

No. _____

In The
Supreme Court of the United States

DARIEN VASQUEZ; BRANDON VALENTIN,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- 1) Whether the Eighth Amendment's ban on cruel and unusual punishment, as recognized in *Graham v. Florida*, prohibits sentencing juvenile nonhomicide offenders to aggregate term-of-years sentences, constituting *de facto* life sentences, without the possibility of parole.

- 2) Whether Geriatric Release satisfies the Eighth Amendment's requirement, as recognized in *Graham v. Florida*, that states provide juvenile nonhomicide offenders some realistic, meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

LIST OF PARTIES IN PROCEEDINGS BELOW

1. Darien Vasquez, Petitioner/Appellant
2. Brandon Valentin, Petitioner/Appellant
3. Commonwealth of Virginia, Appellee

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The opinion and judgment of the Supreme Court of Virginia is reported at *Vasquez v. Commonwealth*, 291 Va. 232, 781 S.E.2d 920 (2016). (App. A) The Orders from the Court of Appeals of Virginia denying Petitioners' petitions for appeal from the relevant judgments of the Circuit Court of Rockingham County, Virginia, are unreported. (App. H-I) The Final Orders of the Circuit Court of Rockingham County, Virginia, are unreported. (App. B-G)

JURISDICTION

The Supreme Court of Virginia issued its opinion and judgment in this matter on February 12, 2016. (App. A) The Supreme Court of Virginia denied Petitioners' Motions for Rehearing on May 13, 2016. (App. J-K) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Petitioners, who are contemporaneously filing motions to proceed *in forma pauperis*, are timely filing this Petition for Writ of Certiorari by U.S. Postal Service, first class postage prepaid, on August 11, 2016. *See* Sup. Ct. R. 13.1, 13.3, 29.2, 29.3, & 39.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioners Darien Vasquez and Brandon Valentin respectfully submit that this case arises out of the judgments of the Circuit Court of Rockingham County, Virginia ("trial court"), sentencing Petitioners to the functional equivalent of life in prison without parole for nonhomicide offenses committed as juveniles, in violation of the Eighth Amendment to the United States Constitution's ban on cruel and unusual punishments.

Petitioners were tried as co-defendants and each convicted of multiple nonhomicide crimes arising from an incident that took place when they were sixteen (16) years old. In October 2012, Petitioners broke and entered into the townhouse of KH, a female student at James Madison University in Harrisonburg, Virginia. KH was subsequently robbed and raped separately by the Petitioners, and was physically assaulted and forced to perform several additional sex acts by and on Vasquez. Before leaving the residence, the offenders took numerous items from KH and her roommates. They were arrested a short distance away and, after lengthy questioning, made confessions to police that same night.

Following a bench trial, Petitioners were both convicted of numerous felonies, including breaking and entering with a deadly weapon in violation of Va. Code Ann. § 18.2-91¹, abduct with intent to defile in violation of Code § 18.2-48(ii), rape by force,

¹ Unless otherwise noted, all references in this Petition to "Code §" refer to sections of the Annotated Code of Virginia (1950, as amended).

threat, or intimidation in violation of Code § 18.2-61(A)(i), and robbery in violation of Code § 18.2-58.² (App. C, E-G)

Prior to sentencing, Vasquez' attorney filed a Memorandum on Juvenile Sentencing, which Valentin adopted, arguing that a lengthy term-of-years sentence can constitute a *de facto* life sentence and that Virginia's conditional release of geriatric prisoners ("geriatric release") statute, Code § 53.1-40.01, does not provide a meaningful opportunity to obtain release for juvenile offenders convicted of nonhomicide crimes, in violation of this Court's holding in *Graham v. Florida*, 560 U.S. 48 (2010). (App. L) More specifically, Petitioners' attorneys asked the court to consider the defendants' ages and lack of maturity as important factors in sentencing because, as the Supreme Court has recognized, juveniles, are simply different from adult offenders because: (1) they lack maturity and have an underdeveloped sense of responsibility leading to recklessness, impulsivity, and needless risk taking; (2) they are more vulnerable and susceptible to negative influences and outside pressures, including from their family and peers; and (3) their character is not as well formed as an adult's and their traits are less fixed and their actions less likely to be evidence of irretrievable depravity. (App. L)

