IN THE

SUPREME COURT OF VIRGINIA

Record Nos. 141071, 150357

DARIEN VASQUEZ, Appellant,

v.

COMMONWEALTH OF VIRGINIA, Appellee.

BRANDON VALENTIN, Appellant,

v.

COMMONWEALTH OF VIRGINIA, Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellants Darien Vasquez and Brandon Valentin appeal their consecutive term-of-years sentences imposed on multiple felony convictions for breaking into the victim's home, serially raping and sodomizing her, and stealing various possessions. Because Vasquez and Valentin were 16 years old at the time of their crimes, each contends that:

- the cumulative, aggregate sentence he received exceeds his normal life expectancy and is the functional equivalent of life without parole;
- his sentence violates the Supreme Court's holding in *Graham v. Florida*, which prohibits life-without-parole sentences for juvenile nonhomicide offenders;[1] and
- his eligibility for conditional release at age 60, under Code § 53.1-40.01, fails to provide the "meaningful opportunity for release" required by *Graham*, even though this Court held in *Angel v. Commonwealth*[2] that Virginia's conditional-release provision satisfies *Graham*.

Appellants also contend that the evidence was insufficient to support their convictions for armed burglary and conspiracy to commit armed burglary.

Appellants' *Graham* claim (Assignment of Error No. 1) presents three embedded questions:

1. Whether Appellants' assignments of error are fatally defective because (i) they have not asked this Court to overrule *Angel*,

[1] 560 U.S. 48 (2010).

[2] 281 Va. 248, 704 S.E.2d 386, *cert. denied*, 132 S. Ct. 344 (2011).

and (ii) Vasquez's assignment of error erroneously asserts that Virginia's conditional-release statute must provide a "reasonable probability of release" rather than, as *Graham* requires, "some meaningful opportunity for release";

2. Whether *Graham* should be extended from cases involving life-without-parole sentences to cases involving consecutive term-of-years sentences that, when aggregated, exceed a defendant's life expectancy; and

3. Whether Appellants presented sufficient evidence to justify overruling *Angel* and to overcome the strong presumption that Virginia's conditional-release statute is constitutional as applied to them.

Appellants' sufficiency-of-the-evidence challenge (Assignment of Error No. 2) presents the following question:

4. Whether a reasonable factfinder could conclude beyond a reasonable doubt that Appellants were armed with a deadly weapon when they broke into the victim's townhouse, where one investigator testified that Valentin admitted to having a hunting knife in his book bag at the time of entry and another investigator testified that Vasquez admitted to having a knife in his jacket at the time of entry (though later testified that Vasquez may have claimed to have found that knife after entering).

STATEMENT OF FACTS

In accordance with the familiar standard that applies when "the sufficiency of evidence is challenged on appeal," the facts set forth here are presented "in the 'light most favorable' to the Commonwealth, as the party prevailing at trial."[3]

[3] *Kelley v. Commonwealth*, 289 Va. ___, ___, 771 S.E.2d 672, 674 (2015).

A. Vasquez and Valentin break into the victim's home and serially rape and abuse her.

The primary victim in this case, K.H., was a student attending James Madison University in Harrisonburg, Virginia. In 2012, she lived off-campus in a multi-bedroom townhouse that she shared with two housemates, E.M. and T.K.[4]

On the evening of October 20, 2012, K.H. went to bed early, around 8 p.m., because she was not feeling well. She had been "sick pretty much that whole week."[5] She was home alone; her housemates were both out of town.[6] One of her housemates, T.K., an apparent martial-arts enthusiast,[7] owned several large knives that he kept in his bedroom.[8] K.H. closed her bedroom door, took some cold medicine, and went to sleep, a podcast playing in the background.[9] Her bedroom was on the second floor.[10]

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[4] JA 117:8-16.

[5] JA 119:22.

[6] JA 117:17-19.

[7] JA 182:6-8.

[8] JA 175:24-176:3, 177:3-8.

[9] JA 120:1-11.

[10] JA 118:16.

Later that evening, Vasquez and Valentin broke through the window in the first-floor bedroom belonging to E.M.[11] They carried into the home a book bag that contained a "wolf" knife.[12] The wolf knife, according to the testimony of a Harrisonburg police investigator, was "[a]bsolutely" capable of killing someone.[13]

They proceeded upstairs to the second floor and entered T.K.'s bedroom.[14] There they stole (among other property): T.K.'s U.S. Marine Corps "Ka-Bar" knife; his "Winchester" knife;[15] his "Smith & Wesson" knife;[16] and a solid gold coin worth more than $1,500.[17]

Then they opened the door to K.H.'s bedroom, where she lay sleeping. K.H.—who survived the ordeal and whom the circuit judge found "very credible, intelligent and very brave"[18]—gave a first-hand account of what happened. While she described the Appellants' conduct at trial as the

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[11] JA 198:3-10, 294:6-9.

[12] JA 231:11-24, 232:16-233:1, 403:3-16, 405:12-21. *See* Exs. 60, 62.

[13] JA 406:18-24.

[14] JA 174:23-175:1.

[15] JA 179:7-16.

[16] JA 181:1-7.

[17] JA 192:20-193:6.

[18] JA 472:15-16.

actions of Person 1 and Person 2,[19] the evidence summarized below conclusively established—and Appellants do not dispute—that Person 1 was Vasquez and Person 2 was Valentin.

K.H. awoke as Vasquez leaned over her, holding a large knife to her throat.[20] Valentin stood in the doorway, also holding a knife and blocking any escape.[21] Vasquez had some kind of cloth over his face[22] and wore a leather jacket and sweatpants.[23] Valentin's face was also covered.[24] Vasquez demanded "all" of her "cash," but when K.H. said she didn't have any, he said "well then you're going to die."[25] K.H. pleaded that they take her wallet, credit cards, and PlayStation instead.[26] Vasquez took her by the shoulder, pressed the knife to her back, and moved her around the room to hand over her personal belongings.[27]

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[19] JA 120:20-24, JA 171:18-23 ("attacker 1" and "attacker 2").

[20] JA 120:12-15.

[21] JA 120:15-19, 121:17-20.

[22] JA 120:25-121:2.

[23] JA 120:23-24.

[24] JA 121:3-5.

[25] JA 121:9-14.

[26] JA 121:23-122:1.

[27] JA 122:1-8.

Vasquez then pushed K.H. over to her closet and ordered her to undress.[28] She removed her gray tee shirt and shorts, but not her underwear; Vasquez told her to take those off too.[29] Then he pushed her to the floor and pulled down his sweatpants;[30] he told her to "suck him off" or he "would kill" her.[31]

As K.H. performed fellatio on Vasquez, he forced her head down, "choking" her.[32] That continued for "[a] few minutes."[33] Then Vasquez forced her back to her feet, pressed the knife to her back, and pushed her back to the bed.[34] Vasquez said he really wanted to "f---" her "now," told her to retrieve a condom, made her put it on him, and forced her to have intercourse on top of him.[35] She testified that he was "rough" and "it hurt."[36]

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[28] JA 123:6-7.

[29] JA 123:9-12.

[30] JA 335:6-7.

[31] JA 123:14.

[32] JA 123:16-24.

[33] JA 124:5.

[34] JA 124:7-17.

[35] JA 124:16-125:6.

[36] JA 125:9.

She also testified that, while Vasquez was raping her, he held the knife in his hand, "right in front of me."[37]

Next, Vasquez forced her into the bathroom at knifepoint, turned on the bathtub faucet, and told her to get in; she complied.[38] Valentin followed, standing in the doorway to the bathroom, still holding his knife, and blocking any exit.[39]

Vasquez then forced K.H. back into the bedroom, where he lay down on the bed and ordered her to get a condom for Valentin so she could "make them both happy."[40] She said that Vasquez told her to "suck him off again and while I was doing that his friend was going to f---- me from behind."[41] While performing fellatio on Vasquez for a second time, she felt Valentin attempt to enter her anus and her vagina from behind, but he did

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[37] JA 125:10-13.

[38] JA 125:14-126:5.

[39] JA 125:21-25, 126:9-11.

[40] JA 126:6-15.

[41] JA 127:2-4.

not succeed in penetrating her.[42] While attempting to do so, Valentin threatened "don't turn around, I'll kill you if you turn around."[43]

Vasquez then got up and left the bedroom, leaving Valentin alone with the victim. Valentin closed the door and locked it.[44] He demanded to see her phone, asked if she had contacted anyone, checked to confirm that she had not called the police or anyone else, and pocketed the device.[45]

Holding the knife in his hand, and still wearing the condom, Valentin pushed her down onto the bed, raped her vaginally, and eventually ejaculated into the condom.[46] Valentin took off the condom and put it in his pocket.[47] Vasquez knocked on the door and Valentin opened it; Vasquez was still armed with a knife.[48]

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[42] JA 127:7-12.

[43] JA 128:14-15, 169:16-19.

