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# Amici Curiae Brief on Behalf of the Fred T. Korematsu Center for Law and Equality, the Latina/o Bar Association of Washington, and the Loren Miller Bar Association, in Support of Petitioner

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No. 42064-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION TWO

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IN RE THE PERSONAL RESTRAINT PETITION OF GUADALUPE SOLIS DIAZ

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Amici Curiae Brief on Behalf of the Fred T. Korematsu Center for Law  
and Equality, the Latina/o Bar Association of Washington, and the Loren  
Miller Bar Association, in Support of Petitioner.

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## IDENTITY AND INTEREST OF AMICI CURIAE

The Fred T. Korematsu Center for Law and Equality (“Korematsu Center”), based at Seattle University School of Law, advances justice through research, advocacy, and education. Currently, the Korematsu Center is leading a statewide effort to understand the racial disproportionality that exists within our criminal justice system.<sup>1</sup> Effective life sentences like this one are especially devastating for youth of color who are much more likely than white youth offenders to receive such sentences.<sup>2</sup> The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The Latina/o Bar Association of Washington and the Loren Miller Bar Association are associations of attorneys committed to represent and advance the interests of the Latina/o and African-American communities. LBAW and LMBA are active participants in the legal community, advocating for solutions to the problems confronting our legal system.

## SUMMARY OF ARGUMENT

In *Graham v. Florida*, the U.S. Supreme Court held that sentencing juveniles to life without parole for non-homicide offenses constitutes cruel

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<sup>1</sup> Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System* (2011).

<sup>2</sup> Human Rights Watch, *The Rest of their Lives: Life Without Parole for Youth Offenders in the United States in 2008*, at \*39 (2008).

and unusual punishment. 560 U.S. \_\_\_, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The *Graham* Court reasoned that youth are less culpable than adults because of biological differences in brain development that render youth more immature, more likely to engage in risky behavior, and more vulnerable to external influences like peer pressure. *Id.* at 2040. Additionally, because youth brains are still developing well into late adolescence, the Court determined that their personality traits are more transient and capable of change than adult personalities. *Id.* at 2026-27. The undisputed scientific data confirms that youth cannot be expected to act as mature adults.

Although the *Graham* Court concluded that youth offenders must be given a “meaningful opportunity to obtain release,” it left it to the States, “in the first instance” to define what a meaningful opportunity would be and when it must occur. *Id.* at 2030. That instance has arrived: Guadalupe Solis Diaz, a youth convicted of a non-homicide offense committed when he was 16 years old, received an effective life sentence of 92.5 years. Because Washington has abolished its parole system, this sentence gives Guadalupe no meaningful opportunity to obtain release. This case is a prime example of how a youth offender’s biological immaturities and susceptibility to peer pressure may facilitate poor decision making both in committing a crime and during plea-bargaining.

Given *Graham*'s reasoning and what we know scientifically about youth brain development, this Court should vacate Guadalupe's sentence. The Court also should use this opportunity to provide guidance to the lower courts by defining "meaningful opportunity" as a term of years no longer than the youth's age at the time s/he committed the underlying offense. In this way, a 16-year-old offender will have the opportunity – *though not the guarantee* – to be released by the age of 32, if that youth has "demonstrated maturity and rehabilitation." *Id.* at 2030. An age-based proportional definition of "meaningful opportunity" would be consistent with the *Graham* Court's reasoning that because youth offenders are less culpable than their adult counterparts, we should not give up on them no matter how heinous their crimes may have been. *Id.* at 2032-33.