² Valentin was also convicted of numerous conspiracy charges, grand larceny in violation of Code § 18.2-95, rape by force, threat, or intimidation as a principal in the second degree in violation of Code §§ 18.2-61(A)(i) and 18.2-18, wear a mask upon private property without consent in violation of Code § 18.2-422, and attempted anal intercourse by force, threat, or intimidation in violation of Code §§ 18.2-67.1 and 18.2-26. (App. E, G) Vasquez was also convicted of numerous conspiracy charges, grand larceny in violation of Code § 18.2-95, three counts of oral sodomy in violation of Code § 67.1, two counts of anal sodomy in violation of Code § 18.2-67.1, attempted sodomy in violation of Code § 18.2-67.1, an additional count of rape in violation of Code § 18.2-61, wear a mask upon private property without consent in violation of Code § 18.2-422, and object penetration in violation of Code § 18.2-67.2. (App. C, F)

Following conviction Vasquez also requested temporary transfer to the Virginia Department of Juvenile Justice pursuant to Code § 16.1-289 for a juvenile sex offender evaluation. The trial court denied this request and sentenced Vasquez to an aggregate term of incarceration of two hundred and eighty-three (283) years with one hundred and fifty (150) years suspended, for an active sentence of 133 years. (App. F) Valentin was sentenced to an aggregate term of incarceration of one hundred and forty-eight (148) years in prison with eighty (80) years suspended, for an active sentence of 68 years. (App. G) Valentin had no prior criminal record.

When sentencing Petitioners, the trial court stated, "I know that you would like to take it back and you do not like being where you are, but there are certain things that people do in life where *you don't get a second chance.*" (Emphasis added.) (App. M) Additionally, the trial court stated,

I understand that the numerical total of these sentences is such that the concept of geriatric parole will be your chance for release because it is in effect [a] *de facto life sentence.* But there are just certain crimes that that's what it warrants and in this case that's where we're at.

(Emphasis added.) (App. M) When the trial court subsequently addressed K.H.'s family at the conclusion of the sentencing hearing, the trial court further stated that "she will not be threatened, she will not have these individuals to be afraid of." (App. M)

Petitioners appealed their sentences to the Court of Appeals of Virginia ("Court of Appeals"), arguing that their sentences constituted *de facto* life without parole sentences for nonhomicide offenses committed as juveniles, and that Virginia's geriatric release statute, Code § 53.1-40.01, does not provide a realistic, meaningful

opportunity to obtain release, in violation of the Eighth Amendment's ban on cruel and unusual punishments and this Court's holding in *Graham v. Florida*, 560 U.S. 48 (2010).³ In *per curiam* opinions, the Court of Appeals denied Petitioner's petitions, without addressing whether Petitioners' sentences implicated this Court's holding in *Graham*. (App. H-I) Rather, the Court of Appeals held that they were bound by the Virginia Supreme Court's decision in *Angel v. Commonwealth*, 281 Va. 248, 704 S.E.2d 386 (2011), that Code § 53.1-40.01⁴ provides such juvenile nonhomicide offenders a meaningful opportunity for release. (App. H-I)

Petitioners subsequently appealed their sentences to the Virginia Supreme Court, again arguing that their sentences constituted *de facto* life without parole sentences and that Va. Code § 53.1-40.01 does not provide a realistic, meaningful opportunity to obtain release, in violation of the Eighth Amendment and this Court's holding in *Graham*. A majority of the Virginia Supreme Court held that Petitioners' sentences do not violate the Eighth Amendment because this Court's holding in *Graham* simply does not apply to aggregate term-of-years sentences, as opposed to a single life without parole sentence, regardless of whether the term of years extends

³ Petitioners also appealed certain convictions, which both the Court of Appeals and Virginia Supreme Court upheld and which are not the subject of this Petition.

