In The

Supreme Court of Virginia

RECORD NO. 150357

BRANDON VALENTIN,

***Appellant*,**

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

John C. Holloran (VSB No. 25182)
Justin L. Corder (VSB No. 80253)
LAW OFFICES OF JOHN C. HOLLORAN
409 Virginia Avenue
Harrisonburg, Virginia 22802
(540) 433-7890 (Telephone)
(540) 434-8020 (Facsimile)
holloran@aol.com
justinlcorder@gmail.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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I. Valentin's de facto Life Sentence Does Not Provide for a Meaningful Opportunity to Obtain Release, in Violation of the Eighth Amendment

A. Valentin's Assignment of Error is Not Defective and is Sufficient to Place the Matter Before this Court

The Commonwealth contends that, because Brandon Valentin's ("Valentin") first assignment of error does not explicitly ask this Court to overrule Angel v. Commonwealth, 281 Va. 248, 704 S.E.2d 386 (2011), it identifies the wrong issue and is fatally defective. (Brief of Appellee 23-24.) The Commonwealth's argument is without merit, however, as Valentin's first assignment of error lists, pursuant to Rule 5:17(c)(1), "the specific errors in the rulings below" upon which Valentin intends to rely. Rule 5:17(c)(1). Moreover, Valentin filed his Petition for Appeal in this Court on March 6, 2015, before the amendment to Rule 5:17(c)(1), adding the language "or the specific existing case law that should be overturned, extended, modified, or reversed", took effect on July 1, 2015.

Additionally, Rule 5:17 further provides that, "[w]hen appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to assignments of error presented in, and to actions taken by, the Court of Appeals may be included in the petition for appeal to this Court." Rule 5:17(c)(1)(ii). For obvious reasons, Valentin neither asked the trial court

nor the Court of Appeals to overrule Angel nor did he assign error to the failure of either of the lower courts to overrule Angel. Rather, Valentin preserved the arguments contained in his first assignment of error in the trial court and before the Court of Appeals by arguing that Valentin's sentence for nonhomicide offenses committed as a juvenile violates the Eighth Amendment to the United States Constitution. (App. 34-38, 88-94, 95-100, 580-83, 589-91, 600-14, 628-32.) Valentin v. Commonwealth, Va. App. Record No. 1791-13-3, Petition for Appeal, 1, 10-17 (Feb. 14, 2014).

Lastly, Valentin specifically argued in his Petitions for Appeal before both the Court of Appeals and this Court, that Code § 53.1-40.01 does not provide juvenile offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," despite this Court's previous holding in Angel. Valentin v. Commonwealth, Va. Record No. 150357, Petition for Appeal, 1, 18-25 (March 6, 2015); Valentin v. Commonwealth, Va. App. Record No. 1791-13-3, Petition for Appeal, 1, 12-14 (Feb. 14, 2014). Accordingly, Valentin's first assignment of error, granted by this Court, is sufficient to place the question of the constitutionality of Valentin's sentence squarely before this Court.

B. Valentin's Sentence Violates the Foundational Principles of the Supreme Court's Eighth Amendment Jurisprudence

The Commonwealth contends that the Supreme Court's holding in Graham v. Florida, 560 U.S. 48 (2010), should be limited to only those sentences explicitly termed "life without parole" because: (1) the Supreme Court's analysis in Graham focused, in part, upon the rarity of "life without parole" sentences; (2) juvenile offenders may still bring proportionality challenges against term of years sentences; and (3) applying Graham to term of years sentences could raise difficult questions. (Brief of Appellee 25-31.) Contrary to the Commonwealth's contention, however, Valentin's sentence accomplishes precisely what the Supreme Court declared to be unconstitutional in Graham – a court's deciding "at the outset" that a child who has not committed homicide will never be fit to reenter society and should spend the rest of their lives in prison. Graham, 560 U.S. at 75, 82.

While the Supreme Court did discuss the relative rarity of juveniles sentenced to life without parole when deciding Graham, the Court focused primarily upon the fact that, "because juveniles have lessened culpability they are less deserving of the most severe punishments." Id. at 68. For, as the Court explained, "[c]ommunity consensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual. In accordance with the constitutional design, the task of

interpreting the Eighth Amendment remains our responsibility." Id. at 67 (citation and internal quotation marks omitted).

In exercising that responsibility in Graham, then, the Supreme Court focused upon the facts that, "[a]s compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." Id. at 68 (citation and internal quotation marks omitted). Accordingly, the Supreme Court held that, because juveniles are less culpable than adults and cannot be classified among the worst offenders, the Eighth Amendment forbids States "from making the judgment at the outset that those offenders never will be fit to reenter society." Id. at 68, 72, 75. Rather, States must "give [juvenile defendants] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 75.