#### ARGUMENT

#### **I. Medical Research on Brain Development Confirms that Youth Offenders Under 18 Years of Age Are Categorically Different from Adult Offenders with Regard to Culpability, Susceptibility to Deference, Vulnerability to Peer Pressure, and Capacity for Change.**

A youth's mind is different. Parents know it. Lawmakers know it.<sup>3</sup>

And the U.S. Supreme Court knows it. In *Roper* and *Graham*, the Court

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<sup>3</sup> In fact, state law explicitly acknowledges differences between a youth brain and an adult brain: "The legislature finds that emerging research on brain development indicates that adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into

recognized that a youth's culpability "is diminished, to a *substantial degree*" based on biological differences between a youth's brain and an adult's brain. *Roper v. Simmons*, 543 U.S. 551, 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (emphasis added). These biological distinctions have long been recognized by common-sense and ratified by our society's laws which "recognize[] a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2, 105 S. Ct. 733, 83 L.Ed.2d 720 (1985) (Powell, J., concurring).<sup>4</sup>

These judicially and legislatively recognized distinctions are based on three categorical differences that separate youth from adults: (1) a propensity to engage in risky behavior; (2) a susceptibility to external

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consideration when sentencing juveniles tried as adults. The legislature further finds that applying mandatory minimum sentences for juveniles tried as adults prevents trial court judges from taking these differences into consideration in appropriate circumstances." RCW 9.94A.540, Findings -- Intent -- 2005 c 437(1).

<sup>4</sup> For instance, Washington State has enacted numerous protective laws to keep youth from purchasing, using, or possessing certain substances or items. *See, e.g.*, RCW 66.44.290(1) (prohibiting persons under twenty-one years of age from purchasing or consuming alcohol); RCW 70.155.080(1) (prohibiting minors from purchasing, possessing, or attempting to obtain tobacco products); RCW 9.41.020(2)(iii) (prohibiting minors from owning or possessing a firearm, except as provided by RCW 9.41.042). Further, the state has categorically barred minors from playing in authorized gambling activities, RCW 9.46.228, voting in any election authorized by the Constitution and otherwise qualified by law, RCW 26.28.015(3), or making certain decisions regarding their own body or the body of their lawful issue, such as consenting to surgery, RCW 26.28.010(5). Similarly, minors may not enter nor be bound by a contract, RCW 26.28.015(4), RCW 26.28.030, sue or be sued in any court of the state without a guardian ad litem, RCW 26.28.01(6), marry without parental consent, RCW 26.28.010(1), or even mark their bodies with a tattoo, RCW 26.28.085.

Federal law also recognizes youth incompetency in certain activities. Under 10 U.S.C. § 505(a), a person must be eighteen to serve in the military without parental consent. Federal law also prohibits, with certain exceptions, persons under the age of eighteen from possessing a handgun or handgun ammunition. 18 U.S.C. § 922(x)(2), (5).

pressures; and (3) a transient personality with a penchant for change.

*Graham*, 130 S. Ct. at 2028-33. “The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’” *Roper*, 543 U.S. at 570 (citation omitted). Science can now verify what society’s laws and common sense have always known to be true: because youth minds are different, youth offenders must be treated differently than adult offenders.<sup>5</sup>

**A. Because Youth Brains Are Structurally Hardwired in Ways that Promote Risky and Impulsive Behavior, Adult Sanctions Do Not Deter Youth Misconduct.**

The notion that youth, as a group, are prone to impulsive behavior is not simply a stereotype. Indeed, various studies have confirmed that youth “exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking.”<sup>6</sup> In fact, across cultures, developmental psychiatrists have found that reckless and sensation seeking behavior *peaks* during adolescence.<sup>7</sup> In particular, *violent crimes* “peak sharply” in late adolescence (ages 16 and 17).<sup>8</sup> This behavior often involves criminal

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<sup>5</sup> Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1011-13 (2003).

<sup>6</sup> Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 421 n.1 (2000).

<sup>7</sup> Beatrice Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, in FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR 250 (Aboitiz & Cosmelli, eds.) (2009).

