1   IN THE SUPREME COURT OF THE UNITED STATES

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3 JOE HARRIS SULLIVAN,   :

4   Petitioner   :

5   v.   : No. 08-7621

6 FLORIDA.   :

7 - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Monday, November 9, 2009

10

11   The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:01 a.m.

14 APPEARANCES:

15 BRYAN STEVENSON, ESQ., Jacksonville, Fla.; on behalf of

16   the Petitioner.

17 SCOTT D. MAKAR, ESQ., Solicitor General, Tallahassee,

18   Fla.; on behalf of the Respondent.

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1   C O N T E N T S

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 1   P R O C E E D I N G S

 2   (11:01 a.m.)

 3   CHIEF JUSTICE ROBERTS: We will hear

 4   argument next in Case 08-7621, Sullivan v. Florida.

 5   Mr. Stevenson.

 6   ORAL ARGUMENT OF BRYAN STEVENSON

 7   ON BEHALF OF THE PETITIONER

 8   MR. STEVENSON: Mr. Chief Justice, and may

 9   it please the Court:

10   Joe Sullivan was 13 years of age when he was

11   arrested with two older boys, one 15, one 17, charged

12   with sexual assault, ultimately convicted, and sentenced

13   to life without parole.

14   Joe is one of only two children this age who

15   have ever been sentenced to life without parole for a

16   non-homicide, and no child has received this sentence

17   for non-homicide in the last 18 years.

18   JUSTICE GINSBURG: Mr. Stevenson, there is a

19   serious question before we get to the particulars of

20   this case. Justice Kennedy suggested it in the last

21   argument. This -- the time ran out for post-conviction

22   relief in 1993, and this petition is brought in 2007.

23   There is a two-year statute of limitations. Florida

24   said there is a procedural bar; we don't get to the

25   merits of this case.

1   MR. STEVENSON: Yes, two responses. First

2   of all, with regard to challenges to sentences, Florida

3   law, under Rule 3.850 makes it very clear that a

4   challenge to a sentence can be brought at any time.

5   What the trial court --

6   JUSTICE GINSBURG: There's a question

7   whether that means an illegal sentence, like the judge

8   gave more than the maximum punishment. Do you have any

9   indication in Florida law that correcting a sentence any

10 time overtakes the limitation on post-conviction relief?

11   MR. STEVENSON: Yes, we cite in our brief

12 Summers v. State, which is an example of someone

13 challenging their sentence after this Court's decision

14 in Apprendi long after the time would have run.

15   JUSTICE SOTOMAYOR: Except the court there

16 applied 39(a) and said: Yes, it's a change in law, but

17 it hasn't been made retroactive.

18   MR. STEVENSON: That -- that's correct. But

19 the propriety of that determination is exactly what can

20 be -- is engaged in by the State courts, and that is

21 what we simply sought here.

22   JUSTICE SOTOMAYOR: But isn't that what the

23 Court said here? It said, first of all, Roper doesn't

24 command the results you are seeking; and, second, it

25 didn't make its application retroactive. So wasn't it

 1 really consistent with 39(a), the Florida court?

 2   MR. STEVENSON: No, Justice Sotomayor. The

 3 only thing the judge said here was that: I don't

 4 think the reasoning of Roper can be applied to someone

 5 serving life in prison without parole.

 6   JUSTICE SOTOMAYOR: No, that's an unfair

 7 characterization. What the judge said was Roper didn't

 8 say that it applied to life without parole. That's a

 9 very vastly different thing than saying that the

10 reasoning shouldn't be applied. It said that we are not

11 choosing to, but that's not what Roper said.

12   MR. STEVENSON: But our argument -- and I

13 accept that. Our argument was we recognized that Roper

14 dealt with the death penalty as opposed to life without

15 parole, but our argument was that the reasoning of Roper

16 is similarly applicable to someone sentenced to life

17 imprisonment without parole.

18   The trial judge could not evaluate the

19 procedural question without analyzing Roper, and that's

20 what the trial court did. The trial court conceded that

21 if Roper applies Joe Sullivan is entitled to review.

22   JUSTICE SCALIA: But Roper was decided under

23 a regime, which I -- I think still exists, that death is

24 different. How could it possibly be thought to apply to

25 this case, which is not a death case?

1   MR. STEVENSON: Well, because -- because

2   what the court said in Roper categorically for the first

3   time is that kids are different, and in this context we

4   were arguing that --

5   JUSTICE SCALIA: It said kids are different

6   for purposes of the death penalty, which is different.

7   MR. STEVENSON: Well, I think our argument

8   was that they are different for the purposes of

9   sentencing. And what triggered this -- and this is why

10   this is relevant to this procedural question -- was that

11   the State of Florida did apply Roper to juveniles who

12   had been sentenced to death after this Court's decision.

13   And the case we cited to the Florida appeals

14   court, Bonifay v. Florida -- it's on page 38 of our

15   joint appendix -- was a case where Florida implemented

16   that law, and the law under Florida was that death row

17   prisoners sentenced at the time of Joe Sullivan had

18   their sentences reduced to life in prison with parole.

19   JUSTICE GINSBURG: Let me -- let me -- but

20   this judge said: Yes, there is a Federal question in

21   this case: Does Roper render unconstitutional life

22   without parole for juveniles? He answers that question

23   no. And then he said: There is no other Federal

24   question in the case; I do not reach the question that

25   you are raising, that is, life without parole being

1   cruel and unusual. All -- the only Federal question

2   that, under our rules, I reach is does Roper cover this

3   case? No. Anything else is procedurally barred.

4   What was wrong with that --

5   MR. STEVENSON: Well, because under your

6   precedent, if the question -- if the judgment of

7   procedural default is dependent on an analysis, an

8   assessment of Federal law, in any context, then it is

9   not an independent and adequate State ground, and that's

10   the basis on which we --

11   JUSTICE KENNEDY: Well, suppose arguendo we

12   assume that the judge is right, that Roper did not

13   establish a rule that applies in this case. Then what

14   position are you in with reference to the procedural

15   bar? Do you have any other arguments that overcome the

16   procedural bar?

17   MR. STEVENSON: Yes. The rule would still

18   allow us to challenge the sentence under the no-time

19   restriction as it relates to --

20   JUSTICE SCALIA: No, no. The only Federal

21   question in the case -- or at least the preliminary

22   Federal question, the threshold Federal question, is

23   simply whether the State court was right about what

24   Roper did. And if we agree with the State court about

25   what Roper did, then the State's bar automatically

7

1   applies and that's the end of the case.

2   MR. STEVENSON: Well, yes, but if you agree

3   with the State court about Roper did, then we don't --

4   we are not entitled to relief under -- under either

5   theory, under a merits theory or a default theory, but

6   the point is --

7   JUSTICE SCALIA: Oh, I don't -- I don't know

8   about that. We -- is the argument here that, unless

9   Roper mandates this result, you don't urge that the

10   Constitution requires it? I don't think so.

11   MR. STEVENSON: No. Our argument simply is

12   that the question that the trial judge dealt with here

13   was, in part, dependent on an assessment of the Federal

14   Constitution, whether the Eighth Amendment does

15   constrain a sentence like this. We relied on Roper.

16   The court found that Roper was not available

17   to Mr. Sullivan when this case was on appeal, prior to

18   1993. Based on that determination, the court then

19   engaged in an analysis. And, again, what triggered

20   this -- and I just want to make this really clear, that

21   death row prisoners after Roper in Florida got a better

22   sentence than Joe Sullivan.

23   They got life with parole eligibility after

24   25 years. The argument was that that established a

25   reasonable basis for Joe Sullivan --

 1   JUSTICE GINSBURG: I thought -- I thought

 2   Simmons got life without parole. I thought that

 3   Simmons' sentence was life without parole.

 4   MR. STEVENSON: Simmons did, Your Honor, in

 5   Missouri. But in Florida, at the point at which these

 6   sentences were being imposed there was no life without

 7   parole for capital murder. People convicted of capital

 8   murder could -- could only be sentenced to life in

 9   prison, with parole eligibility after 25 years.

10   And so the question was generated by this

11   Court's decision in Roper, how is it constitutional

12   under the Eighth Amendment for the death sentence

13   prisoner to get life with parole after 25 years, and Joe

14   Sullivan at 13, convicted of a non-homicide --

15   JUSTICE ALITO: Your argument is that

16   because the -- the State judge had to decide whether

17   Roper dictated or required the result that you were

18   asking for, that -- that it's not an independent State

19   ground. That's the argument?

