force, threat, or intimidation in violation of Code §§ 18.2-67.1 and 18.2-26. (App. 88-94, 487-93, 628-32.)

that trial court erred by sentencing Valentin to a term of incarceration for nonhomicide offenses committed as a juvenile that does not provide for a "meaningful opportunity to obtain release," in violation of the Eighth Amendment. (App. 95-110.) The Court of Appeals found no error in the trial court's judgments, however, and affirmed Valentin's convictions and sentence. (App. 95-110.)

Pursuant to Virginia Supreme Court Rules ("Rule") 5:5(a), 5:9, 5:14(a), and 5:17(a)(2), Valentin timely filed a notice of appeal and petition for appeal from the final judgments of the Court of Appeals. Valentin v. Commonwealth, Va. App. Record No. 1791-13-3, Va. Record No. 150357, Notice of Appeal (March 4, 2015); Valentin v. Commonwealth, Va. Record No. 150357, Petition for Appeal (March 6, 2015). By order dated September 16, 2015, this Court granted the assignments of error listed above. Valentin v. Commonwealth, Va. Record No. 150357 (Sept. 16, 2015 Order).

## STATEMENT OF FACTS

The evidence introduced at trial demonstrated that K.H., a woman, woke up one night in October 2012 to the sight of two individuals, later identified as the defendants, in her townhome in Harrisonburg, Virginia. (App. 117-20.) The first person was leaning over her holding a knife to her

throat and the second person was standing in the doorway of her room. (App. 120, 123.) K.H. was subsequently robbed and raped separately by the two individuals, and was physically assaulted and forced to perform several additional sexual acts by and on the first individual. (App. 121-38, 172.) K.H. described the height, build, and clothing of the first individual, describing him as the physically taller and larger of the two, with a mole near his mouth, and could only generally describe the height and build of the second individual. (App. 120-22.)

After the two individuals left her residence, K.H. drove to a friend's house and her friend called the police. (App. 139-40.) Shortly thereafter, two Harrisonburg Police officers stopped and ultimately arrested Vasquez, who matched the clothing, facial, and physical description of the first offender from the incident in K.H.'s residence, and Valentin as they were walking down a street near K.H.'s residence.[4] (App. 213-16, 220, 223-24.)

The evidence introduced at trial further demonstrated that Valentin and Vasquez both possessed knives while inside K.H.'s residence. (App. 120, 122-23.) Police also found several knives in the defendants' possession after encountering the defendants outside of K.H.'s residence.

[4] For purposes of clarity, any reference to the "first person," "first offender," or "first individual" throughout this Opening Brief refers to Vasquez and any reference to the "second person," "second offender," or "second individual" refers to Valentin.

(App. 210-11, 214-17, 225, 231.) K.H.'s roommates at the time of this incident, Tristan Kirkman and Emily Meyers, both testified that several items, including several knives owned by them were taken from their rooms and/or residence on the night at issue. (App. 174, 176-81, 191, 196-97, 208-09.) It should be noted, however, that the police encountered the defendants the night of the incident after being stopped by a man in the street who had nothing to do with the incident at issue and who "made a complaint that two individuals that [the police] had just passed had taken his stuff." (App. 213, 223-24.) Significantly, no evidence was introduced at trial as to what had been taken from that person. (App. 213, 223-24.)

Upon being questioned by police, Valentin repeatedly stated that he and Vasquez took several different items from K.H.'s residence, including several knives. (App. 294, 299-300, 305.) Additionally, Investigator Mike Spiggle with the Harrisonburg Police Department ("Investigator Spiggle") testified, regarding his interview with Valentin, that Valentin asserted that he "didn't have a knife on her" during the sexual assault of K.H. in her bedroom. (App. 305-06.)

The Commonwealth's Attorney asked Investigator Spiggle if Valentin denied "having a knife," and Investigator Spiggle said, "[y]es." (App. 306.) The Commonwealth's Attorney then asked if Valentin "mention[ed] a

hunting knife in the book bag," and Investigator Spiggle replied, "[y]es." (App. 306.) The Commonwealth's Attorney also asked if "he sa[id] no one used that knife that he brought in," to which Investigator Spiggle replied, "[r]ight." (App. 306.) Significantly, however, this testimony occurred in the context of Investigator Spiggle discussing his interview with Valentin regarding the sexual assault of K.H. in her bedroom. (App. 305-06.) Additionally, upon cross-examination, Investigator Spiggle clarified that based upon his interview of Valentin, "it was clear that the weapons were obtained inside of the residence." (App. 332.)

Investigator Greg Miller with the Harrisonburg Police Department ("Investigator Miller") testified that, following his arrest, Vasquez stated "he had a little knife when he entered the residence and it was in his jacket." (App. 353.) However, when asked during cross-examination whether Vasquez actually stated that "he found the knife in the residence," Miller testified, "[y]es. I wasn't clear if it was right outside or inside, but as they were entering a knife was found . . . yes." (App. 401-02.) Investigator Miller further testified that the defendants mentioned "coming in to the residence with the backpacks and kind of filling them with things." (App. 403.)