[44] JA 129:5-9.

[45] JA 129:12-16.

[46] JA 129:19-130:5.

[47] JA 130:6-9, 227:9-16.

[48] JA 130:13-22.

Vasquez then led K.H. back into the bathroom, turned on the showerhead, pushed her in, and ordered her to clean off.[49] As he watched, he said he wanted to "f---" her "while you're wet."[50]

Vasquez then pulled her out of the shower by the arm, forced her to her knees, and made her perform oral sex on him again (the third time). As he did so, he repeatedly hit her head with the knife using one hand while slapping her face with the other; this went on for a few minutes.[51]

Then Vasquez said he wanted anal sex.[52] He pulled K.H. to her feet, turned her around, and ran the knife across her back and along her flank area.[53] He tried to rape her anally but could not successfully penetrate.[54]

Vasquez next ordered K.H. to clean out her mouth, using her finger and toothpaste.[55] When later asked whether he was trying to get rid of the

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[49] JA 130:24-131:9.

[50] JA 131:11-12.

[51] JA 131:15-133:7.

[52] JA 133:11-13.

[53] JA 133:16-21.

[54] JA 133:22-25.

[55] JA 134:3-9.

evidence of the assault, Vasquez said "I guess."[56] Valentin watched from the doorway, blocking any exit.[57]

Vasquez then led K.H. downstairs, holding a knife to her right leg as they walked.[58] Vasquez demanded "more stuff" and K.H. said she had nothing else.[59] They moved into E.M.'s bedroom, where K.H. noticed the open window through which the assailants had entered.[60]

As Valentin was moving "all the stuff" out through the open window, Vasquez once again forced K.H. to her knees to perform oral sex on him (the fourth time).[61] He forced his penis into her mouth as far in as it could go, choking her.[62] Holding her down, he counted aloud how many seconds she took to free her head from his penis; the third time, the longest, he said "you're going to beat the world record."[63] Vasquez continued that assault

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[56] JA 320:15.

[57] JA 134:10-14.

[58] JA 134:20-22.

[59] JA 135:7-10.

[60] JA 135:13-16.

[61] JA 135:25-136:1.

[62] JA 136:9-12.

[63] JA 136:9-16.

for a few minutes.[64]

Then Vasquez forced K.H. to her feet and said "now I want to f--- that ass."[65] He turned her around and pushed his penis partway into her anus.[66] He pulled out, stepped away for a few seconds, and then returned with some kind of object (she could not tell what it was), which he stuck into her anus.[67]

As K.H. tried to break free, Valentin pushed Vasquez away from her and urged that the two finally leave.[68] But Vasquez, still armed with a knife, grabbed the victim's arm and pulled her towards the open window, saying he was going to take her along with them.[69] Valentin persuaded Vasquez not to take her; but before leaving, Vasquez came at K.H. with the knife, jabbed at her stomach, and threatened that, if she called the police, they would "come back with thirty guys and kill" her.[70]

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[64] JA 136:24.

[65] JA 137:5-6.

[66] JA 137:8-14.

[67] JA 137:15-20.

[68] JA 137:24-138:1.

[69] JA 138:1-5.

[70] JA 138:10-21.

K.H. testified that "they'd been saying the whole night they were going to kill me"[71] and that she did not see an opportunity to escape from "two men with knives."[72] Pictures of the injuries to K.H.'s knees, the inside of her thigh, her flank, and buttocks were admitted into evidence at trial.[73]

After Vasquez and Valentin exited through the window, K.H. ran upstairs to dress and to find a spare set of car keys to get away; she could not call anyone because Valentin had stolen her cell phone.[74] The encounter was not yet over. Valentin startled her by appearing again in the bedroom doorway; this time, however, he only announced that he and his accomplice were finally leaving.[75]

K.H. drove to a friend's house, the police were called, and K.H. was taken to the hospital.[76] Though curled up in a "fetal position" and "rocking back and forth," K.H. was able to describe her assailants to the police.[77]

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[71] JA 128:24-25.

[72] JA 128:18-22.

[73] JA 140:16-142:17.

[74] JA 139:2-8.

[75] JA 139:12-19.

[76] JA 139:21-140:2.

[77] JA 257:1-12.

Based on her description, the Harrisonburg police quickly issued a be-on-the-lookout call for the pair.[78]

Police officers responding rapidly to K.H.'s townhouse were alerted by a pedestrian to the two suspects, who were loaded down with various belongings taken from the townhouse.[79] Each also had a black book bag.[80] Valentin was carrying away, among other things, a hamper containing an envelope with K.H.'s name and address.[81] Vasquez was carrying away, among other things, E.M.'s guitar.[82] Vasquez had in his pocket, among other things, a soiled condom that he said he had just used to have sex with his "girlfriend."[83]

After Valentin and Vasquez were arrested, both made various incriminating statements to the police and also made incriminating statements in a conversation with each other that they did not realize was

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[78] JA 218:10-12, 244:20-23, 256:20-257:12.

[79] JA 213:2-216:22.

[80] JA 219:21-220:6; JA 402:14-23.

[81] JA 218:13-16, 219:21-220:2.

[82] JA 150:9-14, 202:8-25, 215:11-14.

[83] JA 250:22-251:3.

being videotaped.[84] Valentin admitted that he and Vasquez had entered the residence through the window, admitted taking things that were now in police custody, admitted locking himself in K.H.'s room, and admitted having vaginal intercourse with her while holding a knife and wearing a gray tie over his face.[85] Valentin said "What fun is raping a bitch . . . and running?"[86] and "What the f---? We're sixteen and we're getting tried as an adult [sic]. Should have killed that bitch."[87]

Vasquez told the police investigator, among other things, "I'm going to be guilty and apologize for it";[88] described how Valentin had handed him the "military type knife" that he used to assault K.H.;[89] and admitted to various sex acts with the victim.[90] Vasquez also admitted that the victim did not consent[91] and that K.H. looked "really scared"[92] during the attack.

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[84] JA 322:4-7. *See* Ex. 74 (CD with videotape file).

[85] JA 293:11-297:13.

[86] JA 314:18-19.

[87] JA 318:25-319:1.

[88] JA 319:15.

[89] JA 319:18-19.

[90] JA 319:23-320:7.

[91] JA 351:2-7.

[92] JA 358:20-21.

When K.H. was examined at the hospital shortly after the attack, spermatozoa were found and collected from her "thigh, external genitalia, vaginal cervical, perianal buttock and anal/rectal" areas.[93] Patricia Taylor, a forensic scientist, testified that the DNA in each of those samples matched Vasquez's DNA, and that the probability of randomly selecting an unrelated individual with the same DNA profile was less than 1 in 6.5 billion.[94] A single spermatozoon was also recovered from K.H.'s mouth and lip area.[95] Although no statistical population profile was prepared for that specimen, Vasquez, again, could not be excluded as the contributor.[96]

B. The trial judge overrules the defendants' motion to strike and finds them guilty of multiple felonies.

Vasquez and Valentin were transferred for prosecution from the juvenile and domestic relations court to the circuit court, where the grand jury returned 22 felony indictments against Vasquez[97] and 17 against Valentin.[98] Each pleaded not guilty and waived his right to trial by jury.[99]

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[93] JA 282:18-23.

[94] JA 285:22-286:17.

[95] JA 282:24-283:3, 286:24-287:3.

[96] JA 287:10-16.

[97] JA 1-22.

[98] JA 64-80.

They were tried jointly on May 30 and May 31, 2013, by the Circuit Court of Rockingham County, the Honorable Thomas J. Wilson, IV, presiding.

At the close of the prosecution's case, at which the evidence summarized above was presented, the defendants moved to strike the evidence on various grounds. As relevant here, they argued that the evidence was insufficient to support the armed-with-a-deadly-weapon element of the breaking-and-entering indictments; they claimed that the Commonwealth had failed to prove that the defendants possessed a knife when they entered the townhouse.[100] The trial court denied those motions.[101] Defendants presented no evidence, rested, and renewed their motions to strike, which the trial judge took under advisement.[102]

The trial judge found Vasquez guilty on 18 of the 22 indictments, and Valentin guilty on 12 of the 17 indictments.[103] The table appended as

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[99] JA 23-24, 82-83.

[100] JA 408:11-410:19 (Vasquez); 440:16-441:9 (Valentin).

[101] JA 436:3-16 (Vasquez); 441:10 (Valentin).

[102] JA 451:16-453:12.

