In the
Supreme Court of Virginia

Record Nos. 141071 & 150357

Court of Appeals Record Nos. 1878-13-3 & 1791-13-3

Darien Vasquez,
Appellant,

v.

Commonwealth of Virginia,
Appellee

and

Brandon Valentin,
Appellant,

v.

Commonwealth of Virginia,
Appellee.

Brief of Juvenile Law Center as Amicus Curiae in Support of Appellants Darien Vasquez and Brandon Valentin

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STATEMENT OF INTEREST

Founded in 1975, Juvenile Law Center is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

CONSENT OF THE PARTIES

Pursuant to Virginia Supreme Court Procedural Rules 5:4(a) and 5:30, counsel for Amicus Curiae sought and received the consent of all parties. (See written consent of all counsel enclosed with the brief.)

STATEMENT OF THE CASE

Amicus Juvenile Law Center adopts the Statements of the Case as articulated in Appellants' Briefs to the Supreme Court of Virginia.

ASSIGNMENTS OF ERROR

Amicus Juvenile Law Center adopts the Assignments of Error as articulated in Appellants' Briefs to the Supreme Court of Virginia.

STANDARD OF REVIEW

Amicus Juvenile Law Center adopts the Standards of Review as articulated in Appellants' Briefs to the Supreme Court of Virginia.

SUMMARY OF ARGUMENT

In 2010, the U.S. Supreme Court held in *Graham v. Florida*, 560 U.S. 48 (2010) that life without parole sentences for juvenile offenders committing nonhomicide offenses violate the Eighth Amendment's ban on cruel and unusual punishments. The 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. *Graham* held that a sentence that provides no “meaningful opportunity to obtain release” for a juvenile convicted of nonhomicide crimes is unconstitutional. *Id.*

Darien Vasquez and Brandon Valentin were convicted of nonhomicide crimes arising from incidents that took place when each was 16 years old. Mr. Vasquez was sentenced to 133 years in prison; Mr. Valentin was sentenced to 68 years in prison. Neither will have the opportunity for parole. Because Mr. Vasquez and Mr. Valentin were convicted of nonhomicide crimes and given sentences that deprive them of a “meaningful opportunity to obtain release,” their sentences constitute the functional equivalent of life without parole and are unconstitutional despite

being labeled as term-of-years sentences. This Court should follow the U.S. Supreme Court's mandate in *Graham* and hold that Appellants Vasquez and Valentin's sentences are unconstitutional and remand for new sentencing hearings.

ARGUMENT

I. *Graham* And *Miller* Affirm The United States Supreme Court's Recognition That Children Are Categorically Less Deserving Of The Harshest Forms Of Punishment

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments.[1] Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes: "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569-70). *Graham* found that "[t]hese salient characteristics mean that '[i]t is difficult even for expert

[1] *Roper* held that imposing the death penalty on juvenile offenders violates the Eighth Amendment, 543 U.S. at 578; *Graham* held that life without parole sentences for juveniles convicted of nonhomicide offenses violate the Eighth Amendment, 560 U.S. at 82; and *Miller* held that mandatory life without parole sentences imposed on juveniles convicted of homicide offenses violate the Eighth Amendment, 132 S. Ct. at 2469.

psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.* (quoting *Roper*, 543 U.S. at 569, 573). The Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Graham*, 560 U.S. at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)). The *Graham* Court found that because the personalities of adolescents are still developing and capable of change, an irrevocable penalty that afforded no opportunity for release was developmentally inappropriate and constitutionally disproportionate. The Court further explained that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S. at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

Id. The Court's holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow.

In reaching these conclusions about a juvenile's reduced culpability, the U.S. Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth. The Court clarified in *Graham* that, since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offenders" is central to the question of whether a punishment is constitutional. *Id.* at 68-69.