At the close of the Commonwealth's case in chief, the defendants' attorneys moved to strike the evidence as to the break and enter with a

deadly weapon with the intent to commit larceny and conspiracy charges, arguing that the question is whether the breaking and entering "was with a weapon," and that there was no evidence that the defendants entered K.H.'s residence with a knife or knives. (App. 408-10, 441, 444.) The trial court denied the defendants' motions to strike as to the break and enter with a deadly weapon with intent to commit larceny and conspiracy charges, stating that, "at least one of the knives is not accounted for as being the object of a larceny from that [residence]." (App. 436, 441, 450-51.) Significantly, however, the Commonwealth did not ask any witness at trial whether the knife that the trial court referred to as the wolf knife was owned by, or belonged to them in any way.

The defendants renewed their motions to strike at the close of all the evidence, and the trial court again denied the defendants' motions to strike, finding, in part, that the evidence established "that the knife that [was] commonly referred to as the wolf [knife] was in the possession of the defendants prior to the breaking and entering of the dwelling house." (App. 451-52, 466-67, 472.) The trial court subsequently found the defendants guilty of breaking and entering with a deadly weapon with the intent to commit larceny and conspiracy to do the same. (App. 478-79, 487.)

Prior to sentencing, Vasquez' attorney filed a Memorandum on Juvenile Sentencing, which Valentin adopted, arguing that Virginia's conditional release of geriatric prisoners statute, Code § 53.1-40.01, does not provide a meaningful opportunity to obtain release for juvenile offenders convicted of nonhomicide crimes, in violation of the United States Supreme Court's ("Supreme Court") holding in Graham v. Florida, 560 U.S. 48 (2010). (App. 34-38, 580-83, 589-91.) Vasquez and Valentin also argued that a sentence for a term of years can constitute a de facto life sentence and, based upon life expectancy, a sentence of greater than 47 years for a 16-year-old juvenile offender convicted of nonhomicide crimes would violate the Eighth Amendment. (App. 34-38, 580-83, 589-91.)

More specifically, the defendants' attorneys asked the court to consider the defendants' ages and lack of maturity as important factors in sentencing because, as the Supreme Court has recognized, juveniles, are simply different from adult offenders because: (1) they lack maturity and have an underdeveloped sense of responsibility leading to recklessness, impulsivity, and needless risk taking; (2) they are more vulnerable and susceptible to negative influences and outside pressures, including from their family and peers; and (3) their character is not as well formed as an adult's and their traits are less fixed and their actions less likely to be

evidence of irretrievable depravity. (App. 600-14.) Specifically, Valentin argued that the trial court must take his age, lack of maturity, vulnerability or susceptibility to negative influences and/or peer pressure, character formation, and possibility for rehabilitation into account in fashioning his sentence. (App. 600-14.)

Accordingly, Valentin's attorney asked the trial court to fashion a sentence that would provide Valentin a meaningful opportunity to demonstrate growth, maturity, and rehabilitation – particularly as the evidence clearly demonstrated that Valentin was the follower and not the leader as between the two defendants and that he lacked maturity, had an under-developed sense of responsibility and was vulnerable to negative influences, including peer pressure. (App. 607-14.)

Following the defendants' arguments at sentencing, the trial court sentenced Valentin, focusing upon the fact that Valentin had been convicted "of a number of absolutely heinous criminal acts . . . against an innocent citizen who was asleep in her bed who had never done [him] any harm whatsoever in her life." (App. 628-32.) The trial court made no mention of Valentin's age, lack of maturity, vulnerability or susceptibility to negative influences and/or peer pressure, character formation, or possibility for rehabilitation. (App. 628-32.) Rather, the trial court stated, "I know that

you would like to take it back and you do not like being where you are, but there are certain things that people do in life where you don't get a second chance." (Emphasis added.) (App. 628.) Additionally, the trial court stated, "I understand that the numerical total of these sentences is such that the concept of geriatric parole will be your chance for release because it is in effect [a] de facto life sentence. But there are just certain crimes that that's what it warrants and in this case that's where we're at." (Emphasis added.) (App. 631.) When the trial court subsequently addressed K.H.'s family at the conclusion of the sentencing hearing, the trial court further stated that "she will not be threatened, she will not have these individuals to be afraid of." (App. 632.) Consequently, the trial court sentenced Valentin, who had no prior criminal record, to one hundred and forty-eight (148) years in prison with eighty (80) years suspended.[5] (App. 88-94, 628-32; App. Vol. II 656-67.)

Valentin subsequently appealed his sentence and several of his convictions to the Court of Appeals, arguing that the trial court erred by

[5] Similarly, the trial court sentenced Vasquez to two hundred and eighty-three (283) years in prison with one hundred and fifty (150) suspended, stating that, "the totality of the circumstances in this case [is] deserving of a sentence that is a life sentence . . . ." (App. 618-26.) While the trial court observed that Virginia law "afford[s] the mandated opportunity if you will for potential release under . . . the geriatric parole setup," the trial court recognized that it was effectively sentencing both Vasquez and Valentin to a "de facto" life sentence. (App. 621, 625, 631.)

sentencing Valentin to a term of incarceration that constitutes a de facto life sentence for nonhomicide offenses committed as a juvenile and Virginia's geriatric release statute, Code § 53.1-40.01, does not provide a meaningful opportunity for release for juveniles such as Valentin, in violation of the Eighth Amendment and the Supreme Court's decision in Graham. (App. 95-99.) Valentin also argued that the evidence was insufficient to support his convictions of break and enter while armed with a deadly weapon with the intent to commit larceny and conspiracy to do the same. (App. 95-99.)