As a result, Valentin respectfully submits that, while some Courts have limited the Supreme Court's holding in Graham to only express "life without parole" sentences, the stronger position is taken by those courts that have looked to the foundational principles and the underlying reasoning of the Supreme Court's decision in Graham to hold that term of

years sentences can violate the Eighth Amendment's ban on cruel and unusual punishments. See, e.g., Moore v. Biter, 725 F.3d 1184, 1192 (9th Cir. 2013) (holding that Graham applies to both a sentence of life without parole and a sentence of 254 years because both sentences deny the juvenile the chance to return to society and are materially indistinguishable from each other); LeBlanc v. Mathena, Civil Action No. 2:12cv340, 2015 U.S. Dist. LEXIS ____, at *26-32 (E.D. Va. July 1, 2015) (holding that Virginia's sentencing scheme regarding juveniles does not satisfy the requirements of the Eighth Amendment because "[t]he remote possibility of geriatric release does not provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation", as required by Graham); Casiano v. Comm'r of Correction, No. 19345, 2015 WL 3388481, at *11 (Conn. May 26, 2015) (agreeing "with those courts that have concluded that the Supreme Court's focus in Graham and [Miller v. Alabama, 567 U.S. ___, ___, 132 S. Ct. 2455, 2468-69 (2012)] was not on the label of a 'life sentence' but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life") (citations and quotation marks omitted); Bear Cloud v. State, 334 P.3d 132, 144 (Wyo. 2014) (holding that an aggregate sentence of just over forty-five years was the de

facto equivalent of a life sentence without parole); State v. Null, 836 N.W.2d 41, 71-72 (Iowa 2013) (holding that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by Graham") (quoting Graham, 560 U.S. at 75); People v. Caballero, 282 P.3d 291, 295-96 (Cal. 2012) (holding that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment"); Thomas v. Pennsylvania, Docket No. CV-10-4537, 2012 WL 6678686, *2 (E.D. Pa. December 21, 2012) (observing that "the Supreme Court's analysis would [not] change simply because a sentence is labeled a term-of-years sentence rather than a life sentence").

Consequently, while the trial court did not explicitly sentence Valentin to "life without parole" in this case, Valentin's sentence constitutes the functional equivalent of a life sentence. Any distinction between the two is in name only, and without a difference, as both Valentin's sentence and a sentence of "life without parole" would be designed to, and would result in, Valentin spending the rest of his natural life in prison – in direct violation of

the foundational principles and the underlying reasoning of the Supreme Court's holding in Graham. 560 U.S. at 68, 72, 75, 82.

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

The Commonwealth's contention that, because Valentin is eligible for geriatric release at age 60, he is not facing a "life without parole" sentence and the requirements of Graham are satisfied ignores Graham's requirements that juvenile offenders convicted of nonhomicide crimes be given, not just the mere possibility of future release, but a "realistic," "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75, 82 (emphasis added). (Brief of Appellee 31-33.) So too, does the Commonwealth's contention that a lengthy incarceration, by itself, does not deprive a juvenile offender of a meaningful opportunity for release. (Brief of Appellee 33-35.)

For as Virginia's recent numbers regarding the application of its conditional release program demonstrate, Code § 53.1-40.01 does not provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," particularly in light of the numbers specific to sex offenders. Id. (emphasis added). (App. 35-36, 580-82.) Therefore, in light of the application, or lack of application, of Virginia's conditional

release program, it cannot be said that Code § 53.1-40.01 provides a "meaningful opportunity to obtain release."[1] Id.

While the Commonwealth argues that the statistics provided to the trial court regarding geriatric release in Virginia are largely meaningless and should not be relied upon, the language used by the Supreme Court in Graham, that juveniles must be provided a "realistic," "meaningful opportunity" to obtain release must certainly mean something more than mere possibility. Id. at 75, 82 (emphasis added). (Brief of Appellee 35-36.) Accordingly, the statistics regarding how geriatric release is actually applied, or not applied, in the Commonwealth are extremely relevant and informative to the question whether geriatric release provides the "realistic," "meaningful opportunity" to obtain release required by Graham. Id.