[103] JA 26-28, 84-86, 470:25-493:19. Applying the "single larceny" doctrine, the trial judge granted motions to strike four grand-larceny charges against each defendant relating to theft of property from K.H. and E.M., on the ground that those charges were subsumed in the grand-larceny charges arising from the theft of T.K.'s property. *See* JA 476:11-478:6, 480:23-481:23, 486:19-24, 490:3-5, 493:12-17. The court adjudged Valentin not

Attachment 1 shows the indictments, the disposition, and the sentences imposed on each conviction. As to the breaking-and-entering indictments, the trial judge found the Commonwealth's evidence sufficient beyond a reasonable doubt to prove that the defendants possessed the "wolf" knife in a book bag that they brought in with them when they initially broke into the residence through the first-floor window.[104] The trial judge also found that Vasquez and Valentin "were acting in concert at all times in making the entry into that dwelling, [and] that [they] had done so by agreement . . . ."[105]

C. The defendants argue that geriatric release will not satisfy *Graham*.

The trial court sua sponte ordered presentence reports and continued the case for sentencing until August 30, 2013.[106] The presentence reports were filed and, together with victim-impact statements from K.H. and E.M., are contained in the sealed appendix.[107] The presentence reports

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guilty of attempted rape (Indictment 14) but guilty of attempted anal intercourse under force, threat or intimidation (Indictment 15) when he attacked K.H. from behind; the court reasoned that Valentin's "intention was to sodomize her at that point in time; not rape her vaginally." JA 492:20-493:11.

[104] JA 476:4-11.

[105] JA 478:18-479:3.

[106] JA 28, 86.

[107] JA 647-702.

thoroughly evaluated mitigating factors relating to each defendant's background and youth at the time of the crimes, consistent with the purpose of such reports "to fully advise the court so the court may determine the appropriate sentence to be imposed."[108]

On August 29, 2013, Vasquez's counsel filed a "Memorandum on Juvenile Sentencing."[109] Vasquez argued that imposing lengthy, consecutive, term-of-years sentences on him would constitute a *de facto* life sentence in violation of the U.S. Supreme Court's holding in *Graham* forbidding life-without-parole sentences for juveniles convicted of nonhomicide offenses.[110] Vasquez acknowledged that this Court held in *Angel* that Virginia's sentencing scheme complies with *Graham* because it does not impose life without parole; Code § 53.1-40.01 provides the opportunity for conditional release at age 60, and "the factors used in the normal parole consideration process apply to conditional release decisions under this statute."[111] But Vasquez argued that geriatric release was insufficient to satisfy *Graham* because statistics from the Virginia Department of

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[108] Va. Code Ann. § 19.2-299 (2015).

[109] JA 34.

[110] 560 U.S. 48 (2010).

[111] 281 Va. 248, 275, 704 S.E.2d 386, 402, *cert. denied*, 132 S. Ct. 344 (2011).

Corrections purported to show the relative infrequency with which prisoners were granted such release in the years 2010 through 2012.[112]

Valentin adopted Vasquez's *Graham* argument.[113]

D. The trial judge imposes consecutive term-of-years sentences while explicitly recognizing the defendants' opportunity for conditional release at age 60.

At the sentencing hearing on August 30, 2013, defense counsel agreed to the accuracy of the presentence reports[114] and called the defendants' mothers to testify in mitigation.[115] The Commonwealth adduced evidence that Vasquez had accompanied Valentin on three other breaking-and-entering incidents.[116] After counsel concluded their presentation of sentencing evidence, the trial judge heard argument from defense counsel that imposing a lengthy, aggregate sentence for consecutive terms of years would violate *Graham*.[117]

Before imposing sentence, the trial judge made clear that he had carefully considered each presentence report and the mitigating evidence

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[112] JA 35-37.

[113] JA 579:18-25, 580:1-6, 583:13-14.

[114] JA 502:3-7, 502:25-503:7.

[115] JA 523, 563.

[116] JA 515:11-14.

[117] JA 579:22-591:5.

presented at the sentencing hearing.[118] He also observed that no matter how many years he imposed, the defendants would be eligible for release under the conditional-release statute:

> I find that . . . the case law of Virginia and the statutory scheme that we now have . . . no matter what the extent of the sentence is does afford the mandated opportunity if you will for potential release under what we will refer to as the geriatric parole setup. And of course the law is such that we're not required to guarantee eventual freedom. However, you have to have some sort of meaningful opportunity to obtain release at some point in the future. And our supreme court has held, the Supreme Court of Virginia is the supreme court that I'm looking at, has held that our statutory scheme affords that to our juveniles.[119]

The court then imposed consecutive sentences on each of the defendant's convictions, as summarized in Attachment 1. The aggregate sentence for Vasquez totaled 283 years, with 150 years suspended;[120] the aggregate sentence for Valentin totaled 153 years, with 80 years suspended.[121] The longest active sentence imposed for any one conviction was 10 years. The court imposed the most severe sentence—50 years with 40

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[118] JA 618:20-25.

[119] JA 621:4-18.

[120] JA 51-56, 622-24.

[121] JA 89-92, 629-31.

suspended—on Indictment 14 against Vasquez and on Indictment 9 against Valentin, for abduction with intent to defile.[122]

The trial judge said that the suspended sentences were important to "ensure . . . good behavior" if the defendants obtained conditional release.[123] In addressing Valentin, the court noted that the aggregate sentence imposed was in effect a "de facto life sentence"; but the court also made clear that "geriatric parole will be your chance for release."[124]

E. The Court of Appeals rejects the claims pressed here.

Vasquez and Valentin filed petitions for appeal to the Court of Appeals. On June 11, 2014, the court denied Vasquez's appeal in its entirety.[125] The court rejected his claim that his sentence violated *Graham*, holding that Vasquez's challenge was foreclosed by this Court's holding in *Angel*, a decision the intermediate court was "without authority to overrule."[126] The court also rejected Vasquez's challenge to the sufficiency of the evidence that he possessed a knife when he entered the

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[122] JA 54, 91, 625, 631.

[123] JA 622:4-8, 626:7-10.

[124] JA 631:16-20.

[125] JA 59.

[126] JA 60.

residence.[127]

The Court of Appeals denied Valentin's parallel assignments of error.[128] The court granted review on only one of Valentin's other assignments—whether the evidence was sufficient to support his conviction for attempted anal rape.[129] On February 3, 2015, however, the court found the evidence sufficient and affirmed that conviction in an unpublished opinion that recounted the facts of the crime in some detail.[130] Valentin did not appeal that ruling.

ARGUMENT

I. Appellants' sentences do not violate *Graham* (Assignment of Error No. 1).

A. Standard of Review.

In the first assignment of error, each Appellant argues that his sentence amounts to a life-without-parole sentence in violation of *Graham* because Virginia's geriatric-release statute, Code § 53.1-40.01, and the regulations under it, fail to provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation. This Court "review[s]

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[127] JA 61-62.

[128] JA 96-99.

[129] JA 95.

[130] JA 102-04 (Decker, J.).

questions of statutory constitutionality de novo."[131]

B. Appellants' assignments of error are insufficient to reach the *Graham* claim.

As a threshold matter, however, Appellants' assignments of error are fatally defective.

1. Appellants have not asked the Court to overrule *Angel*.

"[T]he inclusion of sufficient assignments of error is a mandatory procedural requirement and . . . the failure to comply with this requirement deprives this Court of its active jurisdiction to consider the appeal."[132] In this case, despite that the Court of Appeals expressly denied each appellant's petition for appeal on his *Graham* claim on the ground that *Angel* was binding precedent that the intermediate court was "without authority to overrule,"[133] neither assignment of error mentions *Angel* nor asks this Court to overrule it. Indeed, given that *Angel* is still good law, the Court of Appeals was bound to follow it. Appellants cannot succeed

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[131] *Toghill v. Commonwealth*, 289 Va. 220, 227, 768 S.E.2d 674, 678 (2015).

[132] *Davis v. Commonwealth*, 282 Va. 339, 339, 717 S.E.2d 796, 796-97 (2011).

[133] JA 60, 97 ("we are bound by *Angel* and have no authority to overrule it").

without overruling *Angel*. Their assignments of error thus identify the wrong issue and, accordingly, are fatally defective.[134]

2. Vasquez's assignment of error is invalid because it identifies the wrong legal standard under *Graham*.

Vasquez's assignment of error contains another fatal defect—it identifies the wrong legal standard under *Graham*. *Graham* prohibits life-without-parole sentences for juvenile nonhomicide offenders and requires that States, instead, provide "*some meaningful opportunity* to obtain release based on demonstrated maturity and rehabilitation"[135]—that is, "some realistic *opportunity* to obtain release before the end of that term."[136] Vasquez completely alters that language. His assignment of error claims that his sentence is invalid because it does not provide "a reasonable *probability* of release."[137]

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[134] *Accord Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 497 (2003) (declining to consider overruling the Court's prior holding when not sought by the petitioner). This Court's recent amendment to Rule 5:17, effective July 1, 2015, may help practitioners avoid such mistakes in the future. *See* Va. Sup. Ct. R. 5:17(c)(1) (requiring petitioners in this situation to "list . . . the specific existing case law that should be overturned, extended, modified, or reversed").

[135] 560 U.S. at 75 (emphasis added).