The Court of Appeals affirmed Valentin's convictions and sentence, however, finding no error in the trial court's judgments and sentence.[6] (App. 95-110.) Specifically, the Court of Appeals found that "Vasquez told Investigator Miller he had a knife when he entered the victim's residence" and that admission, "coupled with his possession of several knives after the offenses, was sufficient . . . to conclude that Vasquez possessed a knife at the time he and [Valentin] entered the apartment." (App. 98.) As a result,

[6] While Valentin also appealed, and the Court of Appeals granted an assignment of error related to, a separate conviction, the Court of Appeals found the evidence sufficient to support, and affirmed, the conviction Valentin challenged in the assignment of error granted by the Court of Appeals. (App. 101-10.) Valentin appealed that ruling of the Court of Appeals to this Court; however, this Court denied Valentin's Petition for Appeal as to that assignment of error. Valentin v. Commonwealth, Va. Record No. 150357, Petition for Appeal, 1, 28-32 (March 6, 2015); Valentin v. Commonwealth, Va. Record No. 150357 (Sept. 16, 2015 Order).

the Court of Appeals affirmed Valentin's convictions, of break and enter while armed with a deadly weapon with the intent to commit larceny and conspiracy to do the same. (App. 97-99.)

Citing Rule 5A:12, the Court of Appeals held that Valentin's first assignment of error was insufficient to challenge the trial court's failure to consider Valentin's youth and its attendant characteristics when fashioning his sentence. (App. 97.) Ultimately, the Court of Appeals held that they were bound by this Court's holding in Angel v. Commonwealth, 281 Va. 248, 274-75, 704 S.E.2d 386, 401-02 (2011), that Virginia's geriatric release statute, Code § 53.1-40.01, provides juveniles a meaningful opportunity for release, as required by the Eighth Amendment and the Supreme Court in Graham. (App. 95-100.) Consequently, the Court of Appeals affirmed the trial court's sentence of one hundred and forty-eight (148) years in prison with eighty (80) years suspended. (App. 88-100, 628-32; App. Vol. II 656-57.) The Virginia Department of Corrections ("DOC") projects Valentin's release date to be July 23, 2080.[7] If still alive on that date, he would be 84 years old.

[7] Virginia Inmate Locator, https://vadoc.virginia.gov/offenders/locator/ (last visited October 25, 2015).

## AUTHORITIES AND ARGUMENT

### I. Appellant's Sentence Constitutes a De Facto Life Sentence and Does Not Provide for a Meaningful Opportunity to Obtain Release, in Violation of the Eighth Amendment

#### A. Standard of Review

Constitutional arguments are questions of law that Virginia Appellate Courts review de novo. See Copeland v. Todd, 282 Va. 183, 193, 715 S.E.2d 11, 16 (2011); Covel v. Town of Vienna, 280 Va. 151, 163, 694 S.E.2d 609, 617 (2010).

#### B. The Eighth Amendment Requires that Juvenile Nonhomicide Offenders be Given a Meaningful Opportunity to Obtain Release

The Eighth Amendment, made applicable to the states by the Fourteenth Amendment to the United States Constitution, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII; U.S. Const. amend. XIV. In Roper v. Simmons, 543 U.S. 551, 578-79 (2005), the Supreme Court adopted a categorical rule, pursuant to its interpretation of the Eighth Amendment, prohibiting the imposition of the death penalty for crimes committed by persons under eighteen years of age.

In so doing, the Supreme Court recognized three important differences between youth under the age of eighteen and adults, all of

which had been noted in prior cases: (1) juveniles' lack of maturity and underdeveloped sense of responsibility often combine to result in impulsive decision making and, in turn, reckless behavior; (2) juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3) "the character of a juvenile is not as well formed as that of an adult." Id. at 569-70. The Supreme Court further recognized that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 573.

In Miller v. Alabama, 567 U.S. ___, ___, 132 S. Ct. 2455, 2468-69 (2012), the Supreme Court further held that life without parole could not be imposed on a juvenile even for a homicide offense without an individualized consideration of the appropriateness of the sentence in light of the nature of the crime and the characteristics of the juvenile offender. In so doing, the Supreme Court recognized that children are "constitutionally different" from adults for purpose of sentencing. Id. at ___, 132 S. Ct. at 2485. Because "juveniles have diminished culpability and greater prospects for reform[,] they are less deserving of the most severe punishments." Id. at

___, 132 S. Ct. at 2464 (quoting Graham, 560 U.S. at 68) (internal quotation marks omitted).

Specifically, the Supreme Court again noted three significant gaps between juveniles and adults that must result in juveniles being treated as "constitutionally different" from adults for sentencing purposes. Id. First, "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." Id. (quoting Roper, 543 U.S. at 569) (internal quotation marks omitted). Second, "children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." Id. (quoting Roper, 543 U.S. at 569) (internal quotation marks omitted). And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity]." Id. (quoting Roper, 543 U.S. at 570) (internal quotation marks omitted).