The U.S. Supreme Court in *Miller* expanded its juvenile sentencing jurisprudence, banning mandatory life without parole sentences for children convicted of homicide offenses. Reiterating that children are fundamentally different from adults, the Court held that a sentencing scheme that mandates life without parole for juvenile offenders violates the Eighth

Amendment and that the sentencer must take into account the juvenile's "lessened culpability", "greater 'capacity for change,'" and individual characteristics before imposing this harshest available sentence. *Miller*, 132 S. Ct. at 2460 (quoting *Graham*, 560 U.S. at 68, 74). The Court noted "that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id*. at 2464-65 (quoting *Graham*, 560 U.S. at 68-69). Importantly, in *Miller*, the Court found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." 132 S. Ct. at 2465. The Court instead emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.*

II. Appellants' Sentences Violate The Eighth Amendment Because They Are The Functional Equivalent Of Life Without Parole

Mr. Vasquez and Mr. Valentin were convicted of nonhomicide offenses that they committed at age 16. Mr. Vasquez was sentenced to 133

years in prison and Mr. Valentin to 68 years in prison, in a state that has abolished parole and offers only a limited opportunity for geriatric release at age 60. (Appellant Vasquez's Petition for Appeal to the Supreme Court of Virginia at 5; Appellant Valentin's Petition for Appeal to the Supreme Court of Virginia at 3). While sentencing Valentin, the trial court itself acknowledged that his sentence of 68 years constituted a "de facto life sentence." (Appellant Valentin's Petition for Appeal to the Supreme Court of Virginia at 12). Because the Appellants' sentences are the functional equivalent of life without parole and fail to provide a meaningful opportunity for release, this Court should hold that these sentences are unconstitutional pursuant to *Miller* and *Graham*.

A. *Graham v. Florida* Requires That Juveniles Convicted Of Nonhomicide Offenses Receive A "Meaningful Opportunity To Obtain Release"

In *Graham v. Florida*, the U.S. Supreme Court held the Eighth Amendment forbids States from "making the judgment at the outset that [juvenile nonhomicide] offenders never will be fit to reenter society." 560 U.S. at 75. Instead, States must give these offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* In *Graham*, the Court explained that juveniles who

commit nonhomicide offenses “should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.” *Id.* at 79. Due to their stage of development, juveniles are more impulsive and susceptible to pressure and less mature and responsible than adults; at the same time, they possess a greater capacity for rehabilitation, change and growth than do adults. *Id.* at 68. Emphasizing these unique developmental characteristics, the Court held that juveniles who are convicted of nonhomicide offenses require distinctive treatment under the Constitution. *Id.* at 82.

Miller v. Alabama, 132 S. Ct. 2455 (2012), banning mandatory life without parole sentences for juvenile *homicide* offenders, confirms that a life without parole sentence is unconstitutional for a juvenile convicted of nonhomicide crimes, even multiple nonhomicide offenses. *Miller* found that, “given all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon.*” 132 S. Ct. at 2469 (emphasis added). Under *Miller* and *Graham,* a juvenile convicted of only nonhomicide crimes by definition cannot be categorized as one of the most

culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring) ("The dissent itself here would permit life without parole for 'juveniles who commit the worst types of murder,' but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.").[2]

B. Even When Juveniles Commit Multiple Nonhomicide Offenses, They Are Entitled To A "Meaningful Opportunity to Obtain Release" Under *Graham*

A court cannot, "at the outset," decide that a child who has not committed homicide should be sentenced to die in prison. *Graham*, 560 U.S. at 75. Sentencing Appellants to die in prison is no more constitutional because it involved *multiple* convictions of nonhomicide offenses; it remains a sentence contrary to U.S. Supreme Court precedent. The U.S. Supreme Court has found that people who do not kill or intend to kill are categorically less culpable than people who commit homicide offenses. *Graham*, 560 U.S. at 69. The fact that a child was convicted of *multiple*

[2] Although *Amici,* throughout the brief, distinguish between juveniles convicted of homicide and nonhomicide offenses, *Amici* do not intend to suggest that extreme term-of-years sentences are constitutionally appropriate for juveniles who commit homicide offenses. Appropriate sentencing for juveniles convicted of homicide offenses is not at issue in this case.