20   MR. STEVENSON: My argument is that if Roper

21   applied -- if Roper is relevant -- because what the

22   State courts of Florida have said is that when you are

23   looking at this question there are three things. One,

24   is it a rule from the Florida Supreme Court or United

25   States Supreme Court?

 1   Two, is it a rule of constitutional -- of a

 2   constitutional nature? Which, obviously, this would be.

 3   Three, is it a rule of fundamental significance? That's

 4   all. We don't have to establish --

 5   JUSTICE ALITO: No, but I'm -- I'm

 6   interested in how we decide whether it's independent.

 7   If you had cited -- if you said Marbury v. Madison

 8   dictates this rule, well, the judge would have to decide

 9   what Marbury v. Madison required. That is a Federal --

10   that can be characterized as a Federal question. That

11   would make the -- that would make it -- the State law

12   ground not an independent ground?

13   MR. STEVENSON: No, Your Honor. I mean, we

14   could say that -- that some rule that has to do with

15   antitrust applied, but the judge wouldn't have to

16   consider that, wouldn't have to evaluate that; it

17   wouldn't be determinative. Here, the judge could not

18   reject our claim without an analysis of Roper.

19   The judge engaged in that -- and let -- let

20   me just point out, this is not a case of procedural

21   default, State court ruling, we are now in Federal

22   habeas. This is a question about jurisdiction.

23   The question that the State is raising is

24   does this Court have jurisdiction to review the Federal

25   question that was presented below, when the trial court

1   itself engaged in an analysis of Roper. This Court

2   doesn't lose its jurisdiction to deal with a Federal

3   question when the State court analyzed that question to

4   reach its --

5   JUSTICE SCALIA: Well, that's true, but once

6   we analyze the question, if we decide, as the trial

7   court decided, that in fact Roper does not demand the

8   result in this case and therefore there is no exception

9   to the procedural bar of Florida, which makes an

10   exception where the fundamental constitutional right

11   asserted was not established within the period provided

12   for, once we decide that in fact Roper didn't establish

13   it, you're out of court, it seems to me.

14   Then -- then, automatically, the -- the

15   procedural bar of Florida applies.

16   MR. STEVENSON: No, Justice Scalia. The

17   other provision of 3.850 would still allow us to

18   challenge this sentence because it is a challenge to a

19   sentence, and Florida says that there is no time

20   limitation on the challenge of a sentence.

21   JUSTICE GINSBURG: Then that would

22   completely overtake the specific provision. I mean, if

23   you say the catch-all illegal sentence, open to

24   challenge at any time, then there is nothing left to

25   this specific provision that says two-year statute of

1   limitations, unless three things.

2   MR. STEVENSON: That's correct, Justice

3   Ginsburg. Florida applies the provision, the construct

4   that, with regard to challenges to sentences, at least,

5   there is no time limitation.

6   We contend that the more relevant challenge

7   is generated by this Court's decision in Roper. But,

8   even without that, we are entitled to merits review and

9   no one has argued against that.

10   I mean, it's worth stating here that there

11   was no responsive pleading filed by the State in the

12   trial court. There was no responsive pleading. No one

13   asserted an affirmative defense arguing that these

14   procedural defaults be --

15   JUSTICE KENNEDY: And you say the -- under

16   Florida law, the question is not whether the right was,

17   to use the phrase, "clearly established"?

18   MR. STEVENSON: That's correct.

19   JUSTICE KENNEDY: But the right is whether

20   or not -- it had -- what was your phrase? "A

21   significant bearing"?

22   MR. STEVENSON: That's right. That comes

23   from Summers v. State, which is cited in our brief,

24   Justice Kennedy, where the court has made it clear,

25   because they have to sometimes engage in these questions

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1   about what's retroactive, how does it apply?

2   They have done that with regard to Apprendi.

3   They have done that with regard to some of this Court's

4   other decisions in a vast array of areas. Eighth

5   Amendment questions come up all the time before the

6   Florida Supreme Court under that analysis. And with

7   that in context, I don't think there is any real

8   question that this Court has jurisdiction, and that is

9   the issue here: Do you have jurisdiction to review the

10   Federal question that was considered below?

11   JUSTICE SCALIA: Did -- did you raise below

12   your assertion that the exception -- that there is an

13   exception for challenging -- for vacating sentences,

14   that there is -- that that is an exception to the normal

15   rule of two-years limitation? Did you make that

16   argument below?

17   MR. STEVENSON: No, because at no point did

18   the State make any argument that we were barred or

19   precluded in any way. On appeal, we did reference the

20   provision in the -- Bonifay v. State, which was a case

21   that talked about how these provisions can be

22   challenged, how these sentences can be challenged at any

23   time.

24   That was the way the case was presented,

25   Justice Scalia, because at no point did the State ever

1   argue an affirmative defense of procedural default. And

2   that's how the case gets here. It gets here in the

3   posture of a very rare sentence.

4   I do want to respond to the notion that we

5   are uncertain about what will happen. There is no

6   uncertainty about what will happen to Joe Sullivan if

7   this Court rules in his favor. Florida law clearly

8   states what the next sentencing option is. He could

9   only be sentenced to 40 years in prison with good time

10   and credits available. That's what Florida law says.

11   Under 775.082, anyone not sentenced to life in prison

12   can only receive a maximum sentence of 40 years. And

13   that --

14   CHIEF JUSTICE ROBERTS: Why won't the next

15   case we get be an argument that for a juvenile,

16   particularly one as young as -- as your client, 40 years

17   is too long; 40 years doesn't recognize his capacity for

18   moral development within a reasonable period?

19   MR. STEVENSON: Mr. Chief Justice, you may

20   get that case and this Court will have to evaluate that.

21   But I think here what we haven't resolved, which I think

22   we have to resolve, is the question of whether life

23   without parole is unconstitutional, whether that's

24   excessive. And I think there is a great deal of

25   evidence to support that this Court should make that

1 finding, in part because of its lack of consensus.

2   There are only nine kids in the entire

3 country that have been sentenced to life without parole

4 for any crime.

5   CHIEF JUSTICE ROBERTS: No, but -- I mean,

6 you look at the Federal Government allows this sentence,

7 right? 38 States allow this sentence. I just don't

8 understand how you can say there is a consensus --

9   MR. STEVENSON: Yes.

10   CHIEF JUSTICE ROBERTS: -- that this type of

11 sentence is unconstitutional.

12   MR. STEVENSON: I think with regard to very

13 young kids, I -- I don't think we can say that the

14 States have adopted or considered or approached this

15 kind of sentence, in part because --

16   JUSTICE SCALIA: All you have established is

17 that there is a consensus that that sentence should be

18 rare, not a consensus that that sentence should not be

19 available, because most States make it available.

20   MR. STEVENSON: I -- I think, Your Honor,

21 that -- that the judgment that they have made it

22 available in some conscious way can't really be

23 defended, because no one who has set the minimum age for

24 imposing a sentence of life without parole has set it as

25 young as -- as 13. When States have taken up this

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1   question, they have never said that a child of 13 should

2   be subject to life without parole. What they said is --

3   CHIEF JUSTICE ROBERTS: So it would be -- it

4   would be reasonable under your approach to have

5   different results in these two cases, a difference in

6   terms of consensus or when sentencing is allowed would

7   result in a different result in your case than in

8   Mr. Graham's case?

9   MR. STEVENSON: It would be conceivable. It

10   wouldn't be desirable. I'll concede that. But, yes,

11   it's conceivable only in the sense that we know that

12   States like Florida that have created no minimum age for

13   trying children as adults, but have created life without

14   parole for these adult sentencers have created this

15   world where these things are possible.

16   But if you accept that Florida has adopted

17   life without parole for a child of 13, you also have to

18   accept that they have adopted it for a child of 6 or 5,

19   because --

20   CHIEF JUSTICE ROBERTS: It seems to me, once

21   -- excuse me.