<sup>8</sup> Terrie Moffit, *Adolescent-Limited and Life-Course-Persistent Antisocial ?Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 685-86 (1993).

activities such as drunk driving and drug use, and reckless conduct such as unprotected sex.<sup>9</sup> This is due, in part, because youth overvalue rewards and minimize risks, thereby skewing their cost calculus when making decisions.<sup>10</sup>

Recent brain imaging studies have found a biological link between risk taking behavior and pre-frontal brain development.<sup>11</sup> In particular, youth brains show increased neural activity in parts of the brain linked to risky behavior,<sup>12</sup> and less activity in the prefrontal cortex, which continues to mature through late adolescence.<sup>13</sup> Prefrontal cortex maturation is especially important when gauging youth culpability because that part of the brain is associated with decision making generally,<sup>14</sup> including making moral judgments,<sup>15</sup> and evaluating future consequences.<sup>16</sup> Moreover, the

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<sup>9</sup> “[I]n laboratory experiments and studies across a wide range of adolescent populations, developmental psychologists [have shown] that adolescents are risk takers who inflate the benefits of crime and sharply discount its consequences, even when they know the law.” Jeffrey Fagan, *Why Science and Development Matter in Juvenile Justice*, THE AMERICAN PROSPECT, Aug. 14, 2005, at 2.

<sup>10</sup> Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47, 57 (2009) [hereinafter “Steinberg 2009”].

<sup>11</sup> James Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment by Risky Rewards*, 27 J. OF NEUROSCI. 4839 (2007).

<sup>12</sup> Robert Shepherd, *The Relevance of Brain Research to Juvenile Justice*, 19 CRIM. JUST. 51, 52 (2005) (“[T]here are clear neurological explanations for the difficulties adolescents have in cognitive functioning, in exercising mature judgment, in controlling impulses, in weighing the consequences of actions, in resisting the influence of peers, and in generally becoming more responsible.”).

<sup>13</sup> Casey, B. J. et al., *The Adolescent Brain*, 28 Developmental Rev. 62, 68 (2008).

<sup>14</sup> Samantha B. Wright et al., *Neural Correlates of Fluid Reasoning in Children and Adults*, 1:8 Frontiers Human Neurosci. 7 (2008) (prefrontal cortex controls reasoning).

<sup>15</sup> Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ NEURO-PSYCHIATR 657 (2001).

ability to regulate one's emotions – a crucial element of behavior control<sup>17</sup> – does not fully develop until *post*-adolescence.<sup>18</sup>

As a result, youth brains develop with a *structural imbalance* that effectively promotes poor decision making: the areas that motivate reckless behavior mature sooner than the areas that regulate such behavior.<sup>19</sup> Put simply, the youth brain is literally hard-wired to promote poor decision making. Because youth brains are biologically less “capable” of regulating their behavior,<sup>20</sup> “[i]t is statistically aberrant to refrain from such [risk-taking] behavior during adolescence.”<sup>21</sup>

Additionally, experience demonstrates and the scientific research confirms that long sentences such as this one do nothing to deter youth offenders because their limited life experiences make it difficult for them to weigh consequences and perceive long stretches of time.<sup>22</sup> Indeed,

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<sup>16</sup> Antoine Bechera et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 *BRAIN* 2189, 2189-99 (2000).

<sup>17</sup> Sang Hee Kim & Stephan Hamann, *Neural Correlates of Positive and Negative Emotion Regulation*, 19:5 *J. COGNITIVE NEUROSCI.* 776, 776 (2007).

<sup>18</sup> Casey, *supra* note 13, at 65.

<sup>19</sup> Steinberg 2009, *supra* note 10, at 54.

<sup>20</sup> Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescents: Why Adolescents May Be Less Culpable Than Adults*, 18 *BEHAV. SCI. & L.* 741, 742 (2000).

<sup>21</sup> Spear, *supra* note 6. *See also* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *DEVELOPMENTAL REV.* 339, 344 (1992) (noting that over half of youth reported driving drunk, using drugs, engaging in other criminal acts).

<sup>22</sup> “Few adolescents are likely to be able to grasp the true significance of a life sentence. One twenty-nine-year-old woman serving life without parole told a researcher for this report that when she was sentenced, at the age of sixteen: ‘I didn’t understand “life without” . . . [that] to have “life without,” you were locked down forever. You know it really dawned on me when [after several years in prison, a journalist] came and . . . he

“*Roper* noted that ‘the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.’ *Graham*, 130 S. Ct. at 2028 (quoting *Roper*, 543 U.S. at 571).<sup>23</sup> In one study, researchers found that the threat of adult sanctions had *no deterrent effect whatsoever* on youth crime.<sup>24</sup>

In sum, there is a strong biological basis for the notion that youth offenders are less culpable than their adult counterparts.