nonhomicide counts does not alter this equation. *See, e.g.*, *Gridine v. Florida*, No. SC12-1223, 2015 WL 1239504 (Mar. 19, 2015) (holding a seventy-year prison sentence for a juvenile convicted of multiple nonhomicide offenses unconstitutional).[3] The U.S. Supreme Court has equated life without parole for juveniles with death sentences for adults. *See Miller*, 132 S. Ct. at 2466 (viewing life without parole "for juveniles as akin to the death penalty"); just as an adult who was convicted of multiple *nonhomicide* offenses could not receive the death penalty, *see, e.g., Coker v Georgia*, 433 U.S. 584, 599 (1977) (plurality opinion) (banning the death penalty for an individual convicted of rape and robbery), a juvenile who is convicted of *multiple* nonhomicide offenses cannot be sentenced to die in prison, an otherwise unconstitutional sentence. The U.S Supreme Court has been clear: "[a]s it relates to crimes against individuals . . . the death penalty should not be expanded to instances where the victim's life was not taken." *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008). Where no life has been taken, a child analogously cannot be sentenced to die in prison – even if the child is convicted of multiple offenses.

[3] All unpublished opinions cited in this brief are available on Westlaw and copies will be provided to the Court upon request.

The brutality or cold-blooded nature of a nonhomicide offense provides no exception to *Graham*'s categorical ban on life without parole for nonhomicide offenders. *See Graham*, 560 U.S. at 78 (noting that, absent a categorical ban, "an 'unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity'" should require a less severe sentence) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

C. A Sentence That Precludes A "Meaningful Opportunity To Obtain Release" Is Unconstitutional Regardless Of Whether It Is Designated "Life Without Parole"

A sentence for nonhomicide offenses that provides the juvenile offender no meaningful opportunity to reenter society is unconstitutional. The Supreme Court's Eighth Amendment jurisprudence has clarified that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not how a sentence is labeled. For example, the U.S. Supreme Court took this commonsense and equitable approach in *Sumner v. Shuman,* 483 U.S. 66 (1987), where it noted that "there is no basis for distinguishing, for purposes of deterrence, between an inmate

serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." 483 U.S. 66 at 83.

Graham established "a categorical rule [which] gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." 560 U.S. at 79. Whether a sentence is formally labeled life without parole should not relieve courts from following *Graham*'s mandate that children who commit nonhomicide offenses must be provided a meaningful opportunity for release from prison. Courts cannot circumvent the categorical ban on life without parole for juveniles who did not commit homicide simply by choosing a lengthy term-of-years sentence – here 133 years or 68 years – instead of life without parole. As the Iowa Supreme Court noted, in vacating mandatory 60-year sentences for juvenile homicide offenders pursuant to *Miller* and *Graham*, "it is important that the spirit of the law not be lost in the application of the law." *Iowa v. Ragland*, 836 N.W.2d 107, 121 (2013). *See also Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013) ("*Graham's* focus was not on the label of a 'life sentence' – but rather on the difference between life in prison with, or without, possibility of parole."); *Henry v. Florida*, No. SC12-578, 2015 WL 1239696,

at *4 (Mar. 19, 2015) (holding that *Graham* forbids term-of-years sentences that preclude any "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'") (citing *Graham*, 560 U.S. at 75).

To hold that a sentence that precludes a meaningful opportunity for release does not violate *Graham* because it was not formally labeled "life without parole" defies commonsense and cannot be squared with the Supreme Court's Eighth Amendment jurisprudence.

D. Virginia's Geriatric Release Policy Does Not Constitute A Meaningful Opportunity For Release Under *Graham*

In 1995, the Commonwealth of Virginia abolished parole. The Department of Corrections has estimated that Mr. Vasquez will complete his sentence at age 132, an age Mr. Vasquez will never reach; Mr. Valentin will complete his sentence at age 84. A sentence that exceeds a juvenile offender's life expectancy clearly fails to provide an offender a meaningful opportunity for release or to demonstrate growth and maturity.[4]

[4] *See California v. Caballero*, 282 P.3d 291, 295 (2012) ("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.")*; Colorado v. Rainer*, No. 10CA2414, 2013 WL 1490107 (Co. Ct. App. Apr. 11, 2013), *cert. granted en banc*, No. 13SC408,

This Court held in *Angel v. Commonwealth,* 704 S.E.2d 386 (Va. 2011) that a meaningful opportunity for release was actually guaranteed through Virginia's "geriatric release" statute. This statute allows for the conditional release of prisoners who have reached age 60 and served ten years of the sentence or age 65 and served five years of the sentence. Va.