⁴ Code § 53.1-40.01, enacted in 1994, when parole was abolished in Virginia, provides that an inmate sentenced for an offense other than First Degree Murder,

who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or . . . who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.

well beyond any realistic life expectancy. *Vasquez v. Commonwealth*, 291 Va. 232, 781 S.E.2d 920 (2016). (App. A)

Two justices, while concurring with the result of the majority decision, disagreed with the majority's conclusion that this Court's decision in *Graham* does not apply to such *de facto* life sentences. *Id.* (Mims, J., concurring). (App. A) In so doing, the concurring Justices reasoned that, "*Graham's* mandate prohibiting life sentences without parole for juvenile nonhomicide offenders applies equally to *de facto* life sentences. However . . . Virginia's geriatric release statute, *if applied as written*, is capable of providing juveniles with such sentences a meaningful opportunity for release as mandated by *Graham* . . ." *Id.* (emphasis added). (App. A) The concurrence cautioned, however, that while Virginia's geriatric release statute may provide a meaningful opportunity for release, "whether the geriatric release statute *as applied* will continue to provide the 'meaningful opportunity for release' required by *Graham* is subject to debate. Statistics describing the frequency with which geriatric release has been granted post-*Angel* are troubling: less than 4% of the eligible offenders who applied for geriatric release have received early release." *Id.* (emphasis in original). (App. A) Ultimately, the concurrence concluded that Petitioners' challenge was not yet ripe. *Id.* (App. A) Petitioners subsequently moved for rehearing, which motions were denied. (App. J-K)

REASONS FOR GRANTING THE WRIT

This case presents two straightforward questions that have sharply divided both state courts of last resort and the lower federal courts when interpreting and applying this Court's decision in *Graham v. Florida*. First, does the Eighth Amendment's categorical ban against sentencing juvenile nonhomicide offenders to life in prison without a realistic, meaningful opportunity for release apply to *de facto* life sentences consisting of aggregate term-of-years sentences which far exceed any reasonable life expectancy, as Petitioners' sentences in this matter do? Second, is the Eighth Amendment's requirement that states provide juvenile nonhomicide offenders a realistic, meaningful opportunity for release satisfied by a state's geriatric release provision which fails to consider or account for the juvenile nonhomicide offender's youthful status and qualities, and whose meaningful application of which is overwhelmingly absent? Virginia stands in the minority on both questions. Accordingly, this case is worthy of consideration because it implicates any indeterminate parole system which does not adequately take into consideration the juvenile offender's age and the inherent qualities of youth.

Additionally, this case comes to the Court directly from the Supreme Court of Virginia and provides this Court a straightforward opportunity to address these fundamental questions presented on the merits, without needing to consider the high hurdles imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in various sections of 28 U.S.C.). In fact, the Virginia courts and federal courts in

Virginia are currently split as to the second question presented. On July 1, 2015, the United States District Court for the Eastern District of Virginia held that Virginia's geriatric release provision does not comply with this Court's decision in *Graham* even under the high burden of AEDPA. *LeBlanc v. Mathena*, Civil Action No. 2:12cv340, 2015 U.S. Dist. LEXIS ____ (E.D. Va. July 1, 2015). The matter is currently pending before the United States Court of Appeals for the Fourth Circuit and, regardless of the outcome, will certainly be appealed to this Court, with the added issue regarding the application of AEDPA. *LeBlanc v. Mathena*, No. 15-7151 (4th Cir. argued May 10, 2016).