#### **B. Youth Are Particularly Vulnerable to External Pressures at Home and to Peer Pressures.**

Another reason youth are less culpable than adults is because they are uniquely susceptible to negative external influences and peer pressure. First, youth are not old enough to control or remove themselves from negative environments, which can undermine decision making. In particular, youth are completely “dependent on living circumstances of their parents and families and hence are vulnerable to the impact of

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asked me, “Do you realize that you’re gonna be in prison for the rest of your life?” And I said, “Do you really think that?” You know. . . and I was like, “For the rest of my life? Do you think that God will leave me in prison for the rest of my life?” Human Rights Watch, “The Rest of Their Lives,” *supra* note 2, at 4-5.

<sup>23</sup> “Because juveniles’ ‘lack of maturity and under-developed sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,” *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L.Ed.2d 290 (1993), they are less likely to take a possible punishment into consideration when making decisions. This is particularly so when that punishment is rarely imposed.” *Graham*, 130 S. Ct. at 2028-29.

<sup>24</sup> Eric L. Jensen & Linda Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violence Juvenile Crime*, 40 CRIME & DELINQ. 96, 100-02 (1994).



conditions well beyond their control.”<sup>25</sup> Put differently, youth are not old enough to “extricate themselves from a criminogenic setting.” *Roper*, 543 U.S. at 569; *see also id.* (noting that “juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment”).

Second, youth brains are more sensitive to certain emotional triggers, such as fear, rejection, and the desire to “fit in,” making them particularly vulnerable to peer pressures.<sup>26</sup> In fact, the parts of the brain associated with resistance to peer influence are still developing well into late adolescence.<sup>27</sup> One study found that peer pressure *doubles* risky behavior, including criminal behavior, among youth.<sup>28</sup> Peer pressure can be especially pronounced in the gang context, where the data indicate enormous group pressure exists to engage in self destructive behavior.<sup>29</sup> Indeed, it is no coincidence that most youth crime is *group youth crime*.<sup>30</sup>

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<sup>25</sup> Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision making of Delinquent Youths*, in *YOUTH ON TRIAL* 33 (Grisso & Schwartz, eds., 2000).

<sup>26</sup> Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Pressure*, 43 *DEVELOPMENTAL PSYCHOL.* 1531, 1536-38 (2007).

<sup>27</sup> Steinberg 2009, *supra* note 10, at 56.

<sup>28</sup> Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *Developmental Psychol.* 625, 626-34 (2005).

<sup>29</sup> *See* Michele Mouttapa, et al., *I'm Mad and I'm Bad: Links Between Self-Identification as a Gangster, Symptoms of Anger, and Alcohol Use Among Minority Juvenile Offenders*, 8 *Youth Violence & Juvenile Justice* 71 (2010) (finding that identifying with a “gang member peer group” increases the likelihood of destructive behavior such as heavy alcohol use).

<sup>30</sup> Franklin Zimring, *Penal Proportionality for the Young Offender*, in *YOUTH ON TRIAL* 281 (2000) (“No matter the crime, if a teenager is the offender, he is usually not

Together, these two vulnerabilities – an inability to control their external environment and a susceptibility to peer pressure – combine to make youth less culpable twice over. These pressures were particularly salient for Guadalupe, because his absent father and alcoholic mother poisoned his home environment, while his peers exerted pressures within the context of a gang. Long before Guadalupe became a prisoner in the Washington Department of Corrections, he was trapped in an environment he could not shape or escape. This environment profoundly affects the calculus of culpability.