2014 WL 7330977 (Dec. 22, 2014) (holding that a sentence where a juvenile nonhomicide offender becomes eligible for parole after his statistical life expectancy violates *Graham*); *Thomas v. Pennsylvania*, No. 10-4537, 2012 WL 6678686, at *2 (E.D. Pa. Dec. 21, 2012) (memorandum opinion) (vacating a sentence in which a 15-year-old offender would not be parole-eligible until age 83 noting that "[t]his Court does not believe that the Supreme Court's analysis would change simply because a sentence is labeled a term-of-years sentence rather than a life sentence if that term-of years sentence does not provide a meaningful opportunity for parole in a juvenile's lifetime. The Court's concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based on their label."); *but see Diamond v. Texas*, 419 S.W.3d 435 (Tex. Ct. App. 2012) (upholding a child's consecutive 99 year and 2 year sentences without any discussion of *Graham*); *Burnell v. Texas*, No. 01-10-00214-CR, 2012 WL 29200, at *8 (Tex. Ct. App. Jan. 5, 2012) (memorandum opinion) (holding that a 25-year sentence does not violate *Graham*); *Arizona v. Kasic*, 265 P.3d 410, 411 (Ariz. Ct. App. 2011) (upholding an aggregate term 139.75 years based on 32 felonies, including one attempted arson continued into defendant's adulthood); *Louisiana v. Brown*, 118 So. 3d 332, 341 (2013) (upholding consecutive term-of-years sentences rendering the defendant eligible for parole at 86); *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) (upholding a sentence where the earliest possibility of parole was at age 95); *Angel v. Commonwealth*, 704 S.E.2d 386, 402 (2011) (finding that *Graham* was not violated because juveniles sentenced to life without parole for nonhomicide offenses in Virginia would be eligible for release at age 60).

Code Ann. § 53.1-40.01. This statute, however, does not provide a meaningful opportunity for release, as required by *Graham*.

1. Geriatric Release Is Extremely Uncommon

To comply with Graham, a juvenile non-homicide offender's opportunity for release must be "meaningful." *Graham*, 560 U.S. at 79. Data from the Virginia Department of Corrections establishes that geriatric release is incredibly uncommon, and therefore cannot be consider a meaningful opportunity for release.

In fiscal year 2014, only 7 offenders were granted geriatric release; this constituted less than one percent of all offenders who were eligible for geriatric release and less than 3.5% of those who applied. Virginia Department of Corrections, *Geriatric Offenders Within the SR Population* 7 (2015) *available at* http://vadoc.virginia.gov/about/facts/research/Geriatric2015.pdf. These low percentages do not constitute a meaningful opportunity for release. In comparison, 24 offenders over age 65 *died* in custody that same year. *Id.* at 6. In other words, geriatric prisoners were substantially more likely to die in prison than to be released through geriatric parole. This higher likelihood

of dying in prison does not constitute the meaningful opportunity for release contemplated by *Graham*.

2. *The Geriatric Release Guidelines Do Not Consider The Youth-Specific Characteristics Mandated By* Graham

A "meaningful opportunity for release" also requires that the parole board focus on the characteristics of the youth, including his or her lack of maturity at the time of the offense, and not merely the circumstances of the offense. *Roper* cautioned against the "unacceptable likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course." 543 U.S. at 573. *See also Graham*, 560 U.S. at 78. Similarly, in parole review, the parole board must not allow the underlying facts of the crime to overshadow the juvenile's immaturity at the time of the offense and progress and growth achieved while incarcerated.

Virginia, however, does *not* have specific release guidelines for juveniles who are sentenced in the adult system, and the parole guidelines require that the length of the sentence and the facts and circumstances of the crime be considered. Virginia Parole Board Policy Manual 2-3 (2006) [hereinafter "Virginia Parole Board Policy Manual"] *available at* http://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf. Moreover, many of

the factors considered in the geriatric release process will actually work to the detriment of juvenile offenders.[5] For instance, the parole guidelines mandate that the "family and marital history," "intelligence and education," and "employment and military experience" of the prisoner be considered. Virginia Parole Board Policy Manual 3. In contrast to inmates incarcerated as adults, those who were incarcerated as children or teens, like Mr. Vasquez and Mr. Valentin, will have no opportunity to establish a record of stable marital relationships, education outside of the institution, or an employment or military history. Therefore, treating juvenile offenders the same way as adults in release proceedings places them at a significant disadvantage.