[136] *Id.* at 82 (emphasis added).

[137] JA 63 (emphasis added).

Nothing in *Graham* requires a "reasonable probability of release"—*i.e.*, that the defendant is more likely than not to be released. That language is nowhere found in *Graham*. What is more, to require *probable release* would contradict *Graham*'s assurance that the Eighth Amendment "does *not* require the State to release that offender during his natural life."[138]

As in *John Crane, Inc. v. Bristow*, the assignment of error here omits the correct legal standard and would force the Court either to adopt that erroneous standard or to "expand[] the assignment of error beyond its plain language."[139] That renders it fatally deficient.

* * *

As a result, both petitions for appeal as to Assignment of Error No. 1 should be dismissed as improvidently granted.

C. *Graham* should not be extended to consecutive term-of-years sentences.

There are two issues embedded in the merits of Appellants' *Graham* argument. The have identified only one—whether Virginia's conditional-release statute provides a meaningful opportunity for release under *Graham*. That overlooks a second question: whether *Graham* even applies

[138] 560 U.S. at 75 (emphasis added).

[139] *John Crane, Inc. v. Bristow*, No. 120947, slip op. at 3 (Va. Oct. 25, 2013), *available at* http://valawyersweekly.com/fulltext-opinions/?p=32396.

to consecutive, term-of-years sentences like the ones at issue here. Courts in other jurisdictions have divided sharply over that question.

The federal courts of appeals in the Fifth and Sixth Circuits have said that *Graham* applies only to life sentences, not to aggregate term-of-years sentences.[140] Courts in Arizona, Louisiana, Missouri, Ohio, Tennessee, and Texas have agreed with that conclusion.[141] By contrast, the Ninth

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[140] *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir.) (holding that neither *Graham* nor *Miller* "applies to [defendant's] discretionary federal sentence for a term of years."), *cert. denied*, 134 S. Ct. 572 (2013); *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) (distinguishing life-without-parole sentence in *Graham* from defendant who "was sentenced to consecutive, fixed-term sentences—the longest of which was 10 years," totaling 89 years), *cert. denied sub nom. Bunch v. Bobby*, 133 S. Ct. 1996 (2013); *see also Goins v. Smith*, 556 F. App'x 434, 439 (6th Cir.) (following *Bunch*, rejecting *Graham* claim by juvenile nonhomicide offender facing "mandatory prison term of 42 or 45 years, after which he will be able to apply for judicial release"), *cert. denied sub nom. Goins v. Lazaroff*, 135 S. Ct. 144 (2014); *United States v. Walker*, 506 F. App'x 482, 489 (6th Cir. 2012) ("*Graham* does not apply in cases where the defendant receives a sentence that is 'less severe' than a life sentence.").

[141] *State v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011) (holding *Graham* inapplicable to sentence for 32 "felonies involving multiple victims" where "the longest prison term . . . for any single count was 15.75 years"); *State v. Brown*, 118 So. 3d 332, 335, 341 (La. 2013) (holding *Graham* inapplicable to 70-year aggregate sentence where defendant would not be eligible for release until age 86); *Willbanks v. Mo. Dep't of Corr.*, No. WD77913, 2015 Mo. App. LEXIS 1100, at *50, 2015 WL 6468489, at *17 (Mo. Ct. App. Oct. 27, 2015) ("[W]e decline to extend *Graham*'s holding to multiple, consecutively imposed, non-LWOP, term-of-years sentences."); *State v. Watkins*, Nos. 13AP-133, -134, 2013 Ohio App. LEXIS 5791, at *13-14, 2013 WL 6708397, at *5 (Ohio Ct. App. Dec. 17, 2013) (holding *Graham* inapplicable to 67-year aggregate sentence for juvenile nonhomicide

Circuit, over a vigorous dissent from denial of rehearing en banc, held that a lengthy term-of-years sentence extending beyond the defendant's life expectancy is subject to *Graham*.[142] Courts in California, Colorado, Florida, and Iowa have agreed with that view.[143] As the Sixth Circuit

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offender), *appeal granted*, 10 N.E.3d 737 (Ohio 2014); *State v. Merritt*, No. M2012-829, 2013 Tenn. Crim. App. LEXIS 1082, at *16, 2013 WL 6505145, at *6 (Tenn. Crim. App. Dec. 10, 2013) (holding *Graham* inapplicable to 225-year aggregate sentence comprised of nine 25-year consecutive sentences); *Burnell v. State*, No. 01–10–00214, 2012 Tex. App. LEXIS 34, at *23-24, 2012 WL 29200, at *8 (Tex. Crim. App. Jan. 5, 2012) (holding *Graham* inapplicable to 25-year sentence).

[142] *Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013) ("[W]e cannot ignore the reality that a seventeen year-old sentenced to life without parole and a seventeen year-old sentenced to 254 years with no possibility of parole, have effectively received the same sentence. Both sentences deny the juvenile the chance to return to society. *Graham* thus applies to both sentences."), *reh'g en banc denied*, 742 F.3d 917 (9th Cir. 2014).

[143] *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) ("[W]e conclude 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."); *People v. Rainer*, No. 10CA2414, 2013 Colo. App. LEXIS 509, at *40, 2013 WL 1490107, at *12 (Colo. App. Apr. 11, 2013) (holding that *Graham* applied to 112-year aggregate sentence for which the defendant, who had a life expectancy of 63.8 to 72 years, would not be parole eligible until age 75), *cert. granted*, 2014 Colo. LEXIS 1085 (Dec. 22, 2014); *Henry v. State*, No. SC12-578, 2015 Fla. LEXIS 533, at *10-11, 2015 WL 1239696, at *4 (Fla. Mar. 19, 2015) ("Because Henry's aggregate sentence, which totals ninety years and requires him to be imprisoned until he is at least nearly ninety-five years old, does not afford him this opportunity, that sentence is unconstitutional under *Graham*."), *reh'g denied*, 2015 Fla. LEXIS 2048 (Fla. Sept. 24, 2015); *State v. Pearson*, 836 N.W.2d 88,

correctly summed up: "courts across the country are split over whether *Graham* bars a court from sentencing a juvenile nonhomicide offender to consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant's life expectancy."[144]

There are at least three reasons why the first group has it right and why this Court should not extend *Graham* to cases, like this one, involving aggregate term-of-years sentences. First, *Graham*'s evolving-standards-of-decency analysis depended on the *rarity* of juveniles serving life-without-parole sentences; the U.S. Supreme Court found such sentences in federal and State courts to be so "exceedingly rare" as to support the conclusion that "a national consensus has developed against it."[145] But the Court's survey in *Graham* excluded juvenile offenders serving aggregate term-of-years sentences like those imposed on Vasquez and Valentin.[146] That

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96 (Iowa 2013) (invalidating imposition of 35-year sentence on juvenile nonhomicide offender).

[144] *Bunch*, 685 F.3d at 552; *see also United States v. Cobler*, 748 F.3d 570, 580 n.4 (4th Cir.) (Keenan, J.) ("The Supreme Court has not yet decided the question whether a lengthy term-of-years sentence is, for constitutional purposes, the same as a sentence of life imprisonment without the possibility of parole."), *cert. denied*, 135 S. Ct. 229 (2014).

[145] *Graham*, 560 U.S. at 67 (citation omitted).

[146] *See id.* at 63 ("The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense."); *id.* at 113 n.11 (Thomas, J., dissenting) ("[T]he Court counts only those juveniles

omission necessarily leaves open whether a nationwide survey on that issue would show a similar "national consensus."[147] Courts properly reject categorical challenges to sentences under the Eighth Amendment when, as in this case, the record suffers from a "complete lack of evidence" on whether the requisite "national consensus" exists.[148]

Second, declining to expand *Graham*'s categorical bar to aggregate term-of-years sentences will not necessarily immunize such sentences from Eighth Amendment scrutiny. Such sentences might still be subject to Eighth Amendment review under an as-applied, proportionality challenge.[149] Although this Court has not yet decided that question, the

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sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (*e.g.*, 70 or 80 years' imprisonment).").

[147] *Moore*, 742 F.3d at 920 ("If the Court [in *Graham*] did not consider aggregate term-of-years sentences adding up *de facto* to life without parole, it cannot have squarely addressed their constitutionality.") (O'Scannlain, J., dissenting from denial of rehearing en banc).

[148] *Cobler*, 748 F.3d at 581; *Willbanks*, 2015 Mo. App. LEXIS 1100, at *35, 2015 WL 6468489, at *13 (rejecting argument to extend *Graham* to *de facto* life-without-parole sentences where defendant, unlike Graham, "made no effort to demonstrate that there is any national consensus").