The Supreme Court further recognized that "none of what is said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." Id. at ___, 132 S. Ct. at 2465. Accordingly, the Supreme Court stated, "appropriate occasions for

sentencing juveniles to this harshest possible penalty will be uncommon." Id. at ___, 132 S. Ct. at 2469. The Supreme Court made this observation in light of the difficulty of "distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption'"; therefore, a sentencer must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. (quoting Roper, 543 U.S. at 573).

Perhaps most significantly, however, for purposes of this appeal, the Supreme Court adopted the categorical rule in Graham, 560 U.S. at 82, that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." If a state imposes a sentence of life, the Court explained, "it must provide [the juvenile] with some realistic opportunity to obtain release[.]" Id. For as the Supreme Court explained, "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." Id. at 79. The Supreme Court further explained that a sentence of life without parole

> deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence. [T]his sentence means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.

Graham, 560 U.S. at 69-70 (internal citation and quotation marks omitted).

Accordingly, the Supreme Court held, "[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 [juvenile defendants] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 75 (emphasis added). The Supreme Court further stated, "[t]he 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." Id. (emphasis added). As the Supreme Court explained, "[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible," a judgment that is difficult even for expert psychologists. Id. at 72-73 (citing Roper, 543 U.S. at 573). "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." Id. at 74.

### C. Valentin's Term of Years Sentence Violates the Foundational Principles of the Supreme Court's Eighth Amendment Jurisprudence

The Supreme Court has declared that, pursuant to the Eighth Amendment, state trial courts cannot, "at the outset," decide that a child who has not committed homicide will never be fit to reenter society and should spend the rest of their lives in prison. See Graham, 560 U.S. at 75. Rather, states must "give [juvenile defendants] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id.

While Valentin's sentence, like the Appellant's in Graham, does not explicitly specify that Valentin spend life in prison "without parole," Virginia, like Florida, has abolished the parole system. Id. at 57; see Angel, 281 Va. at 274, 704 S.E.2d at 401. Code § 53.1-165.1. (App. 88-94.) Accordingly, while the trial court sentenced Valentin to a term of years, and did not explicitly sentence Valentin to a term of "life without parole," Valentin submits that a sixty-eight (68) year active prison sentence for a 16-year-old juvenile based on the aggregation of sentences for nonhomicide offenses

constitutes a de facto life sentence for purposes of Eighth Amendment considerations. (App. 88-94.)

In Graham, the defendant, Terrance Jamar Graham, pled guilty in a Florida state court to armed burglary with assault or battery and an attempted armed robbery, offenses which occurred when the defendant was sixteen-years-old. Graham, 560 U.S. at 53-54. Pursuant to a plea agreement, the trial court withheld adjudication of guilt as to both charges and placed Graham on probation for a period of three years. Id. at 54. During his probationary period, Graham was arrested for participating in a home invasion robbery and the Florida trial court subsequently imposed the maximum possible punishment for the prior offenses – life in prison. Id. at 57. In so doing, the Florida court found that there was no chance for Graham's rehabilitation, stating "we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life [and] the only thing I can do now is to try and protect the community from your actions." Id. at 57. Florida, like Virginia, had abolished parole; consequently, Graham's sentence gave him no possibility for release unless he was granted executive clemency. Id. at 57.

Graham appealed and the Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a

juvenile offender who did not commit homicide." Id. at 82. In so holding, the Supreme Court stated:

> Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

Id. at 79.

Similar to the Florida trial court's deciding "at the outset," in Graham, that a child who has not committed homicide should spend the rest of their lives in prison, the trial court in Valentin's case likewise decided "at the outset that [Valentin] never [would] be fit to reenter society." See Graham, 560 U.S. at 75. (App. 628-32.) Specifically, when sentencing Valentin, the trial court focused almost exclusively upon the fact that Valentin had been convicted "of a number of absolutely heinous criminal acts." (App. 628-32.) The trial court made no mention of Valentin's age, lack of maturity, vulnerability or susceptibility to negative influences and/or peer pressure, character formation, or possibility for rehabilitation. (App. 628-32.)

Rather, the trial court stated, "I know that you would like to take it back and you do not like being where you are, but there are certain things that people do in life where you don't get a second chance." (Emphasis added.) (App. 628.) Additionally, the trial court stated, "I understand that the numerical total of these sentences is such that the concept of geriatric parole will be your chance for release because it is in effect [a] de facto life sentence. But there are just certain crimes that that's what it warrants and in this case that's where we're at." (Emphasis added.) (App. 631.) Indeed, when addressing K.H.'s family at the conclusion of the sentencing hearing, the trial court commented that "she will not be threatened, she will not have these individuals to be afraid of." (App. 632.)

Additionally, Code § 8.01-419 lists the table of life expectancy. Code § 8.01-419. For a newborn male, the life expectancy would be 74.7 years. Code § 8.01-419. For a 16-year-old male, the life expectancy would be 59.6 years. Code § 8.01-419. However the same table recognizes that additional evidence may be considered in determining life expectancy. Code § 8.01-419.