Though Virginia's parole guidelines require the parole board to consider "mitigating and aggravating factors" of the offense, Virginia Parole Board Policy Manual 3, there is no guidance as to what factors should be considered mitigating and how the youth's age and developmental characteristics at the time of the offense should be weighed. In its recent

[5] The regulations set forth by the Parole Board governing the implementation of Va. Code Ann. § 53.1-40.01 state that when a prisoner is eligible for geriatric release, "the factors used in the normal parole consideration process apply". *Angel*, 704 S.E.2d at 402.

sentencing cases, the U.S. Supreme Court has repeatedly spoken of youth as a mitigator. *See, e.g.*, *Roper v. Simmons*, 543 U.S. at 572-73 ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."); *Graham v. Florida*, 560 U.S. at 68, ("[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments."); *Miller v. Alabama*, 132 S. Ct. at 2467("[W]e insisted in [previous] rulings that a sentencer have the ability to consider the 'mitigating qualities of youth.'"). Absent a requirement that the parole board consider age and age-related characteristics at the time of the offense as mitigating factors counseling in favor of parole, this parole determination is simply not in compliance with the Supreme Court's dictates. *See, e.g.*, *Miller*, 132 S. Ct. at 2468-69 (finding that many factors impact a juvenile's culpability, including (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the . . . offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with

youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation.")*.*

3. For An Opportunity For Release To Be Meaningful, Review Must Occur Early And Regularly

A meaningful opportunity for release must mean more than simply release on a stretcher to die shortly thereafter at home. For an opportunity for release to be "meaningful" under *Graham,* review must begin long before a juvenile reaches old age. Providing an opportunity for release only after decades in prison denies these young offenders an opportunity to live a meaningful life in the community and meaningfully contribute to society. *See, e.g.*, *Iowa v. Pearson*, 836 N.W.2d 88, 96 (2013) (striking down a 35-year sentence that would render the juvenile eligible for parole at age 52 because it violated *Miller* by "effectively depriv[ing] of any chance of an earlier release and the possibility of leading a more normal adult life."). Finding employment after age 60, with felony convictions and no work experience outside of prison, will make it unlikely that Appellants would be able to become productive, tax-paying members of society upon their release. Appellants are also unlikely to be able to engage in other aspects of a meaningful life, like starting a family. *See, e.g.*, *Iowa v. Null*, 836

N.W.2d 41, 71 (2013) (“The 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*.”).

Allowing possible release from prison before a juvenile offender reaches his geriatric years is consistent with research showing that juvenile recidivism rates drop significantly in the mid-twenties, decades before late adulthood. The Supreme Court has noted that “‘[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.’” *Roper*, 543 U.S. at 570 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). In a study of juvenile offenders, “even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25.” Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*.

Chicago, IL: MacArthur Foundation, 3 (2014) *available at* http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf. Therefore, most juvenile offenders would no longer be a public safety risk once they reached their mid-twenties, let alone their thirties, forties, fifties or sixties. Because most juveniles are likely to outgrow their antisocial and criminal behavior as they mature into adults, review of the juvenile's maturation and rehabilitation should begin relatively early in the juvenile's sentence, and the juvenile's progress should be assessed regularly. *See, e.g.*, *Research on Pathways to Desistance: December 2012 Update*, Models for Change, 4 *available at* http://www.modelsforchange.net/publications/357 (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% report continued high levels of antisocial acts. The study also found that "it is hard to determine who will continue or escalate their antisocial acts and who will desist[,]" as the "original offense . . . has little relation to the path the youth follows over the next seven years.").