I. **PETITIONERS AGGREGATE TERM-OF-YEARS SENTENCES CONSTITUTE *DE FACTO* LIFE SENTENCES FOR NONHOMICIDE CRIMES, IN VIOLATION OF THE EIGHTH AMENDMENT**

The Virginia Supreme Court held that Petitioners' sentences do not violate the Eighth Amendment because this Court's holding in *Graham* simply does not apply to aggregate term-of-years sentences, as opposed to a single life without parole sentence. *Vasquez*, 291 Va. at ____, 781 S.E.2d at ____. (App. A) Citing the United States Courts of Appeal for the Fifth and Sixth Circuits, the Virginia Supreme Court concluded that this Court's holding in *Graham* applies only to those juvenile nonhomicide offenders convicted of "a single crime resulting in a single life-without-parole sentence." *Vasquez*, 291 Va. at ____, 781 S.E.2d at ____ (citing *Bunch v. Smith*, 685 F.3d 546, 547

(6th Cir. 2012)⁵; *U.S. v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013) (per curiam). (App. A)

In so doing, the Virginia Supreme Court placed Virginia, as of the date of its decision in this matter, in the minority of published state decisions regarding whether lengthy terms of years sentences constitute *de facto* life sentences for purposes of Eighth Amendment considerations. *See, e.g., Henry v. State*, 175 S.3d 675 (Fla. 2015); *Brown v. State*, 10 N.E.3d 1 (Ind. 2014); *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013); *People v. Caballero*, 282 P.3d 291 (Cal. 2012). *But see, e.g., State v. Brown*, 118 So.3d 332 (La. 2013); *State v. Kasic*, 265 P.3d 410 (Ariz. App. 2011). A similar division is seen in far more numerous unpublished state and lower federal court decisions, including those involving AEDPA. *See, e.g., Casiano v. Comm'r of Correction*, 115 A.3d 1031 (Conn. 2015) (unpublished); *Colorado v. Rainer*, 2013 WL 1490107 (Co. Ct. App. Apr. 11, 2013) (unpublished); *Thomas v. Pennsylvania*, Docket No. CV-10-4537, 2012 WL 6678686 (E.D. Pa. Dec. 21, 2012) (involving AEDPA). *But see, e.g., Bunch*, 685 F.3d 546 (involving AEDPA); *Walton*, 537 F. App'x 430 (unpublished); *Willbanks v. Missouri Dep't of Corrections*, 2015 Mo. App. LEXIS 1100 (Mo. Ct. App. Oct. 27, 2015) (unpublished); *State v. Watkins*, 2013 Oh. App. LEXIS 5791 (Ohio Ct. App. Dec. 17, 2013) (unpublished); *State v. Merritt*, 2013 Tenn. Crim. App. LEXIS 1082 (Tenn. Crim. App. Dec. 10, 2013) (unpublished); *Burnell v. State*, 2012 Tex. App. LEXIS 34 (Tex. Ct. App. Jan 5, 2012) (unpublished).

⁵ It should be noted that the Virginia Supreme Court cited the Sixth Circuit's decision without any discussion as to the stark difference between this matter and one involving the AEDPA standard of review.

Significantly, however, while the Virginia Supreme Court was concerned that applying *Graham* to term-of-years sentences could raise difficult questions, *Vasquez*, 291 Va. at ___, 781 S.E.2d at ___ (citing *Moore v. Biter*, 742 F.3d 917, 917-22 (9th Cir. 2014) (O'Scannlain, J., dissenting) (App. A), Petitioners' sentences in this case accomplish precisely what this Court recognized to be unconstitutional in *Graham* – a trial court's deciding "at the outset" that a child who has not committed homicide will never be fit to reenter society and should spend the rest of his or her life in prison. *Graham*, 560 U.S. at 75, 82. This is particularly true, given that this Court recognized, when deciding *Graham*, that the Court was addressing a case which involved "an issue the Court ha[d] not considered previously: a categorical challenge to a *term-of-years sentence*." *Id.* at 61 (emphasis added).

While this Court did discuss the relative rarity of juveniles sentenced to "life without parole" when deciding *Graham*, this 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 this 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, this 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, this 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.

While Petitioners' sentences, like the Appellant's in *Graham*, do not explicitly specify that Petitioners spend life in prison "without parole", Virginia, like Florida, has abolished the parole system. *Id.* at 57. *See Angel*, 281 Va. at 274, 704 S.E.2d at 401. Code § 53.1-165.1. (App. 88-94.) Consequently, while the trial court sentenced Petitioners to terms of years, and did not explicitly sentence Petitioners to terms of "life without parole," Petitioners submit that the sentences imposed in this case, for 16-year-old juveniles based on the aggregation of sentences for nonhomicide offenses constitute *de facto* life sentences for purposes of Eighth Amendment considerations. (App. 88-94.)