More specifically, the Commonwealth contends that the lack of application of Code § 53.1-40.01 in Virginia is meaningless for purposes of illustrating the treatment of juvenile offenders in Virginia because the geriatric release statute was not enacted until 1994 and, as a result, no

[1] Indeed, the statistics are even worse when considering that between 1994, when Code § 53.1-40.01 was enacted, and early 2010, only fifteen (15) inmates were granted geriatric release, despite over 1,000 inmates being eligible for geriatric release in 2010, alone. See Frank Green, Virginia Rarely Grants Geriatric Parole, RICHMOND TIMES DISPATCH, March 1, 2010, available at http://www.richmond.com/news/va-rarely-grants-geriatric-parole/article_4969b0fe-bdca-5361-984a-7aeb0da2f87e.html (last visited November 30, 2015).

juveniles have yet become eligible for consideration pursuant to that statute. (Brief of Appellee 35-36.) However, that argument only serves to illustrate that, even given the incredible lack of application of geriatric release in Virginia, the geriatric release program still necessarily treats juveniles worse than their adult counterparts, in direct contradiction to the Supreme Court's reasoning in Graham.

Pursuant to Code § 53.1-40.01, all prisoners in Virginia, regardless of their age at the time of offense, may apply for geriatric release when they reach either the age of sixty or sixty-five. Code § 53.1-40.01. This scheme results in juveniles necessarily being required to wait longer and serve a larger percentage of their sentence before they are even eligible to apply for the same conditional release program available to adult offenders. Accordingly, Virginia's geriatric release program, pursuant to Code § 53.1-40.01, necessarily treats juvenile offenders worse than their adult counterparts, and stands in direct contradiction to the foundational principles of the Supreme Court's Eighth Amendment jurisprudence – that "children are constitutionally different" from adults and warrant special consideration regarding sentencing because of the unique characteristics attendant to youth and the possibility for rehabilitation.

Additionally, it should be noted that, contrary to the Commonwealth's assertion, Graham did not suggest that a State could incarcerate a defendant for as long as a half century before providing the required meaningful opportunity for release. (Brief of Appellee 33-35.) Rather, the Supreme Court simply recognized, in Graham, that sentences like Graham's guarantee that the juvenile offender will die in prison "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." Graham, 560 U.S. at 79. The Supreme Court was recognizing, therefore, the harshness of those sentences imposed on juvenile nonhomicide offenders requiring that they spend the rest of their lives in prison. Id. For as the Supreme Court further 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.

As a result, the Supreme Court held that, while the Eighth Amendment does not prohibit lengthy prison sentences for nonhomicide juvenile offenders, it does "forbid States from making the judgment at the

outset that those offenders never will be fit to reenter society." Id. at 75. Consequently, juvenile nonhomicide offenders must be given something much more than just the mere possibility of future release; they must be provided a "realistic," "meaningful" opportunity to obtain release based upon demonstrated maturity and rehabilitation." Id. at 75, 82.

Lastly, while the Commonwealth argues in favor of the "constitutionality of Code § 53.1-40.01," Valentin has not argued, and is not arguing that Code § 53.1-40.01 is unconstitutional. Rather, Valentin is arguing that Code § 53.1-40.01 does not satisfy the Eighth Amendment's requirement that juvenile nonhomicide offenders must be given a "realistic," "meaningful" opportunity to obtain release based upon demonstrated maturity and rehabilitation." Id.

D. Miller v. Alabama & Valentin's Youth

The Commonwealth's contention that the Amicus Curiae mistakenly claims that their sentences are unconstitutional under Miller and that Valentin has not raised that argument before this Court is, itself, mistaken because Valentin's first assignment of error asserts that Valentin's sentence violates the Eighth Amendment, not merely any one particular Supreme Court decision. (Brief of Appellee 39-40.) Additionally, the Amicus Curiae does not argue that Valentin's sentence violates the bare

holding of Miller, but rather argues, along with Valentin, that Valentin's sentence violates the underlying principles and reasoning of the Supreme Court's decisions in Roper v. Simmons, 543 U.S. 551 (2005), Graham, and Miller, namely, that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments. Valentin v. Commonwealth, Va. Record No. 150357, Brief Amicus Curiae, 8-14 (Oct. 26, 2015) (citing Roper, 543 U.S. at 569-70, 573; Graham, 560 U.S. at 68-69, 74-75, 79; Miller, 132 S.Ct. at 2460, 2464-65, 2469).