It is generally accepted that life in prison, with its stressors, violence, and contagious diseases significantly shortens one's life expectancy. See U.S. v. Taveras, 436 F. Supp. 2d 493, 500 (E.D.N.Y. 2006). In fact, the

actual extent of the diminished life expectancy resulting from imprisonment was addressed by the United States Sentencing Commission, which defines a life sentence as 470 months (or just over 39 years), based on average life expectancy and the average age of federal offenders.[8] U.S. v. Nelson, 491 F.3d 344, 349-50 (7th Cir. 2007). As such, for a twenty-five year old median age offender, the life expectancy for a person in general prison population would be 64 years old. Certainly, that life expectancy would be negatively impacted for juveniles like Valentin who begin their sentences as children, thereby serving a greater portion of their life in prison than adults with the same sentence.

Accordingly, while the trial court did not explicitly sentence Valentin to "life without parole," Valentin's sentence constitutes the functional equivalent of a life sentence. Any distinction between the two is in name only, and without a difference, as both Valentin's sentence and a sentence of "life without parole" would be designed to, and would result in, Valentin spending the rest of his natural life in prison. For as the Supreme Court noted in Sumner v. Shuman, 483 U.S. 66, 83 (1987), "there is no basis for distinguishing . . . between an inmate serving a life sentence without

[8] U.S. Sentencing Commission 2014 Sourcebook of Federal Sentencing Statistics, Appendix A, at 7, available at http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2014/sourcebook-2014 (last visited October 25, 2015).

possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy."

As a result, the trial court's judgment sentencing Valentin, as it did, to sixty-eight active years in prison for nonhomicide offenses committed as a juvenile accomplishes precisely what the Supreme Court declared to be unconstitutional in Graham – a trial court's deciding "at the outset" that a child who has not committed homicide will never be fit to reenter society and should spend the rest of their lives in prison. Graham, 560 U.S. at 75, 82. See also Moore v. Biter, 725 F.3d 1184, 1192 (9th Cir. 2013) (holding a sentence of 254 years to be materially indistinguishable from a life sentence without the possibility of parole); LeBlanc v. Mathena, Civil Action No. 2:12cv340, 2015 U.S. Dist. LEXIS ____, at *26-32 (E.D. Va. July 1, 2015) (holding a Virginia sentence of life in prison for a juvenile convicted of rape and abduction with intent to defile to be unconstitutional pursuant to the requirements of the Eighth Amendment as outlined in Graham); Casiano v. Comm'r of Correction, No. 19345, 2015 WL 3388481, at *11 (Conn. May 26, 2015) (concluding that "a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, . . . no hope.'") (quoting Graham, 560 U.S. at 79); Bear Cloud v. State, 334 P.3d 132, 144

(Wyo. 2014) (holding that an aggregate sentence of just over forty-five years was the de facto equivalent of a life sentence without parole); State v. Null, 836 N.W.2d 41, 71-72 (Iowa 2013) (holding that a [52.5 years] term-of-years sentence prior to parole violates the Iowa state constitution's language identical to the Eighth Amendment, pursuant to the rationales of Graham and Miller); People v. Caballero, 282 P.3d 291, 295-96 (Cal. 2012) (holding that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment"). But see, e.g., Bunch v. Smith, 685 F.3d 546, 552-53 (6th Cir. 2012) (concluding that even though an aggregate sentence of eighty-nine years may be the functional equivalent of life, Graham applied only to sentences of "life"); State v. Brown, 118 So.3d 332, 342 (La. 2013) (concluding that "nothing in Graham addresses a defendant convicted of multiple offenses and given term of year sentences").

### D. Virginia Code § 53.1-40.01 Does Not Provide Juveniles a Meaningful Opportunity to Obtain Release

In Angel, this Court considered the constitutionality of three life sentences for a juvenile convicted of multiple sex offenses. Angel, 281 Va. at 258-59, 273, 704 S.E.2d at 392, 401. The defendant in Angel was

sentenced on July 27, 2007, id., and the Supreme Court decided Graham in the early summer of 2010. Graham, 560 U.S. at 48. Because Angel's appeal was pending at the time of Graham, the constitutionality of his sentence was raised before the Supreme Court of Virginia. Angel, 281 Va. at 273, 704 S.E.2d at 401. The unique procedural posture that this Court found itself in when deciding Angel resulted in its reliance upon Virginia's conditional release statute, Code § 53.1-40.01, apparently without any further evidence as to the details of Virginia's conditional release program. Id. at 273-75, 704 S.E.2d at 401-402. Ultimately, this Court held that Code § 53.1-40.01[9] provides a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," as required by the Eighth

[9] Code § 53.1-40.01 provides:

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the provisions of this section.

Amendment, pursuant to the Supreme Court's decision in Graham. Id. at 275, 704 S.E.2d at 402 (citing Graham, 560 U.S. at 75).[10]

It is important to note that the Supreme Court did not explain in Graham what, exactly, it meant by requiring states to provide juveniles "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 75. Instead, the Supreme Court left it to the states "to explore the means and mechanisms for compliance." Id.