As this Court held in *Graham*, "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82. In so holding, this Court stated:

Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his

true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

Id. at 79.

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

Rather, the trial court stated, "I know that you would like to take it back and you do not like being where you are, but there are certain things that people do in life where *you don't get a second chance.*" (Emphasis added). (App. M) Additionally, the trial court stated,

I understand that the numerical total of these sentences is such that the concept of geriatric parole will be your chance for release because it is in effect [a] *de facto life sentence.* But there are just certain crimes that that's what it warrants and in this case that's where we're at.

(Emphasis added.) (App. M) Indeed, when addressing K.H.'s family at the conclusion of the sentencing hearing, the trial court commented that "she will not be threatened, she will not have these individuals to be afraid of." (App. M)

Additionally, it is generally accepted that life in prison, with its stressors, violence, and contagious diseases significantly shortens one's life expectancy. *See U.S. v. Taveras*, 436 F. Supp. 2d 493, 500 (E.D.N.Y. 2006). In fact, the actual extent of the diminished life expectancy resulting from imprisonment was addressed by the United States Sentencing Commission, which defines a life sentence as 470 months (or just over 39 years), based on average life expectancy and the average age of federal offenders.⁶ *U.S. v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. 2007). As such, for a twenty-five year old median age offender, the life expectancy for a person in general prison population would be 64 years old. Certainly, that life expectancy would be negatively impacted for juveniles like Petitioners who begin their sentences as children, thereby serving a greater portion of their life in prison than adults with the same sentence.

While the trial court did not explicitly sentence Petitioners to "life without parole," Petitioners' sentences constitute the functional equivalent of a life sentence. Any distinction between the two is in name only, and without a difference, as both Petitioners' sentences and a sentence of "life without parole" would be designed to, and would result in, Petitioners spending the rest of their natural lives in prison in direct violation of the foundational principles and the underlying reasoning of this

⁶ U.S. Sentencing Commission 2014 Sourcebook of Federal Sentencing Statistics, Appendix A, at 7, *available at* <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2014/sourcebook-2014> (last visited August 9, 2016).

Court's holding in *Graham*. See *Graham*, 560 U.S. at 68, 72, 75, 82. For as the Supreme Court noted in *Sumner v. Shuman*, 483 U.S. 66, 83 (1987), “there is no basis for distinguishing . . . between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy.”

Accordingly, while some Courts, including the Virginia Supreme Court, have concluded that this Court's holding in *Graham* is limited 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 this 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, despite the high bar of AEDPA, *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*, Civil Action No. 2:12cv340, 2015 U.S. Dist. LEXIS at *26-32 (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*, 115 A.3d at 1044 (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); *Henry*, 175 So.3d at 679–80 (holding that “that the constitutional prohibition against cruel and unusual punishment under *Graham* is implicated when a juvenile nonhomicide offender's sentence does not afford any meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”) (internal quotation marks and citation omitted); *Brown*, 10 N.E.3d at 8 (observing that “[s]imilar to a life without parole sentence, Brown's 150 year sentence ‘forfeits altogether the rehabilitative ideal,’” and violates *Graham*) (quoting *Graham*, 560 U.S. at 74); *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); *Caballero*, 282 P.3d at 295-96 (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*, Docket No. CV-10-4537, 2012 WL 6678686 at *2 (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”). *But see, e.g., Walton*, 537 F. App'x at 437 (holding that *Graham*

does not apply to a "discretionary federal sentence for a term of years"); *Bunch*, 685 F.3d at 552-53 (concluding that even though an aggregate sentence of eighty-nine years may be the functional equivalent of life, *Graham* applied only to sentences of "life"); *Brown*, 118 So.3d at 342 (concluding that "nothing in *Graham* addresses a defendant convicted of multiple offenses and given term of year sentences").