Lastly, the Commonwealth asserts that the trial court took into account Valentin's youth and mitigating factors, and that Valentin does not claim otherwise. (Brief of Appellee 40.) This is simply not the case. While the trial court may have considered the presentence report, the presentence report, in relation to Valentin's youth, merely lists Valentin's age at offense and date of birth. (App. II. 7.) Moreover, the very reason that Valentin submits that his sentence is unconstitutional is that he was a juvenile at the time of the offenses. Consequently, Valentin has consistently argued that the trial court necessarily failed to properly consider Valentin's youth and its attendant characteristics when fashioning the sentence at issue in this appeal, as required by the Eighth Amendment.

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

The Commonwealth asserts the evidence was sufficient to demonstrate that Vasquez and Valentin possessed a knife when they entered K.H.'s residence; however, there was simply no evidence at trial that anything was in the backpacks possessed by the defendants at the moment they entered the residence. (Brief of Appellee 45-49; App. 120, 122-23, 174, 176-81, 191, 196-97, 208-11, 213-17, 223-25, 231, 294, 299-300, 305-06, 332, 401-03.)

While Investigator Spiggle testified, regarding Valentin's statements concerning the sexual assault of K.H. in her bedroom, that Valentin "mention[ed] a hunting knife in the book bag," and that Valentin affirmed that "no one used that knife that he brought in," this testimony occurred in the context of Valentin discussing the sexual assault of K.H. in her bedroom, and did not occur in the context of Valentin discussing his entry into the residence. (App. 305-06.) Moreover, upon cross-examination, Investigator Spiggle clarified that based upon his interview of Valentin, "it was clear that the weapons were obtained inside of the residence." (Emphasis added.) (App. 332.)

Additionally, while Investigator Miller initially testified that, following his arrest, Vasquez stated "he had a little knife when he entered the residence and it was in his jacket," he later clarified, regarding that little knife, that Vasquez's statement was that "he had a little knife . . . that [he] found right there right when [he] went in." (App. 353, 370.) Investigator Miller further testified that Vasquez's statement was that "he found [the knife that he had] right when he went in the house." (App. 383-84.) Lastly, when asked during cross-examination whether Vasquez actually stated that "he found the knife in the residence," Miller testified, "[y]es. I wasn't clear if it was right outside or inside, but as they were entering a knife was found . . . yes." (Emphasis added.) (App. 401-02.)

Contrary to the Commonwealth's contention, therefore, the evidence does not demonstrate that Vasquez made inconsistent statements about whether he had the knife before entering. (App. 353, 370, 383-84, 401-02.) Rather, the evidenced introduced at trial demonstrates that it was Investigator Miller's testimony that was inconsistent regarding what, exactly, Vasquez stated regarding the little knife, and Investigator Miller ultimately had to concede that he could not say where and/or when Vasquez obtained the knife that was later found in his possession. (App. 353, 370, 383-84, 401-02.)

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

CONCLUSION

Based on the foregoing, Valentin respectfully requests that this Court hold that Valentin's de facto life sentence does not provide for a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," in violation of the Eighth Amendment, and remand for a new sentencing event. Graham, 560 U.S. at 75. Additionally, Valentin respectfully requests that this Court hold the evidence admitted at trial insufficient, as a matter of law, to support Valentin's convictions of break and enter while armed with a deadly weapon with the intent to commit larceny and conspiracy to do the same.

RESPECTFULLY SUBMITTED,
BRANDON VALENTIN,
BY COUNSEL

CERTIFICATE

We hereby certify that Rule 5:26(h) of the Supreme Court of Virginia have been complied with, as one (1) electronic version in PDF format of this Reply Brief of Appellant has been filed, via VACES, and ten (10) printed copies of the same have been hand-filed with the Clerk of this Court on December 4, 2015. On this same day, one (1) electronic version in PDF format of this Reply Brief of Appellant has been served, via email, to Counsel for Appellee, the Commonwealth of Virginia, Stuart A. Raphael, Solicitor General of Virginia, and Senior Assistant Attorney General Donald E. Jeffrey, III, Esq., Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, SRaphael@oag.state.va.us, djeffrey@oag.state.va.us (E-mail). The foregoing Reply Brief of Appellant contains 15 pages, not including the appendices, cover page, table of contents, table of authorities, and certificate.

John C. Holloran, Esq.
VSB 25182
Law Offices of John C. Holloran
409 Virginia Avenue
Harrisonburg, Virginia 22802
540-433-7890 (Phone)
540-434-8020 (Facsimile)
holloran@aol.com
Counsel for Appellant Valentin

Justin L. Corder, Esq.
VSB 80253
Law Offices of John C. Holloran
409 Virginia Avenue
Harrisonburg, Virginia 22802
540-433-7890 (Phone)
540-434-8020 (Facsimile)
justinlcorder@gmail.com
Counsel for Appellant Valentin