Whatever "means and mechanisms" may comply with the requirements of the Eighth Amendment, Valentin respectfully submits that Code § 53.1-40.01 does not provide juvenile offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," in violation of the Supreme Court's holding in Graham. Id. Virginia's recent numbers regarding the application of its conditional release program, outlined in Vasquez' Memorandum on Juvenile Sentencing (which Valentin adopted), demonstrate that Code § 53.1-40.01

[10] While the appeal in Angel presented this Court with at least six distinct issues, five of those issues related to proceedings at Angel's trial and are not relevant to this discussion. See Angel, 281 Va. at 275-76, 704 S.E.2d at 402. The United States Supreme Court subsequently denied Angel's petition for writ of certiorari. Angel v. Virginia, ___ U.S. ___, 132 S. Ct. 344 (2011) (denying cert.). However, the Supreme Court did not state the reason for the denial and it is not clear which of the multiple issues presented to this Court in Angel were appealed.

does not provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," particularly in light of the numbers specific to sex offenders. Id. (App. 35-36, 580-82.) This becomes particularly clear when one considers the shockingly low number of inmates who have been considered for release, let alone those who have been able to obtain release, compared to the number of those eligible. (App. 35-36.)

For the years 2010 through 2012, for example, the trial court received evidence that just over one percent (1%) of all offenders eligible were granted geriatric release. (App. 35-36.) Additionally, less than ten percent (10%) of that one percent (1%) granted release were sex offenders. (App. 35-36.) Indeed, more murderers were granted geriatric release in recent years than sex offenders. (App. 35-36.) Accordingly, in light of the application, or lack of application, of Virginia's conditional release program, it cannot be said that Code § 53.1-40.01 provides a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[11] Id.

[11] The Richmond Times Dispatch has also noted that between 1994, when the Virginia General Assembly enacted Code § 53.1-40.01, and early 2010, only fifteen (15) inmates were granted geriatric release. Frank Green, Virginia Rarely Grants Geriatric Parole, RICHMOND TIMES DISPATCH, March 1, 2010, available at http://www.richmond.com/news/va-rarely-grants-geriatric-parole/article_4969b0fe-bdca-5361-984a-7aeb0da2f87e.html (last visited October 25, 2016).

Moreover, the American Academy of Child and Adolescent Psychiatry ("AACAP"), which filed amicus briefs in Roper, Graham, and Miller pointing out biological differences between juvenile and adult brains, has urged that juveniles serving life-without-parole sentences receive an initial sentencing review within five years or by the age of twenty-five, whichever comes first, and that, "[a]s maturation and rehabilitation are ongoing processes, subsequent reviews should occur no less than every three years."[12] Such periodic reviews are necessary, according to the AACAP, because "[r]esearch demonstrates that brain development continues throughout adolescence and into early adulthood. The frontal lobes, which are critical for mature reasoning and impulse control, are among the last areas of the brain to mature. They are not fully developed until the early to mid-20's."[13]

Given the foundational principles of the Supreme Court's Eighth Amendment jurisprudence, therefore – that "children are constitutionally different" from adults and warrant special consideration regarding sentencing because of the unique characteristics attendant to youth and the possibility for rehabilitation – Code § 53.1-40.01 cannot satisfy

[12] Am. Acad. of Child & Adolescent Psychiatry, Policy Statement: Juvenile Life Without Parole: Review of Sentences (April 2011), available at http://www.aacap.org/AACAP/Policy_Statements/2011/Juvenile_Life_Without_Parole_Review_of_Sentences.aspx (last visited October 25, 2016).

[13] Id.

Graham's requirement that juveniles be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Miller, 567 U.S. at ___, 132 S. Ct. at 2485; Graham, 560 U.S. at 75. See also LeBlanc, Civil Action No. 2:12cv340, 2015 U.S. Dist. LEXIS ____, at *26-29 (holding that Virginia's sentencing scheme regarding juveniles does not satisfy the requirements of the Eighth Amendment because "[t]he remote possibility of geriatric release does not provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation," as required by Graham); Casiano, No. 19345, 2015 WL 3388481, at *11 (stating "we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of Graham or Miller") (quoting Null, 836 N.W.2d at 71); Bear Cloud, 334 P.3d at 142 (noting that the prospect of geriatric release does not comport with the dictates of Graham); Null, 836 N.W.2d at 71 (holding that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by Graham") (quoting Graham, 560 U.S. at 75). For, if Virginia's geriatric release program treats juveniles differently than adults, it is because the scheme treats juveniles worse than their adult counterparts.