22   MR. STEVENSON: Sorry.

23   CHIEF JUSTICE ROBERTS: It seems to me that

24   one way to take that into effect is through our normal

25   proportionality review and in a case by case. Your --

1   your client -- his crime is horrendously violent. At

2   the same time he is much younger than in the typical

3   case. And it seems to me that requiring under the

4   Eighth Amendment consideration of his age, as I said

5   earlier, I guess, avoids all these line-drawing problems

6   which seem -- the arbitrariness of the line-drawing

7   seems inconsistent with the notion of the Eighth

8   Amendment.

9   MR. STEVENSON: I understand your point,

10   Mr. Chief Justice, but I don't think that is the way the

11   Court should proceed, for two reasons. One -- one is

12   that that kind of case by case analysis hasn't worked

13   well for children. It is in part because these kids are

14   so vulnerable, are so at risk in this system, that

15   they end up --

16   CHIEF JUSTICE ROBERTS: I thought -- I would

17   have thought your argument that this is so rare suggests

18   that maybe that analysis, to the extent it is permitted

19   under State law, has worked well for children.

20   MR. STEVENSON: Well, but -- but I -- I

21   think in many ways it -- it hasn't. I mean, Joe

22   Sullivan never had his case reviewed, never had his

23   sentence reviewed. The lawyer filed an Anders brief on

24   direct appeal. He's been in prison for 20 years, and

25   wouldn't be in this Court but for this Court's decision

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1   in Roper that created some new categorical exemptions.

2   And I think the problem with the

3   individualized review, as Justice Kennedy wrote actually

4   in Roper, is that in this context age can actually be an

5   aggravating factor. I mean, the Court could have said

6   in the death penalty context, let's deal with this on a

7   case by case basis. We actually have a proportionality

8   review that's enshrined in our capital jurisprudence.

9   States have to do that.

10   But we didn't, because we recognize that

11   there are distinctions between kids and adults that have

12   to be respected by our Constitution, that have to be

13   reflected in our constitutional norms. I think --

14   CHIEF JUSTICE ROBERTS: That's because death

15   is different, is what we said; and it is because death

16   is reserved, as this Court said in Roper, for the worst

17   of the worst. And we know that life without parole is

18   not reserved for the worst of the worst.

19   MR. STEVENSON: But I think it is, Your

20   Honor, for -- for -- for the kinds of crimes that we are

21   talking -- for non-homicides, life without parole is

22   reserved for the worst of the worst. That's what this

23   Court effectively created with its decision in Kennedy.

24   And in that context, the same difference

25   that can be made between kids and adults in the death

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1 penalty context we believe needs to be made here. To

2 equate the crime of a 13-year-old with a 25 or

3 30-year-old, particularly one like Joe Sullivan --

4   JUSTICE SCALIA: There are a lot of

5 murderers who get life without parole. Not every

6 murderer gets -- gets executed. So how can you say that

7 these are worst of the worst? Murderers are the worst

8 of the worst and they get life without parole.

9   MR. STEVENSON: Yes, they do,

10 Justice Scalia. But my point is that, with regard to

11 non-homicides, life without parole occupies the same

12 kind of end-of-the-line status that the death penalty

13 does with homicide. And to fail to make a distinction

14 between --

15   JUSTICE SCALIA: Call them the "worse of the

16 worse," maybe, but they are not the worst of the worst.

17   MR. STEVENSON: That's one way of

18 characterizing it. I think, though, whatever we say

19 about children and adults, we know that there are

20 distinctions, and those distinctions that were

21 articulated in Roper are applicable here.

22   JUSTICE ALITO: What is the categorical rule

23 that you would like us to adopt?

24   MR. STEVENSON: I would like you to adopt

25 any rule that bans life without parole for any child

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1   under the age of 14. And I think that would supported

2   by the judgment -- that ruling wouldn't actually

3   invalidate a single State law.

4   JUSTICE GINSBURG: But that would leave out

5   Graham, then? Your rule, you say under the age of 14,

6   so you are distinguishing your case from Graham's? You

7   are not saying all juveniles, just -- you are setting

8   the line at 14?

9   MR. STEVENSON: Well, I support -- my client

10   is 13, and there are differences between kids who are 14

11   and younger and kids who are older. But I support a

12   line that actual draws the line at 18. I think that

13   that distinction can and should be made.

14   JUSTICE GINSBURG: Why not Thompson, where

15   the line was 16?

16   MR. STEVENSON: Well, I mean, the difficulty

17   of course, is that -- and Thompson was a plurality

18   opinion. We don't -- you could draw the line anywhere.

19   And we briefed our case recognizing that this Court has

20   discretion. There could be distinctions that could be

21   made between younger kids and older kids, but we

22   certainly support a judgment that all children should be

23   shielded from this age difference.

24   The reason why we make that distinction is

25   because there are legal distinctions. There are States

1   that have set the minimum age for trying kids or

2   imposing these sentences of life without parole at 16 or

3   17. We do recognize long traditions on the age of 14.

4   In the Court's opinion in Stanford v.

5   Kentucky authored by Justice Scalia -- you referenced

6   this earlier -- at common law we recognized that there

7   was a rebuttable presumption that children 14 and

8   younger could not be tried for felonies, that they were

9   incapable. And so, we are just arguing that these

10   distinctions can be made.

11   JUSTICE GINSBURG: What -- what about

12   homicide, a 13-year-old?

13   MR. STEVENSON: It is our position that,

14   based on the incidence of these sentences, that even

15   between non-homicide and homicide no children of 13

16   should be sentenced to life imprisonment without parole.

17   That is, only -- in 44 States no child for any kind of

18   crime has received that kind of sentence. And this

19   notion that we -- we have to think about who children

20   are in the context of this, for the crime of rape, the

21   median sentence in this country is ten years.

22   JUSTICE GINSBURG: But you are

23   differentiating your position based on young age from

24   Graham's counsel who said for murder, even in the case

25   of a youthful offender, life without parole is an

21

1   appropriate -- is an available sentence?

2   MR. STEVENSON: That's -- that's right, Your

3   Honor. That -- that is, we think that the data, that is

4   the consensus, would support both from an age

5   perspective and from a consensus perspective an absolute

6   ban on life without parole for any child of 13. It --

7   it has been rejected by virtually every State in terms

8   of it application. It has been rejected by many States

9   in terms of its even concept. I mean, there are a lot

10   of States in this country where you can't get any kind

11   of adult sentence for a crime at 13. We don't --

12   CHIEF JUSTICE ROBERTS: So your line is 13,

13   and for obvious reasons. Another line is going to be 16

14   for obvious reasons. When the 15-year-old comes in, he

15   is going to say 15, the 17-year-old -- and that it seems

16   to me is why drawing the line on the basis of the Eighth

17   Amendment -- there is certainly nothing in the Eighth

18   Amendment that suggests there is a difference between 16

19   and 17. Everybody with a different client is going to

20   have a different line, which suggests to me that it

21   ought to be considered in each individual case.

22   MR. STEVENSON: I guess we make these

23   categorical distinctions in lots of contexts, not just

24   in the death penalty context. We appended to our brief

25   hundreds of laws that draw lines that say if you are 14

22

1 you can't drive, you can't enter into a contract.

2   CHIEF JUSTICE ROBERTS: Well, but that's

3 because that's a policy judgment by the legislature.

4 Here we are talking about the dictates of the Eighth

5 Amendment. And the idea that the Eighth Amendment draws

6 those kinds of arbitrary distinctions is one that I

7 don't understand.

8   MR. STEVENSON: Well, it is this Court's

9 history. That is, in Thompson you drew a line between

10 15 and those who were younger. In -- in -- in Roper you

11 have drawn the line at 18 and 17. In other contexts, we

12 wrestle with this all the time. In Atkins, you had to

13 draw a line of defining mental retardation in some

14 sphere.

15   What we are ultimately arguing is that there

16 are people who are vulnerable, that there are people who

17 need protection, and children are some of those people.

18 Their diminished capacity, their diminished culpability,

19 their inability to be responsible, their vulnerability

20 to negative peer pressures, and their capacity to change

21 and reform is what we think generates this question, and

22 we think it's an honest question.

23   JUSTICE SCALIA: It depends on how horrible

24 the crime is that they've committed, doesn't it? But

25 you say it doesn't, it doesn't depend upon how horrible

23

1   it is and how much retribution society demands.

2   MR. STEVENSON: I think for -- for a child

3   of 13 with regard to a sentence of life imprisonment

4   without parole, that is correct, Justice Scalia.