Early and regular assessments enable the reviewers to evaluate any changes in the juvenile's maturation, progress and performance. Regular review also provides an opportunity to confirm that the juvenile is receiving

vocational training, programming, and treatment that foster rehabilitation. *See, e.g.*, *Graham*, 560 U.S. at 74 (noting the importance of "rehabilitative opportunities or treatments" to "juvenile offenders, who are most in need of and receptive to rehabilitation").

4. Whether An Opportunity For Release Is Meaningful Should Not Be Based On Life Expectancy Data

"Life expectancy" is a particularly poor measure of whether a sentence provides a meaningful opportunity for release. First, the life expectancy of inmates who have been sentenced as juveniles is difficult to determine. For instance, the average life span for an American male is 76. *See California v. Mendez*, 114 Cal. Rptr. 3d 870, 882 (Cal. Ct. App. 2010) (citing National Center for Health Statistics, Centers for Disease Control, *National Vital Statistics Reps.* (June 28, 2010) table 2, vol. 58, No. 28). However, "[l]ife expectancy within prisons and jails is considerably shortened." *California v. J.I.A*., 127 Cal. Rptr. 3d 141, 149 (2011), *aff'd as modified*, No. G040625, 2013 WL 342653, at *4 (Cal. Ct. App. Jan. 30, 2013) (citing The Commission on Safety and Abuse in America's Prisons, Confronting Confinement, 11 (June 2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf); *see also* Jason Schnittker et al., *Enduring Stigma: The*

Long-Term Effects of Incarceration on Health, 48 J. Health & Soc. Behav. 115, 115-30 (2007); Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 J. Health & Soc. Behav. 56, 56-71 (2008); Michael Massoglia et al., *No Real Release*, 8 Contexts 38, 38-42 (2009). There is evidence that inmates who were sentenced to life without parole as juveniles have even shorter life expectancies than adults serving the same sentence. Campaign for the Fair Sentencing of Youth, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, *available at* http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf. Therefore, it is debatable whether release at age 60 or 65 is even within the life expectancies of juveniles like Vasquez and Valentin who have served decades in prison. Moreover, even if life expectancy data were perfectly accurate, a full 50% of people will die *before* the age indicated by the statistic. Adele Cummings & Stacie Nelson Colling, *There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. DAVIS J. JUV. L. & POL'Y 267, 283 (2014).

In *Iowa v. Null*, 836 N.W.2d 41 (2013), the Iowa Supreme Court held that a sentence for a juvenile nonhomicide offender granting parole eligibility at age 69, although not labeled "life without parole," merited the same analysis as a sentence explicitly termed "life without parole" and was unconstitutional under *Graham*. The Court was explicit that whether a sentence complied with *Graham* was not dependent on an analysis of life expectancy or actuarial tables. The Court stated:

> [W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates. In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75.

Null, 836 N.W.2d at 71-72.

Appellants' sentences, which require Mr. Vasquez to serve more than one hundred years and Mr. Valentin to serve almost seventy years or test the stringent geriatric release process, are at odds with *Graham*. Moreover, *Miller*, *Graham* and *Roper* make clear that juvenile offenders' capacity to change and grow, combined with their reduced blameworthiness and

inherent immaturity of judgment, set them apart from adult offenders in fundamental – and constitutionally relevant – ways. *Graham* prohibits a judgment of incorrigibility to be made "at the outset," 560 U.S. at 73; Mr. Vasquez's 133-year sentence and Mr. Valentin's 68-year sentence for nonhomicide offenses make precisely this prohibited judgment and are thus unconstitutional.

CONCLUSION

The United States Supreme Court has mandated that any child who commits nonhomicide offenses must have a meaningful opportunity to be released from prison. Accordingly, *Amicus* respectfully requests that this Court invalidate Mr. Vasquez and Mr. Valentin's unconstitutional sentences and remand the cases for new sentencing hearings. This will ensure that Virginia is appropriately applying the United States Supreme Court's decisions on juvenile sentencing and that the prohibition on life without parole sentences for nonhomicide offenses is not subverted by labels.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, October 26, 2015, pursuant to Virginia Supreme Court Rule 5:26, I caused an original electronic copy of the foregoing brief to be served via VACES. Additionally, I caused 10 printed and bound courtesy copies to be hand delivered to:

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