Pursuant to Code § 53.1-40.01, all prisoners in Virginia, regardless of whether they were an adult or a juvenile at the time of offense, may apply for geriatric release when they reach either the age of sixty or sixty-five. Code § 53.1-40.01. This scheme results in juveniles necessarily being required to wait longer and serve a larger percentage of their sentence before they are even eligible to apply for the same conditional release program available to adult offenders. For example, a fifty-year-old adult offender sentenced to fifty years in prison need only wait ten years before he may apply for conditional release. Code § 53.1-40.01. Similarly, a sixty-year-old adult offender sentenced to 50 years in prison need only wait five years before he may apply for conditional release. Code § 53.1-40.01. A sixteen-year-old juvenile offender such as Valentin, however, sentenced to fifty years in prison for the exact same offenses as his adult counterparts, must wait a minimum of forty-four years before he becomes eligible to apply for geriatric release. Code § 53.1-40.01. Accordingly, Virginia's geriatric release program, pursuant to Code § 53.1-40.01, necessarily treats juvenile offenders worse than their adult counterparts, and stands in direct contradiction to the Eighth Amendment's requirement that juveniles be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." See Graham, 560 U.S. at 70,

75 (recognizing that life without parole for juveniles imposes a harsher sentence on juveniles than adults who receive the same sentence because the child will spend a "greater percentage of his life in prison than an adult offender" and a "16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only").

### E. Valentin Preserved His Argument that the Trial Court Failed to Properly Consider Valentin's Youth and its Attendant Characteristics

Lastly, while the Court of Appeals found that Valentin's first assignment of error was insufficient to challenge the trial court's failure to consider Valentin's youth and its attendant characteristics when fashioning his sentence, citing Rule 5A:12 (App. 95-100.), this argument is covered by Valentin's first assignment of error and was raised when he challenged the constitutionality of the sentenced imposed by the trial court in his Petition for Appeal filed in the Court of Appeals. Valentin v. Commonwealth, Va. App. Record No. 1791-13-3, Petition for Appeal, 1, 8-17 (Feb. 14, 2014). Indeed, the very reason that Valentin's sentence is unconstitutional is that he was a juvenile at the time of the offenses. Consequently, the trial court necessarily failed to properly consider Valentin's youth and its attendant characteristics when fashioning the sentence at issue in this appeal, as required by the Supreme Court and the Eighth Amendment.

## II. The Evidence Was Insufficient to Convict Valentin of Break and Enter While Armed with a Deadly Weapon with the Intent to Commit Larceny and Conspiracy to do the Same

### A. Standard of Review

When examining a challenge to the sufficiency of the evidence, Virginia appellate courts will review the evidence in the light most favorable to the party prevailing at trial and consider any reasonable inferences from the proven facts. See Zimmerman v. Commonwealth, 266 Va. 384, 386, 585 S.E.2d 538, 539 (2003). The judgment of the trial court is presumed to be correct and will be reversed only if it is "plainly wrong or without evidence to support it." Viney v. Commonwealth, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005).

### B. Argument

Code §§ 18.2-90 & -91 proscribe breaking and entering into a dwelling house with the intent to commit larceny. Code §§ 18.2-90 & -91. Code § 18.2-91 further provides that, "if [a] person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony." Code § 18.2-91.

In Hitt v. Commonwealth, 43 Va. App. 473, 477, 481, 598 S.E.2d 783, 784-85, 787 (2004), the Court of Appeals recognized that only the breaking and entering from outside a dwelling house into the dwelling house, and not

the breaking and entering of a room within a dwelling house, constitutes the breaking and entering of a dwelling house as required by Code §§ 18.2-90 & -91. Accordingly, because the defendant in Hitt had not broken into a dwelling, but had only broken into a room after being present in the home with the occupants' permission, the Court of Appeals reversed the defendant's conviction of statutory burglary under Code § 18.2-91. Hitt, 43 Va. App. at 476-77, 483, 598 S.E.2d at 784-85, 788.

Consequently, in order to support a conviction for breaking and entering with the intent to commit larceny, the Commonwealth was required to prove beyond a reasonable doubt that Valentin committed breaking and entering with the intent to commit larceny while armed with a deadly weapon at the moment of entry into K.H.'s residence. See id. at 476-77, 481, 483, 598 S.E.2d at 784-85, 787-88. However, the evidence at trial was insufficient to convict Valentin of breaking and entering while armed with a deadly weapon with the intent to commit larceny in violation of Code § 18.2-91 and conspiracy to do the same in violation of Code §§ 18.2-91 and 18.2-22.

Specifically, the evidence introduced at trial demonstrated that Valentin and Vasquez both possessed knives while inside K.H.'s residence. (App. 120, 122-23.) Police also found several knives in the defendants'

possession outside of K.H.'s residence after they had exited her residence. (App. 210-11, 214-17, 225, 231.) Significantly, the police encountered the defendants the night of the incident after being stopped by a man in the street who had nothing to do with the incident at issue and who "made a complaint that two individuals that [the police] had just passed had taken his stuff." (App. 213, 223-24.) No evidence was introduced at trial as to what had been taken from that person. (App. 213, 223-24.) Additionally, K.H.'s roommates at the time of this incident both testified that several items, including several knives owned by them were taken from their rooms and/or residence on the night at issue. (App. 174, 176-81, 191, 196-97, 208-09.)