While the Virginia Supreme Court majority was concerned, along with the dissenting Judges in the Ninth Circuit, with questions such as, "if *Graham* applies to term-of-years sentences, what exact number of years would constitute life", Petitioners submit that, given the sentences in this case, this Court need not tackle the closer cases. *See Moore*, 742 F.3d at 917-22 (O'Scannlain, J., dissenting); *Vasquez*, 291 Va. at ___, 781 S.E.2d at ___. (App. A) For as the trial court recognized when sentencing Petitioners, "the numerical total of these sentences is such that the concept of geriatric parole will be [Petitioners'] chance for release because [they are in effect] *de facto life sentence[s]*." (Emphasis added.) Petitioners' sentences, well beyond any foreseeable life span, render any argument at this stage over what minimum term-of-years sentence may constitute "life" premature. For certainly, Petitioners sentences of sixty-eight (68) and one hundred thirty-three (133) years were not only designed to be, in effect, life sentences, they will result in Petitioners spending the rest of their natural lives in prison, without the possibility of parole or any realistic, "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation", in violation of the Eighth Amendment and this Court's holding in *Graham*. *See Graham*, 560 U.S. at 75.

II. GERIATRIC RELEASE DOES NOT SATISFY THE EIGHTH AMENDMENT'S REQUIREMENT THAT STATES PROVIDE JUVENILE NONHOMICIDE OFFENDERS A REALISTIC, MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE

Amongst the states that retained geriatric release after *Graham*, without any consideration of age at the time of offense, Virginia is the lone holdout. Other states have held that such a scheme violates this Court's decision in *Graham*. See *Null*, 836 N.W.2d at 71-72; *Bear Cloud*, 334 P.3d at 132-44. This Court's decision in *Graham* recognized that states must provide, "some meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. At the same time, however, this Court left it to the states "to explore the means and mechanisms for compliance." *Id.*

Since this Court's decision in *Graham*, many states have adjusted their sentencing structure accordingly. See Cal. Penal Code § 1170(d)(2) (periodic sentencing reviews); Wyo. Stat. Ann. § 6-10-301(c) (parole eligibility after a term of years). Some, like Virginia, have not.

A. GERIATRIC RELEASE DOES NOT CONSIDER OR ACCOUNT FOR THE INHERENT QUALITIES OF YOUTH

This Court recognized in *Graham* that the Constitution "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide... if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham*, 560 U.S. at 82 (emphasis added). As previously noted, the Virginia Supreme Court held in *Angel* that Code § 53.1-40.01 satisfies the requirements of the Eighth Amendment. *Angel*, 281 Va. at 274-76, 704 S.E.2d at 401-02. While other forms of juvenile parole

have been considered, they have yet to be enacted in Virginia, in contrast with several other states. *See* Cal. Penal Code § 1170(d)(2) (periodic sentencing reviews); Wyo. Stat. Ann. § 6-10-301(c) (parole eligibility after a term of years).

This Court has repeatedly emphasized that a foundational principal of the Eighth Amendment is that “children are constitutionally different” from adults for purposes of sentencing. *See Miller*, 567 U.S. at ___, 132 S. Ct. at 2485; *Graham*, 560 U.S. at 75. Yet, Virginia's geriatric release statute takes into consideration neither a juvenile offender's age at the time of the offense nor the other inherent qualities of youth. Accordingly, juvenile offenders sentenced to lengthy terms of incarceration in Virginia necessarily fare worse than their adult counterparts.

First, they must serve a significantly longer period of incarceration than adult offenders before they are eligible to be considered for release. This Court recognized this exact concern when it observed that a “16 year old and 75 year old each sentenced to life without parole receive the same punishment in name only.” *Graham*, 560 U.S. at 70. Indeed, this Court has recognized for more than fifty (50) years that “there may be grounds for concern that the child receives the worst of both worlds . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” *Kent v. United States*, 383 U.S. 541, 556 (1966).