5   I think in our construct, where we don't

6   always impose these sentences even for those horrible

7   offenders, to not recognize the difference between a

8   child and an adult is cruel and unusual. To say to the

9   13-year-old in this case that you get life without

10   parole, but to the 17-year-old you get four years and

11   you are released in six months, or to the 15-year-old

12   you get juvenile treatment, speaks to the kind of

13   difficulty we have with the absence of a categorical

14   ban.

15   We make these bans all the time. And I

16   think that the States are capable of implementing them.

17   We cite Gerstein v. Pugh as an example where this Court

18   found time between arrest and presentation to be

19   violative of constitutional norms, and the States were

20   empowered to implement that.

21   With regard to Joe Sullivan, we don't have

22   to speculate. We know what the sentence will be. If he

23   is returned and resentenced, he will be sentenced up to

24   40 years, or actually the points that were applied to

25   him would recommend a sentence between 27 years and

1   40 years. And we don't contend that that would be

2   violative of the Constitution, because there is --

3   JUSTICE SOTOMAYOR: Could you go back

4   through the statistics for me? For children under 14,

5   how many are in prison for life without parole for

6   homicide and non-homicide cases?

7   MR. STEVENSON: There are 73 children 14 and

8   younger who have been imprisoned for life without

9   parole. They can be found in only 18 States. For the

10   age of 13 and younger, there are only nine kids, and

11   that's including both kids convicted of homicide and

12   non-homicide.

13   For non-homicide, there are only two. They

14   are both in Florida and Joe Sullivan is one of them. So

15   the universe of children under 14 and younger is very,

16   very small, smaller than what this Court was dealing

17   with in Roper in terms of the number of death sentences;

18   smaller than what this Court was likely dealing with in

19   Atkins. It's what this Court has looked at generally to

20   find consensus and here, where only 18 States have

21   imposed these sentences, a judgment that this is

22   rejected, this is outside the norms, would be consistent

23   with this Court's precedent in Roper and Atkins and

24   Coker and Kennedy and the other cases.

25   JUSTICE BREYER: Can you do what you have

25

1   just done with the category non-homicide cases?

2   MR. STEVENSON: Yes.

3   JUSTICE BREYER: Life without parole?

4   MR. STEVENSON: Yes.

5   JUSTICE BREYER: Under the age of 18 when

6   committed.

7   MR. STEVENSON: Yes. That would be 111.

8   JUSTICE BREYER: 111. Of those 111, how

9   many are in Florida?

10   MR. STEVENSON: 77.

11   JUSTICE BREYER: 77. And of the remaining,

12   how many States are they in?

13   MR. STEVENSON: Six.

14   JUSTICE BREYER: Six.

15   MR. STEVENSON: And with regard to children

16   younger, we're also talking about just the universe of

17   six, 14 and younger, all in Florida. And so it is this

18   absence --

19   JUSTICE SCALIA: This is not homicide. Six

20   --

21   MR. STEVENSON: Non-homicide, yes, sir.

22   Yes, sir. And so it is this absence of a categorical

23   rule that has created some of these results. There are

24   some arbitrary features about this population that we've

25   raised in our brief that are concerning. They are

1   disproportionately kids of color --

2   JUSTICE ALITO: What is your response to the

3   State's argument that these statistics are not

4   peer-reviewed? And these are statistics, am I right,

5   that you generated yourself?

6   MR. STEVENSON: Well, these statistics come

7   from the State's Department of Corrections, Your Honor.

8   I mean, we -- we gave the State -- the State doesn't

9   contest our data, at least in their pleading, and we

10   don't control these numbers. The Departments of

11   Corrections control these number, and where these data

12   are within their power of the State to present. We

13   don't think there is any real question about the

14   reliability of the data we are relying on.

15   JUSTICE SOTOMAYOR: There is a certain

16   number of States that didn't respond at all.

17   MR. STEVENSON: There are very few. In one

18   study, there were only two States. In the report that

19   we generated, we got the information from all states.

20   I see my white light is on. I would like to

21   reserve my time for rebuttal.

22   CHIEF JUSTICE ROBERTS: Thank you, Mr.

23   Stevenson.

24   Mr. Makar.

25   ORAL ARGUMENT OF SCOTT D. MAKAR

1   ON BEHALF OF THE RESPONDENT

2   MR. MAKAR: May it please the Court:

3   As to the data, in our view, the data is

4 unreliable. The data, unlike the death penalty context,

5 where there is a rich literature of data that's been

6 generated over years on mitigating factors and so forth

7 and there's full regard, the data here is suspect.

8   JUSTICE BREYER: You say it's suspect. What

9 is your opinion, so far as you can do it, following

10 category: Non-homicide, life without parole, under the

11 age of 18 when committed?

12   MR. MAKAR: Justice Breyer, we have no data

13 on --

14   JUSTICE BREYER: Not in your own system?

15 You don't know how many people in Florida --

16   MR. MAKAR: I'm sorry, let me -- in Florida,

17 it was the non-homicide --

18   JUSTICE BREYER: Non-homicide, life without

19 parole, under the age of 18 when committed.

20   MR. MAKAR: 150.

21   JUSTICE BREYER: And they say 77?

22   MR. MAKAR: They say 77. That's correct.

23 The reason being is that the study they're relying upon,

24 which was generated this summer while this case was

25 pending --

1   JUSTICE BREYER: What? Sorry.

2   MR. MAKAR: I'm sorry. The reason it's --

3   JUSTICE SCALIA: You are speaking too fast.

4   I can't understand you.

5   MR. MAKAR: I apologize.

6   JUSTICE GINSBURG: Maybe if you raise the --

7   raise the lectern a bit -- no, the other way.

8   MR. MAKAR: The reason why is that the

9   Annino study upon which they relied, which was generated

10   just this past summer, doesn't count a non-homicide

11   offense that happens to also be bundled with a homicide

12   offense.

13   So for example, someone went down the

14   street, committed an armed burglary as Graham did, but

15   then they went across --

16   JUSTICE BREYER: Okay. Let's -- let's count

17   it their way. Let's say that a -- non-homicide --

18   JUSTICE SCALIA: Wait. I -- I don't

19   understand what he's saying. Can I understand this

20   first? He's there for the homicide offense or for the

21   non-homicide offense?

22   MR. MAKAR: This is an individual that they

23   don't count.

24   JUSTICE SCALIA: Yes.

25   MR. MAKAR: And this is a person who

1 committed, for example, an armed burglary.

2   JUSTICE SCALIA: Right.

3   MR. MAKAR: And then put in jail, sentenced

4 to life without parole.

5   JUSTICE SCALIA: For the burglary, not for

6 the --

7   MR. MAKAR: Right, non-homicide. But they

8 happened, as the course of the crime spree, to commit a

9 homicide offense down the road at a different location.

10 They don't count that sentence for the non-homicide

11 offense in their data. They undercount the data

12 dramatically.

13   And in addition, the States -- this is not

14 an easy issue. The States have primary offenses and

15 secondary offenses.

16   JUSTICE BREYER: So -- so in your example,

17 Mr. Smith was sentenced to life without parole for a

18 robbery. Then you said Mr. Smith also killed someone.

19 Now, was he convicted of killing someone?

20   MR. MAKAR: Yes, and he was --

21   JUSTICE BREYER: Yes. Okay. And so did the

22 judge have in front of him the conviction for the

23 killing of the person as well as for the burglary or

24 whatever?

25   MR. MAKAR: Yes, sir.

1   JUSTICE BREYER: Yes. Okay. So I think I

2   can count that as a homicide offense. I understand your

3   point.

4   Now let's suppose that we take those out of

5   it. In other words, for argument's purpose, concede

6   that where there is also a homicide offense, it counts

7   as homicide, not in the set I am asking you about.

8   I am asking you about the set of those

9   non-homicide offenses, life without parole, and they

10   were under the age of 18 when they committed it. How

11   many in Florida?

12   MR. MAKAR: By our number, it's 150. They

13   say it's 77.

14   JUSTICE BREYER: Even though you gave --

15   said that the reason for the difference was a set of

16   instances that I just asked you to put to the side.