**C. The Same Factors That Make Youth Less Culpable than Adults, Also Make Them More Capable of Change. Effective Life Sentences Fail to Recognize This Potential for Rehabilitation.**

“[I]ncorrigibility is inconsistent with youth.” *Graham*, 130 S. Ct. at 2029 (internal citation omitted). Adolescence is a time of remarkable change and transience, when youth are still struggling to form a basic identity. *Roper*, 543 U.S. at 570 (noting that “[t]he personality traits of juveniles are more transitory, less fixed” than those of adults). Youth crime reflects this transient period and is one of the “qualities of youth” itself, rather than a sign of an intractably bad character. *Id.* Although violent crime *peaks* around 16 and 17 years, it “drop[s] precipitously in

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committing the offense alone.”); Moffit, *supra* note 8, at 686-88 (finding a strong correlation between a youth’s propensity to commit a crime and peer delinquency).

young adulthood.”<sup>31</sup> In fact, developmental psychiatrists have found that the vast majority of youth offenders will *stop* committing crime once they are adults,<sup>32</sup> and very few youth offenders develop intractable or long term problems with criminality.<sup>33</sup> This capacity for change is a crucial distinction between youth offenders and adult offenders. “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Graham*, 130 S. Ct. at 2027-28 (quoting *Roper*, 543 U.S. at 570).

Youth characteristics are so malleable that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 2029 (quoting *Roper*, 543 U.S. at 573). If trained psychiatrists cannot predict which youth offenders are incorrigible and which are capable of change, than surely trial judges (and prosecutors) cannot do so either.<sup>34</sup> “The reality that juveniles still struggle to define their identity means it is less

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<sup>31</sup> Moffit, *supra* note 8, at 675.

<sup>32</sup> Steinberg & Scott, *supra* note 5, at 1015.

<sup>33</sup> *Id.*

<sup>34</sup> In fact, vexed researchers have found that those youth offenders who change and those who continue committing crimes exhibit identical behavior at the outset, making it impossible to identify incorrigible offenders. Edward Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 AM. PSYCHOLOGIST 797, 799 (2001).

supportable to conclude that even a heinous crime committed by a juvenile is evidence of [an] irretrievably depraved character.” *Roper*, 543 U.S. at 570. Echoing its reasoning in *Roper*, *Graham* made clear that there is no reliable way – either for a prosecutor or a sentencing judge – to determine when a youth offender’s crimes are the result of “irreparable corruption,” and no reliable way to conclude that a youth offender ought to die in prison. Sentencing Guadalupe to 92 years in prison, therefore, cannot rest on the assumption that he is irredeemably depraved.

Additionally, because youth have such tremendous capacity for change and rehabilitation, *Roper* and *Graham* emphasized that youth offenders should not be given irreversible sentences. Life without parole sentences “share some characteristics with death sentences that are shared by no other sentences.” *Graham*, 130 S. Ct. at 2027. Like the death penalty, a life without parole sentence “does not even purport to serve a rehabilitative function.” *Harmelin v. Michigan*, 501 U.S. 957, 1028, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (Stevens, J., dissenting). Additionally, like the death penalty, this 92-year sentence is irreversible because the years Guadalupe will serve can never be returned, and the 92-year term can only end with death.<sup>35</sup> This sentence, like the death sentence, effectively

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<sup>35</sup> “The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration.” 130 S. Ct. at 2027.

condemns Guadalupe to die in prison whether or not he demonstrates what most youth offenders eventually demonstrate: a matured moral character that warrants a second chance. In this way, a life without parole sentence “deprives children of both any hope for return to society and any opportunity for rehabilitation.”<sup>36</sup> The remote possibility of gubernatorial clemency does not change this calculus. *Graham*, 130 S. Ct. at 2027 (“the remote possibility of [executive clemency] does not mitigate the harshness of the sentence”).

Given that the vast majority of youth offenders do change, and that judges cannot predict when they will not, the *Graham* Court opted for a categorical rule against life without parole sentences for youth non-homicide offenders. *Id.* at 2030 (“Categorical rules tend to be imperfect, but one is necessary here.”). Guadalupe Solis Diaz’s effective life sentence of 92.5 years directly contradicts *Graham*’s rationale.

**II. Given That Youth Are Legally and Scientifically Less Culpable than Adults, this Court Should Declare that Effective Life Sentences Must Provide Youth a Meaningful Opportunity to Obtain Release.**

**A. Effective Life Sentences that Provide No Meaningful Opportunity to Obtain Release Are No Different than Life Without Parole. Therefore, Washington’s Determinate Sentencing Statute Is Unconstitutional As Applied to Youth Non-Homicide Offenders.**

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<sup>36</sup> Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Disclosure*, 41 U.C. Davis L. Rev. 111, 162 (2007).