Upon being questioned by police, Valentin repeatedly stated that he and Vasquez took several different items from K.H.'s residence, including several knives. (App. 294, 299-300, 305.) Investigator Spiggle testified, regarding his interview with Valentin, that Valentin asserted that he "didn't have a knife on her" during the sexual assault of K.H. in her bedroom. (App. 305-06.) The Commonwealth's Attorney asked Investigator Spiggle if Valentin denied "having a knife," and Investigator Spiggle said, "[y]es." (App. 306.) The Commonwealth's Attorney then asked if Valentin "mention[ed] a hunting knife in the book bag," and Investigator Spiggle

replied, "[y]es." (App. 306.) The Commonwealth's Attorney also asked if "he sa[id] no one used that knife that he brought in," to which Investigator Spiggle replied, "[r]ight." (App. 306.) Significantly, however, this testimony occurred in the context of Investigator Spiggle discussing his interview with Valentin regarding the sexual assault of K.H. in her bedroom. (App. 305-06.) Additionally, upon cross-examination, Investigator Spiggle clarified that based upon his interview of Valentin, "it was clear that the weapons were obtained inside of the residence." (Emphasis added.) (App. 332.)

Investigator Miller further testified that, following his arrest, Vasquez stated "he had a little knife when he entered the residence and it was in his jacket." (App. 353.) However, when asked during cross-examination whether Vasquez actually stated that "he found the knife in the residence," Miller testified, "[y]es. I wasn't clear if it was right outside or inside, but as they were entering a knife was found . . . yes." (Emphasis added.) (App. 401-02.)

At the close of the Commonwealth's case in chief, the defendants' attorneys both made motions to strike as to these particular charges, arguing that there was no evidence that the defendants entered K.H.'s residence with a knife or knives. (App. 408-10, 441, 444.) The trial court

denied the defendants' motions to strike, stating that, "at least one of the knives is not accounted for as being the object of a larceny from that [residence]." (App. 436, 441, 450-51.) The defendants renewed their motions to strike at the close of all the evidence, and the trial court denied the defendants' motions to strike, finding that the evidence established "that the knife that [was] commonly referred to as the wolf [knife] was in the possession of the defendants prior to the breaking and entering of the dwelling house." (App. 451-52, 466-67, 472.)

Significantly, however, while the Commonwealth did ask several witnesses, including K.H.'s roommates, if certain knives belonged to them, the Commonwealth did not ask any witness at trial whether the knife that the trial court referred to as the wolf knife belonged to them. (App. 174, 176-81, 191, 196-97, 208-09.) As a result, there was simply no evidence introduced at trial as to the origin and/or ownership of the wolf knife, either positive or negative. "It is axiomatic that the Commonwealth's case cannot rise above its own evidence." Courtney v. Commonwealth, 281 Va. 363, 370, 706 S.E.2d 344, 348 (2011). Accordingly, the complete lack of evidence as to the origin and/or ownership of the wolf knife cannot support the trial court's finding that "the wolf [knife] was in the possession of the defendants prior to the breaking and entering of the dwelling house[,]"

particularly given that the defendants stole items from another individual after leaving K.H.'s residence and no evidence was introduced as to what was stolen from that person. (App. 213, 223-24.)

Consequently, because there was no evidence demonstrating that either Valentin or Vasquez possessed a knife at the time they entered K.H.'s dwelling house, the evidence was insufficient, as a matter of law, to support Valentin's convictions of breaking and entering while armed with a deadly weapon with the intent to commit larceny, and conspiracy to do the same, in violation of Code §§ 18.2-91 and 18.2-22. (App. 120, 122-23, 174, 176-81, 191, 196-97, 208-11, 213-17, 223-25, 231, 294, 299-300, 305-06, 332, 401-03.)

## CONCLUSION

Based on the foregoing, Valentin respectfully requests that this Court hold that the trial court erred by sentencing Valentin to a term of incarceration for nonhomicide offenses committed as a juvenile that constitutes a de facto life sentence and does not provide for a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," in violation of the Eighth Amendment. Graham, 560 U.S. at 75. Accordingly, Valentin respectfully requests that this Court vacate the trial court's sentence in this matter, and the Court of Appeals' judgment

affirming the trial court's sentence, and remand for a new sentencing event. Lastly, Valentin respectfully requests that this Court hold the evidence admitted at trial insufficient, as a matter of law, to support Valentin's convictions of break and enter while armed with a deadly weapon with the intent to commit larceny and conspiracy to do the same, and reverse the Court of Appeals' and the trial court's judgments as to these charges.

**RESPECTFULLY SUBMITTED,**
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## CERTIFICATE

We hereby certify that Rule 5:26(h) of the Supreme Court of Virginia have been complied with, as one (1) electronic version in PDF format of this Brief of Appellant has been filed, via VACES, and ten (10) printed copies of the same have been hand-filed with the Clerk of this Court on October 26, 2015. On this same day, one (1) electronic version in PDF format of this Brief of Appellant has been served, via email, to Counsel for Appellee, the Commonwealth of Virginia, Senior Assistants Attorneys General Steven A. Witmer, Esq., and Donald E. Jeffrey, III, Esq., Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, switmer@oag.state.va.us, djeffrey@oag.state.va.us (E-mail). The foregoing Brief of Appellant contains 8,433 words, and 38 pages, not including the appendices, cover page, table of contents, table of authorities, and certificate.


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