17   MR. MAKAR: Well, okay. If you are asking

18   me to accept their number, if they use that definition,

19   that is correct. It would be 77 individuals. It would

20   be life without parole. That's correct. And --

21   CHIEF JUSTICE ROBERTS: Which of these cases

22   is worse? 16-year-old committing the crimes that Graham

23   committed; 13-year-old committing the crimes that

24   Sullivan committed?

25   MR. MAKAR: Well, worse in which sense? I

31

1   mean, under the Eighth Amendment, which would be --

2   CHIEF JUSTICE ROBERTS: My point is, if you

3   had to consider youth as one of the factors that we

4   consider under proportionality analysis, how do you come

5   out?

6   MR. MAKAR: Well, I think certainly in this

7   case we are at the far extreme. We are off the charts.

8   This is one of those unfathomable --

9   CHIEF JUSTICE ROBERTS: Off the charts on

10   age or off the charts on violence?

11   MR. MAKAR: Violence, I'm sorry. The

12   violence meaning that this is one of the most severe

13   violent acts that any human being could perpetuate upon

14   anyone else. It was done twice; there was two counts.

15   So in that regard --

16   JUSTICE GINSBURG: I'm sorry, which one?

17   JUSTICE SOTOMAYOR: What do you mean, it was

18   done twice? I thought he raped only one person.

19   MR. MAKAR: Two different -- the woman --

20   there was two counts of -- of sexual battery in the --

21   he committed the offense in two different ways upon this

22   woman, and --

23   JUSTICE SOTOMAYOR: So your adversary

24   provided statistics to show that other people who have

25   committed rapes have gotten much smaller terms of

1 imprisonment, the average being, I think we were told,

2 10 years.

3   So explain to me why someone who commits a

4 rape is getting 10 years and this 13-year-old is the

5 most heinous crime for a 13-year-old that justifies life

6 without parole?

7   MR. MAKAR: Well, when we look at the data

8 for sexual battery, there is a distribution, and there

9 is all kinds of factors underlying each of those

10 sentences, and we have hundreds of sexual battery

11 sentences in Florida. Each one is unique and each one

12 is presented to the trial judge to make the

13 determination about the sentence.

14   And there are very harsh sentences,

15 certainly, for some offenses and not for others. But to

16 take the notion that one could average them together and

17 walk into Court and say, I'm way above the average, I

18 should somehow get an Eighth Amendment remedy, we

19 believe is just the wrong methodology.

20   JUSTICE BREYER: What is the right --

21   CHIEF JUSTICE ROBERTS: My --

22   JUSTICE BREYER: Go ahead.

23   CHIEF JUSTICE ROBERTS: Go ahead.

24   JUSTICE BREYER: I mean, I think if you want

25 to address it, that the basic argument here is we want a

 1   bright line. And the justification for the bright line

 2   is, (a), it's pretty unusual to have this. So that is

 3   one part of the clause. And in respect to it being

 4   cruel, you go back to what is supposed to be some kind

 5   of rough, basic connection between criminal law and

 6   generally accepted principles of morality.

 7   And the confusion and

 8   uncertainty about the moral responsibility of a

 9   13-year-old is such that it is not -- it is a cruel

10   thing to do to remove from that individual his entire

11   life. You see, we are at the extreme.

12   Now that's roughly what is

13   perking around in my mind, and I would like you to reply

14   to that.

15   MR. MAKAR: Well, certainly, and I've got,

16   Mr. Chief Justice, questions about how does age play a

17   role in proportionality and so forth. And I think here

18   that a 13-year-old can commit the most heinous of

19   crimes.

20   JUSTICE BREYER: That wasn't my point. I

21   guess I wasn't clear. My point was, of course, there

22   can be cases in any set which go in all kinds of

23   different directions. But, as a general matter, human

24   beings are uncertain about how much moral responsibility

25   to assign to individuals in a particular category, and

1   that category roughly corresponds with an age of

2   maturity.

3   So you get into arguments when you get to

4   10, no; 11, no; 17, yeah, maybe; 16, yeah, maybe. But

5   as long as we are around three years old, five, seven,

6   nine, 12, and they want to say certainly 14, we are in

7   that area of ambiguity. And not just we, people all

8   over America, some thinking one way, some thinking

9   another. And that's enough to cut the connection with

10   morality, a strong enough connection that could justify

11   taking the person's entire life away.

12   You see, I'm trying to make a general

13   argument, and maybe I haven't stated it perfectly. But

14   if you can get the drift of what I'm talking about, I

15   would like to hear your reply.

16   MR. MAKAR: Sure. Well, I think what you

17   are getting to, Justice Breyer, is that --- two things.

18   One is the distribution as a function of age. We know

19   that at younger ages the crime occurrence, the

20   incidence, goes down. And that goes to the second

21   point, which is that this is a good thing. It's -- it's

22   a lawful sentence that can be imposed, but it's rare.

23   And we are -- we should be proud of that. That it

24   doesn't occur with a -- with a great regularity. It's

25   an unfortunate thing when it happens, and we have these

35

1   gross acts of depravity that would justify it even for

2   someone who is very young.

3   Sullivan is not here to tell the Court: I

4   should not be punished. He has told the Court: I can

5   be in jail for the rest of my life. All he is asking

6   for is this opportunity to get out, this parole

7   opportunity. That's what -- what we are talking about.

8   And this issue that he has presented obviously was not

9   one the Florida trial court could have addressed

10   whatsoever.

11   Justice Ginsburg, you hit the nail on the

12   head. To interpret the rules the way they are

13   interpreting our rules in Florida would swallow the

14   3.850(B)(2) exception that says --

15   JUSTICE GINSBURG: Can you tell -- tell us

16   something about that catchall that says an illegal

17   sentence can be reopened at any time, an illegal

18   sentence? What -- Mr. Stevenson said that is not

19   limited to just -- the maximum is 15 years and the

20   defendant got 20.

21   MR. MAKAR: Well, that's incorrect. The two

22   rules he is citing to at this point -- one raised in the

23   reply brief -- deal with motions to correct the sentence

24   that exceeds the limits provided by law -- that exceeds

25   the limits provided by law. And the Florida courts have

1 held that this is -- in these situations it is the law

2 in effect at the time of the sentencing. In other

3 words, if -- and -- and then there is the exception

4 under 3.850(B)(2) that says --

5   JUSTICE KENNEDY: That wouldn't apply to the

6 Eighth Amendment?

7   MR. MAKAR: No, because 3.850(B)(2) -- I

8 think if, for example, at the time of sentencing --

9   JUSTICE KENNEDY: We are talking about the

10 first sentence of (B), I take it?

11   MR. MAKAR: Right. That's the one they are

12 relying upon: A motion to vacate a sentence that

13 exceeds the time limits provided by law may be filed at

14 any time. That has been interpreted in Florida courts

15 not to allow a new constitutional right that has been

16 applied. Retroactively it can be raised. It is applied

17 to say: At the time of your sentencing, on the face of

18 it was there an error that was made?

19   Okay. And -- and to interpret it their way

20 would swallow the exception. Florida is entitled, like

21 every other State, to create a limited exception under

22 its post-conviction rules to say: We are only going to

23 consider new fundamental constitutional rights that are

24 applied retroactively.

25   I think, simply put, the Florida trial court

37

1   couldn't answer the question they want this Court to now

2   answer. It was beyond the trial court's jurisdiction.

3   The court below couldn't create a new right, extend one,

4   or make it retroactive. The trial court did what we

5   would expect the trial court to do here, which is to

6   take a quick look. What are you asking me to do? Do

7   you want me to apply Roper in a context that it doesn't

8   state? I can't do that. The rule 3.850(B)(2) says I

9   can't do that. And a judge said it on the record here,

10   Joint Appendix 56, 57, and 58. The claim does not fit

11   into the limited category of claims allowed to be

12   brought after the expiration of the two-year period.

13   JUSTICE GINSBURG: Now, what -- during the

14   -- during the time, the post-conviction period, would he

15   -- he has an appointed lawyer at trial. Then we know

16   that he has a lawyer in 2007. In between, was counsel

17   available to Sullivan?