The State argues that Guadalupe was not given a life sentence, but rather a determinate sentence of 1,111 months, or 92.5 years. But this labeling argument is illogical and formalistic, unless the State genuinely believes that Guadalupe will live to be 108 years old. A mechanistic understanding of what constitutes a “life sentence” would render *Graham* a nullity by allowing sentencing courts to get around *Graham*’s holding by simply labeling a sentence “determinate” rather than “life.” Whether this sentence is labeled “determinate” or “life” does not change the fact that Guadalupe will die in prison, “even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied [Guadalupe] 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.” *Graham*, 130 S. Ct. at 2033.<sup>37</sup> To the extent that Washington’s Determinate Sentencing Law permits a juvenile convicted

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<sup>37</sup> Additionally, the U.S. Supreme Court has recognized the particular severity of sentences that deny the possibility of parole. For instance, in *Rummel v. Estelle*, the Court *rejected* an Eighth Amendment challenge to a life sentence because the defendant had the possibility to obtain release through parole. 445 U.S. 263, 280-81, 100 S. Ct. 1133, 62 L.Ed.2d 382 (1980). The Court “could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life.” *Id.* However, in contrast, the Court *struck down* the determinate life sentence in *Solem v. Helm*, concluding that it was “far more severe than the life sentence we considered in *Rummel*” because the defendant in *Solem* did not have the possibility for parole. 463 U.S. 277, 297, 103 S. Ct. 3001, 77 L.Ed.2d 637 (1983). Here, like the sentence in *Solem*, Guadalupe’s sentence does not provide the possibility of parole. This Court cannot ignore that Guadalupe *will be imprisoned for the rest of his life*.

of a non-homicide offense to be given an effective life sentence, it is unconstitutional under *Graham*.

**B. A “Meaningful Opportunity” for Release Means That a Youth Offender Be Given a Chance – Though Not a Guarantee – for Release After He Has Served a Term of Years Equivalent to his Age When He Committed the Underlying Offense.**

A life sentence is “the second most severe penalty permitted by law.” *Graham*, 130 S. Ct. at 2027 (internal citation omitted). Because of its severity, the Supreme Court has determined that youth offenders who receive life sentences must be given a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Id.* at 2030. However, the Court left it to the state courts “in the first instance, to explore the means and mechanisms for compliance.” *Id.* That instance has arrived. In accordance with constitutional design and *Graham*’s mandate, “the task of interpreting the Eighth Amendment” falls upon this Court. *Id.* at 2026 (quoting *Roper*, 543 U.S. at 575). This Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Structurally, the categorical rule articulated in *Graham* requires drawing two lines: a front line that defines when a particular offender may be given a life without parole sentence and a back line that provides a “meaningful opportunity to obtain release.” The Supreme Court drew the

front line itself at 18 years of age, to objectively distinguish between minors and adults. *Id.* (“[T]hose who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.”). But *Graham* explicitly left it up to the state courts to draw the back line – that is, *when* a meaningful opportunity for release ought to occur. The front line drawn by the Supreme Court is meaningless if, in the absence of a back line, youth offenders may be sentenced to 92 years, or effective life imprisonment, with no “meaningful opportunity to obtain release.” Ultimately, according to *Graham*, this Court must bring to bear its own judgment to determine *when* a youth offender should be given an opportunity for release based on maturity and rehabilitation.<sup>38</sup> This Court is now called upon to draw that line.