[149] *See United States v. Dowell*, 771 F.3d 162, 167 (4th Cir. 2014) ("A defendant may raise two types of Eighth Amendment challenges to his sentence: He may raise an as-applied challenge on the grounds that the length of a certain term-of-years sentence [is] disproportionate given all the circumstances in a particular case, or he may raise a categorical challenge asserting that an entire class of sentences is disproportionate based on the

Fourth Circuit has held that proportionality challenges may be brought "in cases involving 'terms of years without parole' that are *functionally equivalent* to life sentences 'because of [the defendants'] ages.'"[150] This Court need not resolve whether a proportionality challenge could be brought here, however, because Appellants did not bring one.

Third, extending *Graham* to aggregate term-of-years sentences would open a Pandora's box of bedeviling complexities that courts would have to unravel and solve. Judge O'Scannlain, in the Ninth Circuit, summarized some of the problems as follows:

- "At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number?"
- "Would gain time be taken into account?"
- "Could the number [of years] vary from offender to offender based on race, gender, socioeconomic class or other criteria?"

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nature of the offense or the characteristics of the offender.") (citation and quotation marks omitted). *But see Cole v. Commonwealth*, 58 Va. App. 642, 654, 712 S.E.2d 759, 765 (2011) (Kelsey, J.) ("The United States Supreme Court . . . has never found a non-life 'sentence for a term of years within the limits authorized by statute to be, by itself, a cruel and unusual punishment' in violation of the Eighth Amendment . . . . We thus agree that proportionality review 'is not available for any sentence less than life imprisonment without the possibility of parole.'") (citation omitted).

[150] *Id.* at 168 (emphasis added).

- "Does the number of crimes matter?"; [151] and

- "What if the aggregate sentences are from different cases? From different circuits? From different jurisdictions? If from different jurisdictions, which jurisdiction must modify its sentence or sentences to avoid constitutional infirmity?"[152]

Fortunately, this Court does not have to answer those difficult questions or take sides in the current split of authorities. For even assuming that *Graham* applies to aggregate term-of-years sentences extending beyond a defendant's life expectancy, juvenile nonhomicide offenders like Vasquez and Valentin are eligible for conditional release at age 60 and, therefore, do not face a life-without-parole sentence.

D. *Angel* correctly held that Virginia's sentencing system complies with *Graham* because conditional release at age 60 provides a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

This Court correctly held in *Angel* that

> The regulations for conditional release under this statute [Code § 53.1-40.01] provide that if the prisoner meets the qualifications for consideration contained in the statute, the factors used in the

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[151] *Moore*, 742 F.3d at 922 (O'Scannlain, J., dissenting from denial of rehearing en banc) (quoting *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012), *rev'd*, 2015 Fla. LEXIS 533 (Fla. Mar. 19, 2015)) (bullets added).

[152] *Id.* (quoting *Walle v. State*, 99 So. 3d 967, 972 (Fla. Dist. Ct. App. 2012)). For another thoughtful discussion of the problems, see *Willbanks*, 2015 Mo. App. LEXIS 1100, at *34-50, 2015 WL 6468489, at *12-16.

> normal parole consideration process apply to conditional release decisions under this statute.[153]

Indeed, those regulations specifically provide that "*[a]ll factors* in the parole consideration process . . . shall apply in the determination of Conditional Release."[154] Those comprehensive factors include the "individual's history," his "conduct," and "other developmental activities during incarceration" that would "reflect the probability that the individual will lead a law-abiding life in the community and live up to all conditions of parole if released."[155] They also include all "facts and circumstances of the offense" and all "mitigating" factors.[156] "Changes in motivation and behavior" are also considered.[157]

Those normal parole considerations plainly encompass the offender's youth at the time of the offense. They also afford the inmate the opportunity for release based on his demonstrated maturity and rehabilitation. Indeed, the parole regulations themselves treat geriatric release as a *form*

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[153] 281 Va. at 275, 704 S.E.2d at 402.

[154] Va. Parole Bd. Admin. Proc. 1.226 at 2 (emphasis added), *available at* http://vpb.virginia.gov/files/1108/vpb-procedure-manual.pdf.

[155] Va. Parole Bd. Policy Manual at 2 (upper-case text altered) (Oct. 1, 2006), *available at* http://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf.

[156] *Id.* at 3 (upper-case text altered).

[157] *Id.* at 4 (upper-case text altered).

of parole; they exclude from the category "persons not eligible for parole" persons sentenced to a felony offense committed on or after January 1, 1995, "*except geriatric prisoners who are eligible* under [§] 53.1-40.01."[158]

The fact that the offender must wait until age 60 before seeking conditional release does not deprive him of a meaningful opportunity for release "before the end of [his life] term."[159] *Graham* made clear that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance."[160] And nothing in *Graham* prohibits States from insisting on a lengthy period of incarceration before considering conditional release. Indeed, Justice Alito asked Graham's counsel at oral argument if a Colorado statute would be unconstitutional where it required juvenile offenders to serve 40 years before becoming eligible for parole.[161] Graham's counsel conceded, as he had on brief, that that statute *would* be constitutional:

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[158] *Id.* at 7-8 (upper-case text altered) (emphasis added).

[159] 560 U.S. at 82.

[160] *Id.* at 75.

[161] Transcript of Oral Argument at 6:16-21, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-7412.pdf.

> [I]t should be left up to the States to decide. We think that the—the Colorado provision would probably be constitutional. We will have to see what different States do. I mean, but—but, yes, even that long amount of time would give at least some hope to the adolescent offender.[162]

Justice Kennedy, the author of *Graham*, similarly suggested that a State could incarcerate the defendant for as long as a "half century" before providing the requisite meaningful opportunity for release.[163]

A "half century" is longer than the period that Valentin and Vasquez must wait to apply for conditional release under Code § 53.1-40.01. When they become eligible at age 60, they will have spent fewer than 44 years in

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[162] *Id.* at 6:23-7:3. Graham conceded in his reply brief that Florida "could sentence a juvenile offender to a life sentence and also provide, after some term of years that vindicates society's interest in punishment, a state-initiated hearing to evaluate relevant factors such as maturity, future dangerousness, and fitness for return to society of the now-adult former juvenile offender. For example, Colorado recently enacted a law that provides that juveniles who have been convicted of a felony punishable by life imprisonment or death must be sentenced to life imprisonment with the possibility of parole after 40 years. *See* Colo. Rev. Stat. § 18-1.3-401(4)(b)." Reply Br. at 17, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412), *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_7412_PetitionerReply.authcheckdam.pdf.

[163] *See* 560 U.S. at 79 ("Terrance 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*.") (emphasis added).

confinement. And they can look forward to a life expectancy of another 14 years or more.[164] That satisfies *Graham*'s baseline requirement for "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,"[165] "before the end"[166] of their lives.

E. Appellants have not overcome the strong presumption in favor of the constitutionality of the conditional-release statute.

There is "no stronger presumption known to the law" than the presumption in favor of legislation enacted by the General Assembly.[167] That presumption should be even stronger when, as here, this Court in *Angel* upheld the constitutionality of Code § 53.1-40.01 and the Supreme Court denied Angel's petition for writ of certiorari on the same question.[168]

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[164] Va. Code Ann. § 8.01-419 (2015) (showing life expectancy of 16-year-old male to be another 59.6 years, totaling 75.6 years).

[165] 560 U.S. at 75.

[166] *Id.* at 82. *Accord Kelsey v. State*, No. 1D14-518, 2015 Fla. App. LEXIS 16866, at *5, 2015 WL 6847810, at *2 (Fla. Dist. Ct. App. Nov. 9, 2015) (holding that a 45-year sentence for a juvenile nonhomicide offender did not constitute a *de facto* life sentence under *Graham*).

[167] *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 301, 749 S.E.2d 176, 183 (2013) (quoting *Montgomery Cty. v. Va. Dep't of Rail & Pub. Transp.*, 282 Va. 422, 435, 719 S.E.2d 294, 300 (2011)).

[168] 132 S. Ct. 344 (denying certiorari). *See* Petition for Writ of Certiorari at i, *Angel v. Virginia*, 132 S. Ct. 344 (2011) (No. 11-5730) (Question Presented No. 2: "Does a discretionary geriatric-release hearing at age sixty (60) provide a prisoner condemned to die in prison for non-homicide

As a matter of law, the weak evidence Appellants presented in the circuit court failed to overcome the strong presumption that the conditional-release statute is constitutional. Appellants claimed that geriatric release was not meaningful because statistics from 2010 through 2012 reflected a low percentage of geriatric-release applications granted compared to those eligible and to those who applied.[169] But that argument overlooks several factors that render Appellants' statistical snapshot meaningless.

First, the statistics do not illuminate the treatment of *juvenile* offenders like Appellants because geriatric release was not implemented until 1994.[170] A hypothetical 16-year-old juvenile offender sentenced to a life term in 1995 will not turn 60 until 2039. Second, the statistics do not measure the true opportunity for release, even for the current inmate population, because inmates who committed their crimes before the 1994 Truth-in-Sentencing reforms, and who are eligible for geriatric release, are

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crimes committed while he was a minor with the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth and Fourteenth Amendments?"). Valentin is thus mistaken in claiming "it is not clear" if this issue was presented to the U.S. Supreme Court. Valentin Br. at 26 n.10.