18   MR. MAKAR: Not as a matter of right, and he

19   did file, I believe, a habeas --

20   JUSTICE GINSBURG: No, I mean -- I mean he

21   does -- he had representation in 2007. He didn't for

22   his first post-conviction motion. I'm not asking as a

23   matter of right, but did he, in fact, have counsel

24   during this stage, this --

25   MR. MAKAR: Not -- not that I am aware of,

38

1   Justice Ginsburg. I mean he did file a pro se, State

2   post-conviction challenging the -- the failure to have a

3   semen sample taken and the failure to examine one of his

4   -- his co-defendants at trial. And that was a pro se

5   pleading, and I have looked at it, and it -- it is

6   actually not bad. It was one, I guess, that was

7   probably done while -- along the -- in the --

8   JUSTICE KENNEDY: What age was he at that

9   point?

10   MR. MAKAR: He would have been

11   approximately, I think, 16, somewhere in his late teens,

12   I believe, or a few years after, '89, or '90. It is

13   about four -- he was about 17, I think, or thereabouts.

14   JUSTICE BREYER: Do you want to comment on

15   the district court, the -- the -- what -- what the --

16   your opponent says is that this Florida rule is a rule

17   as the district court applied it that said the

18   following: You have to file a challenge within two

19   years. There are three exceptions to that. One and

20   three clearly don't apply. And as to two, Roper isn't

21   clear enough to make it apply.

22   Their response to that is there is no

23   Florida law that says you have to challenge a sentence

24   within two years. That Florida courts -- and then they

25   have, like, 14 cases listed here. And the Supreme Court

39

1 of Florida has said that when you are trying to correct

2 an illegal sentence, that whole part of the statute does

3 not apply. Okay? What's the response to that?

4   MR. MAKAR: That's not what those cases

5 stand for.

6   JUSTICE BREYER: Okay. So what I should do

7 is go look up and see what those cases hold, and -- and

8 you said to the lower court or the court of appeals --

9 you said their argument is wrong. The two-year statute

10 does apply. The two-year statute does apply. There are

11 three exceptions, and you do not fit within section (B)

12 because. Where did you say that?

13   MR. MAKAR: I don't believe there was any

14 State brief filed in opposition to his appeal. That the

15 first district PCA --

16   JUSTICE BREYER: So the State didn't even

17 deny what he was saying?

18   MR. MAKAR: Didn't deny -- I am sorry.

19   JUSTICE BREYER: So the State -- he says

20 that whole section doesn't apply. There is no two-year

21 statute. And you say Florida did not reply in a brief

22 to that argument?

23   MR. MAKAR: No, because I think it was so

24 obvious from the trial judge's order that he was relying

25 on the procedural bar of 3.850(B)(2). The trial court

40

1 had no -- the trial court couldn't do anything. The

2 trial court couldn't do anything.

3   JUSTICE BREYER: All right.

4   MR. MAKAR: I think -- I think Roper -- he

5 said it just doesn't apply here. It's barred. I -- I

6 can't do anything more with it. So -- and I think the

7 fact that he took a quick look at the Roper decision and

8 made that determination under Florida law -- this Court

9 said in footnote 10 of Harris versus Reed that the trial

10 court shouldn't be fearful of looking at the Federal

11 issue for -- for fear of having it come up as being a --

12 establishing Federal jurisdiction. And then in Tyler

13 versus Cane this Court had a retroactivity issue

14 presented to it as well.

15   JUSTICE BREYER: In any case, there is a

16 circularity point here, I guess. If we were to say in

17 our opinion -- if we were to say that Roper does hold

18 that there is a fundamental constitutional right which

19 we extend to this case and it applies here, and it

20 applies to the -- retroactively to those whose --

21 certainly those who are raising the issue, then we would

22 send it back and Florida now would not bar it under this

23 statute, because it would fall squarely within the

24 exception; is that right?

25   MR. MAKAR: That's exactly right, Justice

41

1   Breyer. If in the Graham case you have a categorical

2   rule that says 18 and under, then prospectively that

3   line is established, and Sullivan could file a

4   post-conviction motion under 3.850(B)(2) and pursue it.

5   JUSTICE GINSBURG: You did say in -- in your

6   brief that if Graham should prevail in his petition,

7   that Sullivan would get the benefit of that decision.

8   How, if we -- if we say just say there was an adequate

9   independent State ground and we have no authority to do

10   any more, how would -- how would Sullivan get the

11   benefit of the --

12   MR. MAKAR: Well, he could file -- the next

13   day he could file a --

14   JUSTICE GINSBURG: A new -- a new

15   post-conviction motion?

16   MR. MAKAR: Absolutely. Absolutely. And

17   that the Florida court would have jurisdiction to move

18   this exception to consider, given that it would

19   establish a fundamental constitutional right that is

20   retroactively applicable to his situation.

21   CHIEF JUSTICE ROBERTS: So would -- would

22   the standards applied in that situation be any different

23   than the standards that would apply if you prevailed on

24   his reading of the procedural bar?

25   MR. MAKAR: I'm --

1   CHIEF JUSTICE ROBERTS: I'm just trying to

2 see if this jurisdictional issue makes any difference.

3 If you are saying -- it sounds to me like you're saying,

4 well, if he wins, he wins, and, if he loses, he loses.

5 I don't think he cares if it's under the procedural bar

6 or some other basis.

7   MR. MAKAR: Well, I think that -- but his

8 winning would be hinging upon Graham, rather than

9 winning in this forum today, on a new claim, that the

10 trial court had no jurisdiction to consider in the first

11 instance.

12   JUSTICE SCALIA: If I understand you

13 correctly, you are saying he could lose here on the

14 procedural bar, and then win later in the State courts.

15 Is that right?

16   MR. MAKAR: But that's premised upon this

17 Court establishing a new fundamental right in Graham, a

18 categorical rule, that would apply to him in his case,

19 retroactive application. That's -- that's possible, and

20 we -- we acknowledge that.

21   JUSTICE SOTOMAYOR: What do the Florida

22 courts do with that series of cases in your footnote, in

23 the yellow brief, where it did apply Apprendi after.

24 Did it rule that it wasn't retroactive? What did it do

25 in those cases to consider the Apprendi challenges?

1   MR. MAKAR: Well, my -- my recollection is

2   that the retroactivity was there, so that they would

3   apply it, but, frankly, I cannot, as I stand here, I

4   can't tell you all -- what all --

5   JUSTICE SOTOMAYOR: If you are wrong and

6   they did do exactly what your adversary said and

7   considered the issue of the legality of the sentence

8   under Apprendi, does that dissonate your argument here?

9   Is our -- does that make your adversary's argument

10   correct?

11   MR. MAKAR: Well, I don't think that a court

12   here or there that may deviate from the rule would

13   establish the precedent. I think they cited, in

14   their -- in their brief, the -- the decision of

15   Carter v. State of the Florida Supreme Court, which I

16   think has a pretty good recitation of how the rule

17   operates.

18   And it may be that there is a fifth district

19   case they rely upon, where the -- the language is a

20   little squishy, but those are -- those are anomalies,

21   and they are not the rule in Florida.

22   JUSTICE GINSBURG: Well, if it's not

23   consistently applied, then it's not an adequate ground.

24   If the -- if the citations are correct and Florida

25   sometimes treats it as legitimate and sometimes doesn't,

1   then it's not a consistently applied -- not an adequate

2   State ground.

3   MR. MAKAR: Well, there is no question that

4   3.850(b)(2) is consistently and regularly applied.

5   These other rules, I would submit, are consistently and

6   regularly applied.

7   The one -- the two fifth district opinions

8   they cite, and I have looked at them and the language

9   there, it's ambiguous, it's not exactly clear, but I

10   don't think that the lower court, the lower appellate

11   court's rulings would override the Florida Supreme Court

12   who controls the rules. They set the rules in Florida.

13   They have rule-making authority, that, somehow, that

14   would throw out the adequacy of the -- of the State law

15   ground.

16   In conclusion, if there are no other

17   questions, we ask that the Court dismiss this on

18   jurisdictional grounds. Alternatively, we ask, as to

19   this case and the others, that -- that the questions

20   presented should be addressed and answered, which is

21   whether there is a categorical ban and -- do not -- a

22   categorical ban does not exist. Thank you.

23   CHIEF JUSTICE ROBERTS: Thank you,

24   Mr. Makar.

25   Mr. Stevenson, you have four minutes

45

1   remaining.