The same logic that compelled the Supreme Court to draw a categorical front line at 18 years leads to the conclusion that a similarly objective and age-based line ought to be drawn on the back. Given what we now know about youth brain development and capacity for change, as well as the Supreme Court’s guidance that the opportunity be “*meaningful*,” Amici urge the Court to hold that youth offenders convicted

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<sup>38</sup> Two categorical rules are necessary because this case, like *Graham*, “implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.” 130 S. Ct. at 2022-23. That is, this case involves a life equivalent sentence as it applies to a class of offenders – youth – who have committed a range of “non-homicide” offenses.



of a non-homicide offense and sentenced to a term of years longer than their age, must be given a meaningful opportunity to obtain release once they have served a term of years equivalent to their age at the time they committed the underlying offense. Under this rule, a sixteen-year-old would be given an opportunity – though not a guarantee – for release by time he is 32 years old, if he has demonstrated maturity and rehabilitation. This rule would in no way *excuse* a youth offender’s crimes; it would simply acknowledge their reduced culpability and provide a clear framework by which to comply with *Graham*.<sup>39</sup>

An age-proportional definition is appropriate for three reasons. First, a life sentence is “especially harsh” for a youth offender who, because of his age, will “serve more years and a greater percentage of his life in prison than an adult offender.” *Graham*, 130 S. Ct. at 2028. “A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.” *Id.* “This reality cannot be ignored.” *Id.* Second, an age-based definition of “meaningful opportunity” would be consistent with the Supreme Court’s logic in *Roper* and *Graham* that the younger an offender is, the less culpable he is. Because age has a positive correlation with culpability, this rule would be the least arbitrary way to comply with *Graham*. And finally, an age-proportional rule would

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<sup>39</sup> “A juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’” 130 S. Ct. at 2026 (citation omitted).

acknowledge the science underlying the Supreme Court's decision in *Graham*: namely, that youth have a tremendous capacity for change and maturation.

Simply redrawing the line to fifty-years or forty-years would not constitute a "meaningful opportunity for release." Embodied in *Graham*'s "meaningful opportunity" requirement is the precept that youth offenders be given an incentive to improve themselves in prison so that they might look forward to the day when they can reenter society, rediscover their humanity, and rebuild their lives:

Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.

*Graham*, 130 S. Ct. at 2032.<sup>40</sup> A release after 30 or 40 years is hardly meaningful, and would not provide a youth offender with any incentive to improve himself, or look forward to the day when he would one day rejoin society. Long sentences that keep youth in prison for decades after they already have demonstrated maturity and rehabilitation defeat the logic

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<sup>40</sup> As the Nevada State Supreme Court observed, a sentence like this "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 offender], he will remain in prison for the rest of his days." *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (Nev. 1989).

underlying *Graham*'s categorical rule, rendering hollow the requirement that youth be given a *truly meaningful opportunity to obtain release*.

This Court should not draw the line in a way that renders *Graham* meaningless.

#### CONCLUSION


“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). Thirty years after *Eddings*, scientific research confirms that youth offenders cannot be expected to think or behave like adults. Recognizing these differences, the Supreme Court articulated a categorical rule that youth offenders convicted of non-homicide offenses cannot receive life sentences without a meaningful opportunity for release.

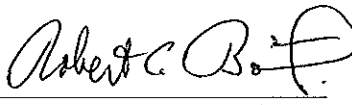
Guadalupe's crime was serious, but “it does not follow that he would be a risk to society for the rest of his life.” *Graham*, 130 S. Ct. at 2029. The Eighth Amendment does not guarantee that a youth non-homicide offender will not spend his life behind bars, but it does forbid statutory schemes that make that judgment at the outset, before the youth is given a chance to redeem himself. To the extent that Washington's

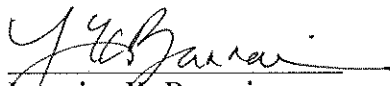
determinate sentencing statute permits life-equivalent sentences for youth non-homicide offenders, it is unconstitutional under *Graham*.


An age-proportional line is necessary to prevent life equivalent sentences for youth non-homicide offenders who are not sufficiently culpable and whose capacity for change counsels against life imprisonment. This Court should VACATE the sentence.

RESPECTFULLY SUBMITTED this 15th day of December 2011.

  
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**DECLARATION OF SERVICE**

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below I served a copy of the Amici Curiae Motion and Brief of the Fred T. Korematsu Center for Law & Equality, the Latina/o Bar Association of Washington, and the Loren Miller Bar Association, by mailing the same, properly addressed and prepaid, to:

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