Second, and more importantly, children are not provided the rehabilitative opportunities that would make them meaningful candidates for geriatric release. For juvenile offenders sentenced as adults are incarcerated before they have had any

significant opportunity to have a meaningful life history. The application for geriatric release in Virginia contains the following, common, questions:

Are you a military veteran with an honorable discharge?
Do you have retirement or disability benefits available upon release?
Do you have other disability income?
Are you eligible for Social Security benefits?
Do you have any other sources of income?
Do you have family support for your residential needs?
Do you have family support financially?
Do you have any other assets (such as property that you own)?⁷

The juvenile offender would not have had the opportunity to meet these criteria before incarceration. These factors are precisely why the Supreme Court of Connecticut has ruled that such a geriatric scheme does not meet the requirements of the Eighth Amendment. *See Casiano*, 115 A.3d at 1046-47. The Connecticut court continued, noting that this Court, “viewed the concept of ‘life’ in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for ‘life’ if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.” *Id.* at 1047.

Upon incarceration, juveniles with lengthy sentences are often at the back of the line for rehabilitative services. Indeed, pursuant to Virginia statute, DOC prioritizes reentry programs by the potential date of release. Code § 53.1-32.2.

This Court has recognized and condemned this exact problem, stating,

defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative

⁷ Available at <http://vpb.virginia.gov/files/1093/vpb-pb27-petition-for-geriatric-release.pdf> (last visited August 9, 2016).

services that are available to other inmates. For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.

Graham, 560 U.S. at 74 (internal citations omitted).

This Court continued, “it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term.” *Id.* at 79. The Court’s concerns are equally applicable to juveniles sentenced to a lengthy term of years.

Additionally, the nature of the offenses in this matter enhances the need for rehabilitative services sooner rather than later. Juvenile sex offenders have a far greater likelihood of rehabilitation than adult sex offenders. Eileen P. Ryan, M.D., “Changing Perceptions of Juvenile Sexual Offending in Society and the Legal System,” *Juvenile Sex Offenders: A Guide to Evaluation and Treatment for Mental Health Professionals*, 2012, pp. 13, 66. This is consistent with the foundational principles of this Court’s Eighth Amendment jurisprudence relating to juveniles, namely, 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. *See Miller*, 567 U.S. at ___, 132 S. Ct. at 2485; *Graham*, 560 U.S. at 75.

Nevertheless, the Virginia Parole Board makes no distinction in its regulations between adult and juvenile sex offenders. Parole was abolished in Virginia in 1995 and no juvenile offenders with lengthy term-of-years sentences will even be eligible to apply for geriatric release for decades.⁸ Accordingly, how juvenile offenders like Petitioners, receiving *de facto* life sentences, avail themselves in the interim will determine whether they can demonstrate maturity and rehabilitation. Absent access to the necessary rehabilitative services, however, prior to applying for geriatric release, any hope of release is an empty one.

B. VIRGINIA CODE § 53.1-40.01 DOES NOT PROVIDE JUVENILES A MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE

The Eighth Amendment requires that states must give juvenile nonhomicide offenders, like Petitioners, some "realistic", "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75, 82. For, as this Court has explained, life without parole,

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

Id. at 69-70.

⁸ For juveniles who commit certain violent felonies, the local Virginia prosecutor has absolute discretion to try them as adults effective July 1, 1996. Code § 16.1-269.1.

As administered in Virginia, geriatric release is more akin to executive clemency, than the "realistic", "meaningful opportunity" contemplated by this Court in *Graham*. *Id.* at 75, 82. For, as noted by the Virginia concurrence, the number of persons granted geriatric release in Virginia is shockingly low.⁹ (App. A) In fact, during oral argument before the Supreme Court of Virginia, Justice Mims, who previously served as a member of the Virginia General Assembly and authored the concurrence in this matter, noted the promises that were made about geriatric release in the 1990's and stated the lack of grants were "not now it was supposed to go."¹⁰