2   REBUTTAL ARGUMENT OF BRYAN STEVENSON

3   ON BEHALF OF THE PETITIONER

4   MR. STEVENSON: Thank you, Mr. Chief

5   Justice.

6   Justice Sotomayor, the case is

7   Hughes v. State. It is cited -- it is an application of

8   Apprendi, where the defendant does not prevail, but,

9   nonetheless, is entitled to that review, and I don't

10   think there is any question in this case that, if a

11   death row prisoner, who was a juvenile, was still on

12   death row in Florida, had not sought the relief and

13   obtained the relief that he is entitled to under Roper,

14   he would be barred from such relief because he did not

15   file within the two years.

16   JUSTICE SOTOMAYOR: You are missing point.

17   What Florida says and what your adversary is saying

18   is -- you are absolutely right, if you win under Graham,

19   you can go under 39.a -- if you win under Graham, and

20   Graham makes its rule retroactive, that fits right into

21   (b)(2) directly, and so those cases, you have no

22   problems with.

23   What he is saying, however, is you can't go

24   in to Florida and ask them to announce the

25   constitutional rule under a case where it hasn't been

1   already held.

2   MR. STEVENSON: Well, I -- and that's what I

3   disagree with, Your Honor. That's exactly what the

4   Court is doing in Hughes. That's exactly what the Court

5   is doing in these other cases. Otherwise, a lot of this

6   Court's rules don't have clear and direct categorical

7   lines.

8   You have to apply them. You have to apply

9   them in context. And it would mean that people whose

10   sentences are now illegal under the law, only when

11   applied, would be so banned, and that's what I don't

12   think the Florida legislature or the Florida --

13   JUSTICE ALITO: And you address this in

14   Footnote 35 of your reply brief, and it would have been

15   a little bit helpful if you had raised it initially, so

16   the State would have had an opportunity to reply, but

17   you introduced the citation there with, for example, and

18   then you cite some cases. Are there others?

19   MR. STEVENSON: Yes -- yes, there are,

20   Justice Alito, and, again, I just want to contextualize

21   why this is the way it is. At no point did the State

22   make any of these arguments in the lower courts. They

23   did make it at trial. They did not make it on appeal.

24   This issue was raised for the first time in this Court.

25   JUSTICE ALITO: There are -- there are other

1   cases in which the lower Florida courts have used --

2   have said that this particular subsection is appropriate

3   for raising a constitutional challenge.

4   MR. STEVENSON: That's correct. There are

5   other situations where they have made Eighth Amendment

6   claims and analyses, and, sometimes, the Petitioners

7   lose. Sometimes, they prevail. They have done it in

8   other contexts. And so I do think that it is quite

9   clear, from the way Florida applies these cases, that

10 this Court has jurisdiction.

11   JUSTICE GINSBURG: I thought, in your cert

12 petition, which I don't have with me, you raised the

13 question of the adequate State ground in the second

14 question.

15   MR. STEVENSON: We did -- well, what we

16 raised was that, without this Court intervening, that

17 people like Joe Sullivan would likely never get review.

18 Our point was that, without an intervention from this

19 Court, people like Joe Sullivan -- there hasn't been a

20 sentence like --

21   JUSTICE GINSBURG: But there was a question

22 that you raised, and then your opening brief doesn't

23 discuss it at all. Your reply brief responds to the

24 State and then brings up something in a footnote that

25 the State doesn't have a chance to answer.

1   That doesn't seem, to me, a very sound way

2 to approach a question that you, yourself, raised.

3   MR. STEVENSON: Yes. Justice Ginsburg, we

4 read that second question to be should this Court take

5 an interest in a case? Should this Court be barred?

6 Should this Court intervene where a child of 13 has been

7 sentenced to life without parole, and there may never be

8 another example. He can't go to Federal habeas corpus

9 because he is time-barred from that. So this Court's

10 opportunity to review the case is critical. That's what

11 we thought we were raising in the second question.

12   Frankly, we thought that the jurisdictional

13 question was a question that was pretty clear -- plain

14 on its face because the trial court's disposition of the

15 this case was completely dependent on its interpretation

16 of Roper, and I think that's what gives this Court

17 jurisdiction.

18   You have said, repeatedly, in

19 Ohio v. Reiner, in Ake v. Oklahoma, when the analysis of

20 a State procedural rule does depend on an assessment of

21 the Federal law, you have jurisdiction.

22   And I think that jurisdiction should be

23 exercised in this case to declare that this sentence is

24 unconstitutional. It is unquestionably unusual to

25 have -- no child of 13 in this country sentenced to life

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1   without parole in 44 States makes it clear that this is

2   an unusual sentence.

3   But we also contend to say to any child of

4   13 that you are only fit to die in prison is cruel. It

5   can't be reconciled with what we know about the nature

6   of children, about the character of children. It cannot

7   be reconciled with our standards of decency, and we

8   believe that the Constitution obligates us to enforce

9   those standards and reverse this judgment.

10   My time is up. Thank you.

11   CHIEF JUSTICE ROBERTS: Thank you,

12 Mr. Stevenson; Mr. Makar.

13   The case is submitted.

14   (Whereupon, at 11:51 a.m., the case in the

15 above-entitled matter was submitted.)

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A

above-entitled 1:11 50:15
absence 24:13 26:18,22
absolute 22:5
absolutely 42:16 42:16 46:18
accept 5:13 16:16,18 31:18
accepted 34:6
acknowledge 43:20
acts 32:13 36:1
actual 20:12
addition 30:13
address 33:25 47:13
addressed 36:9 45:20
adequacy 45:14
adequate 7:9 42:8 44:23 45:1 48:13
adopt 19:23,24
adopted 15:14 16:16,18
adult 16:14 22:11 24:8
adults 16:13 18:11,25 19:19
adversary 32:23 44:6 46:17
adversary's 44:9
affirmative 12:13 14:1
age 3:10,14 15:23 16:12 17:4 18:4 20:1 20:5,23 21:1,3 21:23 22:4 25:10 26:5 28:11,19 31:10 32:10 34:16 35:1,18 39:8
ages 35:19

aggravating 18:5
agree 7:24 8:2
ahead 33:22,23
Ake 49:19
Alito 9:15 10:5 19:22 27:2 47:13,20,25
allow 7:18 11:17 15:7 37:15
allowed 16:6 38:11
allows 15:6
Alternatively 45:18
ambiguity 35:7
ambiguous 45:9
Amendment 8:14 9:12 13:5 17:4,8 22:17 22:18 23:5,5 32:1 33:18 37:6 48:5
America 35:8
analyses 48:6
analysis 7:7 8:19 10:18 11:1 13:6 17:12,18 32:4 49:19
analyze 11:6
analyzed 11:3
analyzing 5:19
Anders 17:23
Annino 29:9
announce 46:24
anomalies 44:20
answer 38:1,2 48:25
answered 45:20
answers 6:22
antitrust 10:15
apologize 29:5
appeal 8:17 13:19 17:24 40:14 47:23
appeals 6:13 40:8

APPEARAN... 1:14
appellate 45:10
appended 22:24
appendix 6:15 38:10
applicable 5:16 19:21 42:20
application 4:25 22:8 43:19 46:7
applied 4:16 5:4 5:8,10 9:21 10:15 24:24 37:16,16,24 39:17 42:22 44:23 45:1,4,6 47:11
applies 5:21 7:13 8:1 11:15 12:3 41:19,20 48:9
apply 5:24 6:11 13:1 37:5 38:7 39:20,21 40:3 40:10,10,20 41:5 42:23 43:18,23 44:3 47:8,8
appointed 38:15
Apprendi 4:14 13:2 43:23,25 44:8 46:8
approach 16:4 49:2
approached 15:14
appropriate 22:1 48:2
approximately 39:11
arbitrariness 17:6
arbitrary 23:6 26:24
area 35:7
areas 13:4

argue 14:1
argued 12:9
arguendo 7:11
arguing 6:4 12:13 21:9 23:15
argument 1:12 2:2,7 3:4,6,21 5:12,13,15 6:7 8:8,11,24 9:15 9:19,20 13:16 13:18 14:15 17:17 27:3,25 33:25 35:13 40:9,22 44:8,9 46:2
arguments 7:15 35:3 47:22
argument's 31:5
armed 29:14 30:1
array 13:4
arrest 24:18
arrested 3:11
articulated 19:21
asked 31:16
asking 9:18 31:7 31:8,17 36:5 38:6,22
assault 3:12
asserted 11:11 12:13
assertion 13:12
assessment 7:8 8:13 49:20
assign 34:25
assume 7:12
Atkins 23:12 25:19,23
authored 21:5
authority 42:9 45:13
automatically 7:25 11:14
available 8:16 14:10 15:19,19