[169] JA 35-36.

[170] 1994 Va. Acts (Sp. Sess. II) chs. 1, 2 (enacting Code § 53.1-40.01).

also eligible for traditional parole; thus the geriatric-release statistics alone are much lower than the true number of inmates actually released.[171]

The federal magistrate judge in *LeBlanc v. Mathena* found those confounding factors dispositive in rejecting, on federal habeas review, a similar statistical challenge to Virginia's conditional-release statute.[172] The Virginia circuit court in *LeBlanc* had rejected the inmate's statistical arguments; and this Court denied his petition for appeal, finding "no reversible error."[173] On federal habeas review, the magistrate judge concluded, under the deferential standard required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), that the circuit court's ruling was neither contrary to nor an unreasonable application of *Graham*.[174]

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[171] Va. Parole Bd. Admin. Proc. 1.226, *supra*, at 1 ("Inmates may receive only one consideration for release, either discretionary parole or conditional release, in any 12 month period.").

[172] *LeBlanc v. Mathena*, No. 2:12-cv-340, 2013 U.S. Dist. LEXIS 189736, at *21-25, 2013 WL 10799406, at *7-8 (E.D. Va. July 24, 2013), *rejected in part, adopted in part*, 2015 U.S. Dist. LEXIS 86090, 2015 WL 4042175 (E.D. Va. July 1, 2015), *appeal pending*, No. 15-7151 (4th Cir. July 22, 2015).

[173] *Commonwealth v. LeBlanc*, No. CR02-1515 (City of Va. Beach Cir. Ct. Aug. 9, 2011), *petition for appeal denied*, No. 111985 (Va. Apr. 13, 2012).

[174] 2013 U.S. Dist. LEXIS 189736, at *17-18, *27-28, 2013 WL 10799406, at *7, *9.

Vasquez and Valentin cite the district court's decision in *LeBlanc*, granting habeas relief and ordering resentencing, but they ignore that the district court did not find merit in LeBlanc's statistical argument either. The district judge in *LeBlanc* instead ruled not only that *Angel* was wrongly decided but that, under AEDPA, the circuit court's decision to follow *Angel* was an "objectively unreasonable" interpretation of *Graham*.[175] The Commonwealth disagrees and has appealed that ruling to the United States Court of Appeals for the Fourth Circuit, where the case is now fully briefed. But as relevant to the appeals here by Vasquez and Valentin, not even the district court in *LeBlanc* found the statistical argument persuasive.[176]

In short, the meager statistical evidence introduced in the trial court cannot rebut the strong presumption favoring the constitutionality of Code § 53.1-40.01. Appellants simply failed to prove that the conditional-release

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[175] 2015 U.S. Dist. LEXIS 86090, at *46-47, 2015 WL 4042175, at *18 ("[E]ven the most skilled legal contortionist could not interpret [the trial court's decision] in a way that sensibly comports with the Supreme Court's crystalline pronouncements in *Graham*. There is no possibility that fairminded jurists could disagree that the state court's decision conflicts with the dictates of *Graham*.") (citation and quotation marks omitted).

[176] *See id.* at *43, 2015 WL 4042175, at *17 ("[T]his Court concludes that statistics cannot be given a controlling effect on whether a state is in compliance with *Graham*. Statistics change, and what may be reasonably viewed as 'realistic' one year may not be so the next.").

program as applied to them will violate *Graham*'s requirement to provide "some meaningful opportunity for release based on demonstrated maturity and rehabilitation."[177] And as noted above, Appellants have not even asked this Court to overrule *Angel*, though the Court would have to do that to grant the relief Appellants seek.

F. *Miller* is inapposite.

Appellants' amicus mistakenly claims that their sentences are unconstitutional under *Miller v. Alabama*.[178] Appellants have not raised that argument, as required by Rule 5:25. Even if they had, it would be meritless. *Miller* held that States may not impose mandatory life-without-parole sentences on juvenile homicide offenders unless the judge or jury has "the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[179] "*Graham* established one rule (a flat ban) for nonhomicide offenses, while [*Miller*] . . . set out a different one (individualized sentencing) for homicide offenses."[180] Because this case does not involve a life-without-parole sentence, *Miller* and *Graham*

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[177] 560 U.S. at 75.

[178] 132 S. Ct. 2455 (2012). *See* Juvenile Law Ctr. Amicus Br. at 12.

[179] 132 S. Ct. at 2475.

[180] *Id.* at 2466 n.6.

are both inapposite. And even if *Miller*'s individualized-sentencing requirement applied in this nonhomicide case, the trial judge took account of Appellants' youth and the mitigating circumstances discussed in the presentence reports, and Appellants do not claim otherwise.[181]

G. If the Court reaches the merits, it should reaffirm that juvenile nonhomicide offenders are eligible for conditional release under Code § 53.1-40.01 based on demonstrated maturity and rehabilitation.

When a Virginia statute is assailed as unconstitutional, this Court may "'construe the plain language of [the] statute to have limited application if such a construction will tailor the statute to a constitutional fit.'"[182] This Court recently did that in *Toghill* to confirm, in accordance with *Lawrence v. Texas*,[183] that Virginia's sodomy statute "cannot criminalize private, noncommercial sodomy between consenting adults, but it can continue to regulate other forms of sodomy, such as sodomy involving children, forcible sodomy, prostitution involving sodomy and sodomy in public."[184]

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[181] This Court held in *Jones v. Commonwealth* that Virginia's sentencing scheme already complies with *Miller*, even in homicide cases. 288 Va. 475, 480-81, 763 S.E.2d 823, 825-26 (2015), *petition for cert. filed*, No.14-1248 (U.S. Apr. 15, 2015).

[182] *Toghill*, 289 Va. at 233-34, 768 S.E.2d at 681 (quoting *McDonald v. Commonwealth*, 274 Va. 249, 260, 645 S.E.2d 918, 924 (2007)).

[183] 539 U.S. 558 (2003).

[184] 289 Va. at 234, 768 S.E.2d at 681.

To the extent anyone could have questioned whether Virginia's geriatric-release statute will afford juvenile nonhomicide offenders an opportunity for meaningful release based on demonstrated maturity and rehabilitation, as required by *Graham*, this Court's decision in *Angel* should have provided a dispositive answer. But as these appeals demonstrate, juvenile nonhomicide offenders serving lengthy aggregate sentences will continue to question *Angel* and to challenge whether geriatric release satisfies *Graham*. Such offenders necessarily must speculate by attempting to forecast how *they* will be treated, years in the future.

If it reaches the merits of the question presented, the Court should nip such arguments in the bud: it should reaffirm that, as applied to juvenile nonhomicide offenders, regulations issued by the Virginia Parole Board under Code § 53.1-40.01 properly allow for consideration of the offender's youth at the time of the offense, as well as the offender's demonstrated maturity and rehabilitation while incarcerated. Such reaffirmation would help dispose of sundry collateral challenges to Virginia's conditional-release statute that seek to relitigate *Angel*.

II. The Commonwealth adduced sufficient evidence that Appellants had a knife when they entered the victim's townhouse to support their armed-burglary convictions (Assignment of Error No. 2).

As summarized in Attachment 1, Vasquez and Valentin were each convicted of breaking and entering with intent to commit larceny "while armed with a deadly weapon at the time of entry," in violation of Code § 18.2-91. Proof of the deadly-weapon element makes that crime a "Class 2 felony,"[185] which is punishable by "imprisonment for life or for any term not less than 20 years."[186] Otherwise, the crime is "statutory burglary," the punishment for which ranges from 20 years to life in a state correctional facility, or, at the discretion of the judge, confinement "in jail for a period not exceeding twelve months."[187] The trial judge sentenced Vasquez and Valentin to 20 years each on that conviction, with 10 years suspended.[188] Each was also convicted of violating Code § 18.2-22 for *conspiring* to commit armed burglary. That offense is a Class 5 felony,[189] punishable by

[185] Va. Code Ann. § 18.2-91 (2015).

[186] Va. Code Ann. § 18.2-10(b) (2015).

[187] Va. Code Ann. § 18.2-91.

[188] JA 51, 89, 624, 630.

[189] Va. Code Ann. § 18.2-22(a)(2) (2015).

up to 10 years in prison.[190] The trial judge sentenced each to 3 years in prison on that conviction.[191]

Appellants argue, however, that the Commonwealth's evidence was insufficient to prove beyond a reasonable doubt that they were armed with a deadly weapon "at the time" they broke into K.H.'s residence. Appellants contend that they acquired various knives in the residence and argue that the Commonwealth failed to prove that they possessed a knife when they *first* entered the townhouse through the bedroom window.