Equally significant is the low number of inmates granted geriatric release when it is well recognized that recidivism drops precipitously after age 50.¹¹ Summarizing the extensive literature in the matter, the U.S. Sentencing Commission recently declared, "It is now a truism that age is one of the strongest factors associated with criminal behavior."¹² Despite these widely accepted truths, the

⁹ The Richmond Times Dispatch has noted that between 1994, when the Virginia General Assembly enacted Code § 53.1-40.01, and early 2010, only fifteen (15) inmates were granted geriatric release. Frank Green, *Virginia Rarely Grants Geriatric Parole*, RICHMOND TIMES DISPATCH, March 1, 2010, *available at* http://www.richmond.com/news/va-rarely-grants-geriatric-parole/article_4969b0fe-bdca-5361-984a-7aeb0da2f87e.html (last visited August 9, 2016).

¹⁰ *Available at* http://www.courts.state.va.us/courts/scv/oral_arguments/2016/jan/141071.MP3 (See 26:25-29:00).

¹¹ U.S. Sentencing Commission, *Measuring Recidivism*, *available at* http://www.ussc.gov/Research_and_Statistics/Research_Publications/2004/200405_Recidivism_Criminal_History.pdf, p. 12.

¹² U.S. Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview* (March 2016), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf, p. 38, n. 56 (citation omitted); U.S. Sentencing Commission, *Measuring Recidivism*, *available at* http://www.ussc.gov/Research_and_Statistics/Research_Publications/2004/200405_Recidivism_Criminal_History.pdf, p. 12.

Virginia Parole Board has declined to utilize geriatric release in any meaningful way. This is particularly true when considering that those few granted geriatric release in Virginia were necessarily adults when they were incarcerated. Such applicants, unlike any potential future applicants who were incarcerated as juveniles, would be able to answer the application questions outlined above regarding military service, retirement savings, family ties, etc., in the affirmative. Considering then, that Petitioners will necessarily have less positive life experience and opportunities to present to the Virginia Parole Board – in addition to their lack of access to rehabilitative services while incarcerated – when they first become eligible to seek geriatric release in 2061, Petitioners will necessarily present as less qualified for geriatric release than even those shockingly few who have been fortunate enough to have gained geriatric release since its inception in 1994.

Despite the conclusion of the Virginia Supreme Court's concurring Justices to the contrary, this matter is ripe for consideration now rather than at some potential future date when Petitioners may become eligible to apply for geriatric release. *See Vasquez*, 291 Va. at ___, 781 S.E.2d at ___ (Mims, J., concurring). (App. A) Certainly, the requirements of the Eighth Amendment cannot be satisfied – given the incredible lack of application of geriatric release in Virginia over the last two decades – by waiting several decades more to see whether juveniles like Petitioners can ever be said to have been provided a "realistic", "meaningful opportunity to obtain release" in Virginia. *Graham*, 560 U.S. at 75, 82.

Such a resolution only serves to demonstrate that Virginia's geriatric release scheme necessarily treats juveniles worse than their adult counterparts, in direct contradiction to this Court's reasoning in *Graham*. Petitioners' incredible lack of access to rehabilitative services, given their low priority, and inability to build up positive life experiences and support prior to incarceration will necessarily and negatively impact whatever minute chances they may ever be said to have had to gain geriatric release. Despite the requirements of the Eighth Amendment, and this Court's holding in *Graham*, Virginia's courts permit juvenile nonhomicide offenders, like Petitioners, to be imprisoned for their remainder of their natural lives with no "realistic", "meaningful opportunity to obtain release." *Id.* This cannot continue.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit this Court should grant certiorari, consider this case on the merits, and answer the questions presented. This Court, as the highest court in the nation, should determine both whether the Eighth Amendment allows the states to impose an aggregate term-of-years sentence which, while not styled "life without parole", necessarily requires juvenile nonhomicide offenders to spend the rest of their natural lives in prison without a meaningful opportunity for release, and whether geriatric release provides such juvenile nonhomicide offenders with a realistic, "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," as required by the Eighth Amendment. *Id.*

RESPECTFULLY SUBMITTED,

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