A. Standard of Review.

The standard of review on this sufficiency-of-the-evidence claim is "well-established":[192] a defendant's conviction after a bench trial "shall not be set aside unless it . . . is plainly wrong or without evidence to support it."[193] This Court reviews the evidence "in the light most favorable to the Commonwealth," giving the Commonwealth "the benefit of all reasonable

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[190] Va. Code Ann. § 18.2-10(e).

[191] JA 51, 89, 624, 630.

[192] *Commonwealth v. McNeal*, 282 Va. 16, 20, 710 S.E.2d 733, 735 (2011).

[193] Va. Code Ann. § 8.01-680 (2015); *McNeal*, 282 Va. at 20, 710 S.E.2d at 735 (same).

inferences deducible from the evidence."[194] That principle requires the Court to "'discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom.'"[195]

"Furthermore, an appellate court's 'examination is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling.'"[196] The reviewing court "'must consider all the evidence admitted at trial that is contained in the record.'"[197]

Perhaps most importantly, "[a]n appellate court does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Rather, the relevant question is whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[198] That tried-and-true approach ensures that an

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[194] *McNeal*, 282 Va. at 20, 710 S.E.2d at 735 (citation and quotation marks omitted).

[195] *Kelley*, 289 Va. at ___, 771 S.E.2d at 674 (quoting *Parks v. Commonwealth*, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980)).

[196] *Perry v. Commonwealth*, 280 Va. 572, 580, 701 S.E.2d 431, 436 (2010) (quoting *Bolden v. Commonwealth*, 275 Va. 144, 147, 654 S.E.2d 584, 586 (2008)).

[197] *Id.* (quoting *Bolden*, 275 Va. at 147, 654 S.E.2d at 586).

[198] *Williams v. Commonwealth*, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)).

appellate court does not "preside de novo over a second trial"[199] and respects trial judges' "major role" in determining the facts and their "expertise" in doing so."[200] The trial court's factfinding, in short, deserves "the highest degree of appellate deference."[201]

B. The evidence was sufficient to show that Vasquez and Valentin possessed a knife when they initially entered the residence.

Viewing the record under that deferential standard, there was sufficient evidence to conclude that Vasquez and Valentin were armed with a deadly weapon, a knife, when they first entered through the window. Neither challenges whether any of the knives at issue here was a "deadly weapon." And neither challenges the trial judge's finding of an agreement to break into the townhouse.[202] The only question raised is whether either defendant had a knife when they broke into the townhouse.

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[199] *Bratton v. Selective Ins. Co. of Am.*, ___ Va. ___, ___, 776 S.E.2d 775, __ (Va. 2015) (Kelsey, J., dissenting) (quoting *Haskins v. Commonwealth*, 44 Va. App. 1, 11, 602 S.E.2d 402, 407 (2004)).

[200] *Id.* (quoting *Haskins*, 44 Va. App. at 11, 602 S.E.2d at 407).

[201] *Bowman v. Commonwealth*, No. 141737, 2015 Va. LEXIS 139, at *5, 2015 WL 6518978, at *2 (Va. Oct. 29, 2015).

[202] JA 478:18-479:3. *See* JA 98 n.3 ("[Valentin] does not dispute the Commonwealth's argument that the evidence was sufficient to convict him as a principal in the second degree upon proof that Vasquez was armed with a deadly weapon at the time the pair entered the residence. *See* Code § 18.2-18 (in felony cases, except most capital murders, principal in second

Investigator Miller testified that Vasquez and Valentin admitted to "coming in to the residence" carrying two black bags.[203] Inspector Spiggle testified that Valentin initially denied having a knife but then admitted having "a hunting knife in the book bag."[204] Significantly, Spiggle further testified that Valentin *admitted* to having brought the knife in with him, though it was not actually used to assault the victim: Valentin said that "no one used that knife *that he brought in*."[205]

Vasquez and Valentin were also carrying two black bags when apprehended shortly after the crime.[206] Officer Drugo testified that Valentin's bag contained the "wolf" knife, as well as another knife.[207] Valentin admitted in his recorded conversation with Vasquez that the police "took *my* book bag."[208] Valentin's book bag also contained "somebody

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degree may be indicted, tried, convicted and punished in all respects as if principal in first degree).").

[203] JA 402:14-23, 403:5-7.

[204] JA 306:15-19.

[205] JA 306:20-24 (emphasis added).

[206] JA 219:21-220:6 (testimony of Officer Westfall); JA 402:14-23 (testimony of Investigator Miller).

[207] JA 231:11-24.

[208] Ex. 74 at 23:18 (emphasis added).

else's homework,"[209] justifying the reasonable inference, combined with the pair's admissions, that they had items in the bags not belonging to K.H. or her housemates, including the "wolf" knife, at the time they entered the residence. Inspector Miller further testified that both defendants also admitted to being in "possession" of both book bags.[210] There was no evidence that the "wolf" knife was owned by K.H. or her housemates.

Given those facts, and the reasonable inferences derived from them, Appellants cannot meet their burden of showing that no rational factfinder could conclude beyond a reasonable doubt that the defendants possessed the "wolf" knife at the time they entered through the window.

Furthermore, there was evidence that Vasquez had an *additional* knife with him at the time of entry. Inspector Miller testified that Vasquez admitted that "he had a little knife *when he entered the residence* and it was in his jacket."[211] To be sure, Miller's later statements about Vasquez's admissions were different. Miller later testified that Vasquez "said he had a little knife . . . that [he] found right there right when [he] went in."[212]

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[209] JA 231:21-22.

[210] JA 403:14.

[211] JA 353:19-21 (emphasis added).

[212] JA 370:9-10.

Inspector Miller also testified that, after Inspector Spiggle joined them, Vasquez said that "he found one [knife] right when he went in the house."[213] And on cross-examination, Miller said "I wasn't clear if it was right outside or inside, but as they were entering a knife was found . . . ."[214]

But such inconsistencies in a witness's testimony are not enough to make the evidence insufficient to support the conviction. The finder of fact has a "right to reject that part of the evidence believed . . . to be untrue and to accept that found . . . to be true."[215] The factfinder may choose to believe a witness's testimony "in whole or in part, as reason may decide."[216] And "the finder of fact has 'the discretion to ignore' that portion of the witness' testimony that is contrary to the portion believed to be true."[217]

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[213] JA 384:1-2.

[214] JA 401:24-402:1.

[215] *Barrett v. Commonwealth*, 231 Va. 102, 107, 341 S.E.2d 190, 193 (1986) (quoting *Belton v. Commonwealth*, 200 Va. 5, 9, 104 S.E.2d 1, 4 (1958)).

[216] *Durham v. Commonwealth*, 214 Va. 166, 169, 198 S.E.2d 603, 606 (1973).

[217] *Breeden v. Commonwealth*, 43 Va. App. 169, 180, 596 S.E.2d 563, 568 (2004); *see also Seaton v. Commonwealth*, 42 Va. App. 739, 751, 595 S.E.2d 9, 15 (2004) (Kelsey, J.) (finding evidence sufficient to show that teller was intimidated by defendant despite teller's "internally inconsistent" testimony that she was not frightened).

A reasonable trier of fact could have concluded from Inspector Miller's testimony that Vasquez himself made inconsistent statements about whether he had the knife *before* entering. In light of Vasquez's "self-serving" motive to minimize his crimes,[218] the court was entitled to believe the portion of Miller's testimony about Vasquez admitting to having the knife at the time he and Valentin broke into K.H.'s townhouse.

In short, upon considering the totality of the evidence, a reasonable trier of fact could conclude beyond a reasonable doubt that Vasquez and Valentin were armed with a knife when they broke into K.H.'s townhouse.

CONCLUSION

As to Vasquez's and Valentin's first assignment of error, the Court should dismiss their appeal as improvidently granted. The Court cannot reach the *Graham* claim because neither appellant has asked the Court to overrule *Angel*, and because Vasquez, in his appeal, misidentified the applicable legal standard. If the Court reaches the merits, it should affirm. In doing so, it should reaffirm that juvenile nonhomicide offenders are eligible for conditional release under Code § 53.1-40.01 and that their youth

[218] *See Carosi v. Commonwealth*, 280 Va. 545, 554-55, 701 S.E.2d 441, 446 (2010) ("A jury is not required to accept the self-serving testimony of the defendant . . . but may rely on such testimony in whole, in part, or reject it completely.").

at the time of the offense, and their demonstrated maturity and rehabilitation, are among the factors that are properly considered.

The Court should also affirm Appellants' convictions for breaking and entering while armed with a deadly weapon.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I certify under Rule 5:26(h) that on November 20, 2015, this brief was filed electronically with the Court, in Portable Document Format, and ten printed copies were hand-delivered to the Clerk's Office in Record No. 141071 and ten in Record No. 150357, in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because it does not exceed 50 pages as measured by that rule. A copy also was electronically mailed to:

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Attachment 1: Summary of Appellants' Indictments, Convictions, and Sentences

Va. Code § Charged:	**Text of Indictment:**	**Vasquez Indictment #: Result/Sentence:**	**Valentin Indictment #: Result/Sentence:**
18.2-91	"did unlawfully and feloniously break and enter, **while armed with a deadly weapon at the time of the entry**, the dwelling house of [K.H.], with the intent to commit larceny"	Indictment 1 (JA 1) 20 years, 15 suspended (JA 51, 624)	Indictment 2 (JA 65) 20 years, 15 suspended (JA 89, 630)
18.2-91 18.2-22	"did unlawfully and feloniously conspire to break and enter, **while armed with a deadly weapon at the time of entry**, the dwelling house of [K.H.], with the intent to commit larceny"	Indictment 2 (JA 2) 3 years (JA 51, 624)	Indictment 1 (JA 64) 3 years (JA 89, 630)
18.2-67.1	"did unlawfully and feloniously engage in fellatio, with [K.H.], against her will, by force, threat, or intimidation"	Indictment 3 (JA 3) 20 years, 10 suspended (JA 51, 622)	
18.2-67.1	"did unlawfully and feloniously engage in anal intercourse, with [K.H.], against her will, by force, threat, or intimidation"	Indictment 4 (JA 4) 20 years, 10 suspended (JA 52, 623)	
18.2-67.1	"did unlawfully and feloniously engage in fellatio, with [K.H.], against her will, by force, threat, or intimidation"	Indictment 5 (JA 5) 20 years, 10 suspended (JA 52, 622)	
18.2-67.1	"did unlawfully and feloniously engage in fellatio, with [K.H.], against her will, by force, threat, or intimidation"	Indictment 6 (JA 6) 20 years, 10 suspended (JA 52, 623)	
18.2-95(ii)	"did unlawfully and feloniously take, steal, and carry away property valued at more than $200.00 and belonging to [T.K.]"	Indictment 7 (JA 7) 10 years, 5 suspended (JA 53, 623-24)	Indictment 4 (JA 67) 10 years, 5 suspended (JA 90, 630-31)

Attachment 1: Summary of Appellants' Indictments, Convictions, and Sentences

Va. Code § Charged:	**Text of Indictment:**	**Vasquez Indictment #: Result/Sentence:**	**Valentin Indictment #: Result/Sentence:**
18.2-95(ii) 18.2-23	"did unlawfully and feloniously conspire to take, steal, and carry away property valued at more than $200.00 and belonging to [T.K.]"	Indictment 8 (JA 8) 2 years (JA 53, 625)	Indictment 3 (JA 66) 2 years (JA 89, 630)
18.2-95(ii)	"did unlawfully and feloniously take, steal, and carry away property valued at more than $200.00 and belonging to [K.H.]"	Indictment 9 (JA 9) *Dismissed under "single larceny" rule (JA 481)*	Indictment 8 (JA 71) *Dismissed under "single larceny" rule (JA 490)*
18.2-95(ii) 18.2-23	"did unlawfully and feloniously conspire to take, steal, and carry away property valued at more than $200.00 and belonging to [K.H.]"	Indictment 10 (JA 10) *Dismissed under "single larceny" rule (JA 481)*	Indictment 7 (JA 70) *Dismissed under "single larceny" rule (JA 490)*
18.2-61	"did unlawfully and feloniously engage in sexual intercourse with [K.H.], against her will, by force, threat, or Intimidation"	Indictment 11 (JA 11) 20 years, 10 suspended (JA 53, 622)	Indictment 5 (JA 68) 20 years, 10 suspended (JA 90, 629-30)
18.2-61	"did unlawfully and feloniously engage in sexual intercourse, with [K.H.], against her will, by force, threat, or Intimidation"	Indictment 12 (JA 12) 20 years, 10 suspended (JA 54, 622-23)	
18.2-61(i) 18.2-18	"did unlawfully and feloniously act as a principal in the 2nd degree during sexual intercourse with [K.H.], against her will by force, threat, or intimidation"		Indictment 6 (JA 69) 5 years (JA 90, 629)
18.2-422	"did unlawfully and feloniously while wearing a mask, hood, or other device whereby a substantial portion of the face is hidden or covered	Indictment 13 (JA 13) 3 years (JA 54, 625)	Indictment 10 (JA 73) 3 years (JA 91, 631)

Attachment 1: Summary of Appellants' Indictments, Convictions, and Sentences

Va. Code § Charged:	Text of Indictment:	Vasquez Indictment #: Result/Sentence:	Valentin Indictment #: Result/Sentence:
	so as to conceal the identity of the wearer, appear in a public place, or upon any private property without first having obtained from the owner or tenant thereof the consent to do so in writing"		
18.2-48(ii)	"did unlawfully and feloniously by force, intimidation, or deception, and without legal justification or excuse, seize, take, transport, detain, or secrete [K.H.] with the intent to deprive her of her personal liberty, or to withhold or conceal her from any person, authority or institution, and with the intent to defile [K.H.]"	Indictment 14 (JA 14) 50 years, 40 suspended (JA 54, 625)	Indictment 9 (JA 72) 50 years, 40 suspended (JA 91, 631)
18.2-48(ii) 18.2-22	"did unlawfully and feloniously conspire to by force, intimidation, or deception, and without legal justification or excuse, seize, take, transport, detain, or secrete K.H. with the intent to deprive her of her personal liberty, or to withhold or conceal her from any person, authority or institution, and with the intent to defile [K.H.]"	Indictment 15 (JA 15) 5 years (JA 55, 626)	Indictment 11 (JA 74) 5 years (JA 91, 631)
18.2-58 18.2-22	"did unlawfully and feloniously conspire to take property from or in the presence of [K.H.], by violence to the person, or by assault or otherwise	Indictment 16 (JA 16)0 5 years (JA 55, 624)	Indictment 12 (JA 75) 5 years (JA 92, 630)

Attachment 1: Summary of Appellants' Indictments, Convictions, and Sentences

Va. Code § Charged:	Text of Indictment:	Vasquez Indictment #: Result/Sentence:	Valentin Indictment #: Result/Sentence:
	putting her in fear of serious bodily harm, or by the threat or presenting of a deadly weapon"		
18.2-58	"did unlawfully and feloniously take property from or in the presence of [K.H.], by violence to the person, or by assault or otherwise putting her in fear of serious bodily harm, or by the threat or presenting of a deadly weapon"	Indictment 17 (JA 17) 15 years, 5 suspended (JA 55, 624)	Indictment 13 (JA 76) 15 years, 5 suspended (JA 92, 630)
18.2-67.2	"did unlawfully and feloniously commit inanimate or animate object sexual penetration on [K.H.], against her will, by force, threat, intimidation, or through the mental incapacity or physical helplessness of such person"	Indictment 18 (JA 18) 20 years, 10 suspended (JA 56, 624)	
18.2-67.1	"did unlawfully and feloniously commit forcible sodomy on [K.H.], against her will, by force, threat, intimidation, or through the mental incapacity or physical helplessness of such person"	Indictment 19 (JA 19) 20 years, 10 suspended (JA 56, 623-24)	
18.2-61 18.2-26	"did unlawfully and feloniously attempt to engage in sexual intercourse with [K.H.], against her will by force, threat, or intimidation"		Indictment 14 (JA 77) *Not guilty (JA 86); overlaps with Indictment 15 (JA 493).*

Attachment 1: Summary of Appellants' Indictments, Convictions, and Sentences

Va. Code § Charged:	**Text of Indictment:**	**Vasquez Indictment #: Result/Sentence:**	**Valentin Indictment #: Result/Sentence:**
18.2-67.1 18.2-26	"did unlawfully and feloniously attempt to engage in anal intercourse with [K.H.], against her will, by force, threat, or intimidation"	Indictment 20 (JA 20) 10 years, 5 suspended (JA 56, 623)	Indictment 15 (JA 78) 10 years, 5 suspended (JA 92, 630)
18.2-95(ii)	"did unlawfully and feloniously take, steal and carry away property valued at more than $200.00 and belonging to [E.M.]"	Indictment 21 (JA 21) *Dismissed under "single larceny" rule (JA 486)*	Indictment 16 (JA 79) *Dismissed under "single larceny" rule (JA 493)*
18.2-95(ii) 18.2-23	"did unlawfully and feloniously conspire to take, steal and carry away property valued at more than $200.00 or and belonging to [E.M.]"	Indictment 22 (JA 22) *Dismissed under "single larceny" rule (JA 486)*	Indictment 17 (JA 80) *Dismissed under "single larceny" rule (JA 493)*
	Total	**18 convictions** **Aggregate sentence:** **283 years,** **150 suspended** **(net 133 years)**	**12 convictions** **Aggregate sentence:** **153 years,** **80 suspended** **(net 73 years)**