15:22 22:1 38:17
average 33:1,16 33:17
avoids 17:5
aware 38:25
a.m 1:13 3:2 50:14

B

b 37:10 40:11 46:21
back 25:3 34:4 41:22
bad 39:6
ban 22:6 24:14 45:21,22
banned 47:11
bans 19:25 24:15
bar 3:24 7:15,16 7:25 11:9,15 40:25 41:22 42:24 43:5,14
barred 7:3 13:18 41:5 46:14 49:5
based 8:18 21:14,23
basic 33:25 34:5
basis 7:10 8:25 18:7 22:16 43:6
battery 32:20 33:8,10
bearing 12:21
behalf 1:15,18 2:4,6,9 3:7 28:1 46:3
beings 34:24
believe 19:1 33:19 38:19 39:12 40:13 50:8
benefit 42:7,11
better 8:21
beyond 38:2

51

bit 29:7 47:15
Bonifay 6:14
  13:20
boys 3:11
Breyer 25:25
  26:3,5,8,11,14
  28:8,12,14,18
  28:21 29:1,16
  30:16,21 31:1
  31:14 33:20,22
  33:24 34:20
  35:17 39:14
  40:6,16,19
  41:3,15 42:1
brief 4:11 12:23
  17:23 22:24
  26:25 36:23
  40:14,21 42:6
  43:23 44:14
  47:14 48:22,23
briefed 20:19
bright 34:1,1
brings 48:24
brought 3:22
  4:4 38:12
BRYAN 1:15
  2:3,8 3:6 46:2
bundled 29:11
burglary 29:14
  30:1,5,23

_____

C

_____

C 2:1 3:1
Call 19:15
Cane 41:13
capable 24:16
capacity 14:17
  23:18,20
capital 9:7,7
  18:8
cares 43:5
Carter 44:15
case 3:4,20,25
  5:25,25 6:13
  6:15,21,24 7:3
  7:13,21 8:1,17
  10:20 11:8

13:20,24 14:2
14:15,20 16:7
16:8,25,25
17:3,12,12,22
18:7,7 20:6,19
21:24 22:21
24:9 28:24
32:7 41:15,19
42:1 43:18
44:19 45:19
46:6,10,25
49:5,10,15,23
50:13,14
cases 16:5 25:6
  25:24 26:1
  31:21 34:22
  39:25 40:4,7
  43:22,25 46:21
  47:5,18 48:1,9
catchall 36:16
catch-all 11:23
categorical 18:1
  19:22 22:23
  24:13 26:22
  42:1 43:18
  45:21,22 47:6
categorically
  6:2
category 26:1
  28:10 34:25
  35:1 38:11
cert 48:11
certain 27:15
certainly 20:22
  22:17 32:6
  33:15 34:15
  35:6 41:21
challenge 4:4
  7:18 11:18,18
  11:20,24 12:6
  39:18,23 48:3
challenged
  13:22,22
challenges 4:2
  12:4 43:25
challenging 4:13
  13:13 39:2

chance 48:25
change 4:16
  23:20
character 50:6
characterizati...
  5:7
characterized
  10:10
characterizing
  19:18
charged 3:11
charts 32:7,9,10
Chief 3:3,8
  14:14,19 15:5
  15:10 16:3,20
  16:23 17:10,16
  18:14 22:12
  23:2 27:22
  31:21 32:2,9
  33:21,23 34:16
  42:21 43:1
  45:23 46:4
  50:11
child 3:16 16:1
  16:17,18 19:25
  21:17 22:6
  24:2,8 49:6,25
  50:3
children 3:14
  16:13 17:13,19
  19:19 20:22
  21:7,15,19
  23:17 25:4,7
  25:15 26:15
  50:6,6
choosing 5:11
circularity
  41:16
citation 47:17
citations 44:24
cite 4:11 24:17
  45:8 47:18
cited 6:13 10:7
  12:23 44:13
  46:7
citing 36:22
claim 10:18

38:10 43:9
claims 38:11
  48:6
clause 34:3
clear 4:3 8:20
  12:24 34:21
  39:21 45:9
  47:6 48:9
  49:13 50:1
clearly 12:17
  14:7 39:20
client 14:16 17:1
  20:9 22:19
Coker 25:24
color 27:1
come 13:5 27:6
  32:4 41:11
comes 12:22
  22:14
command 4:24
comment 39:14
commit 30:8
  34:18
commits 33:3
committed
  23:24 26:6
  28:11,19 29:14
  30:1 31:10,23
  31:24 32:21,25
committing
  31:22,23
common 21:6
completely
  11:22 49:15
concede 16:10
  31:5
conceded 5:20
conceivable
  16:9,11
concept 22:9
concerning
  26:25
conclusion
  45:16
confusion 34:7
connection 34:5
  35:9,10

conscious 15:22
consensus 15:1
  15:8,17,18
  16:6 22:4,5
  25:20
consider 10:16
  32:3,4 37:23
  42:18 43:10,25
consideration
  17:4
considered
  13:10 15:14
  22:21 44:7
consistent 5:1
  25:22
consistently
  44:23 45:1,4,5
Constitution
  8:10,14 18:12
  25:2 50:8
constitutional
  9:11 10:1,2
  11:10 18:13
  24:19 37:15,23
  41:18 42:19
  46:25 48:3
constrain 8:15
construct 12:3
  24:5
contend 12:6
  25:1 50:3
contest 27:9
context 6:3 7:8
  13:7 18:4,6,24
  19:1 21:20
  22:24 28:4
  38:7 47:9
contexts 22:23
  23:11 48:8
contextualize
  47:20
contract 23:1
control 27:10,11
controls 45:12
convicted 3:12
  9:7,14 25:11
  30:19

conviction 30:22
corpus 49:8
correct 4:18
  12:2,18 24:4
  28:22 31:19,20
  36:23 40:1
  44:10,24 48:4
correcting 4:9
Corrections
  27:7,11
correctly 43:13
corresponds
  35:1
counsel 21:24
  38:16,23
count 29:10,16
  29:23 30:10
  31:2
country 15:3
  21:21 22:10
  49:25
counts 31:6
  32:14,20
course 20:17
  30:8 34:21
court 1:1,12 3:9
  4:5,15,23 5:1
  5:20,20 6:2,14
  7:23,24 8:3,16
  8:18 9:24,25
  10:21,24,25
  11:1,3,7,13
  12:12,24 13:6
  13:8 14:7,20
  14:25 17:11,25
  18:5,16,23
  20:19 24:17
  25:16,18,19
  28:2 33:17
  36:3,4,9 37:25
  38:1,3,4,5
  39:15,17,25
  40:8,8,25 41:1
  41:2,8,10,13
  42:17 43:10,17
  44:11,15 45:10
  45:11,17 47:4

  47:4,24 48:10
  48:16,19 49:4
  49:5,6,16
courts 4:20 9:22
  36:25 37:14
  39:24 43:14,22
  47:22 48:1
court's 4:13
  6:12 9:11 12:7
  13:3 17:25
  21:4 23:8
  25:23 38:2
  45:11 47:6
  49:9,14
cover 7:2
co-defendants
  39:4
create 37:21
  38:3
created 16:12,13
  16:14 18:1,23
  26:23
credits 14:10
crime 15:4 17:1
  19:2 21:18,20
  22:11 23:24
  30:8 33:5
  35:19
crimes 18:20
  31:22,23 34:19
criminal 34:5
critical 49:10
cruel 7:1 24:8
  34:4,9 50:4
culpability
  23:18
cut 35:9

———————

D

D 1:17 2:5 3:1
  27:25
data 22:3 27:9
  27:11,14 28:3
  28:3,4,5,7,12
  30:11,11 33:7
day 42:13
deal 11:2 14:24

  18:6 36:23
dealing 25:16,18
dealt 5:14 8:12
death 5:14,23,25
  6:6,12,16 8:21
  9:12 18:6,14
  18:15,25 19:12
  22:24 25:17
  28:4 46:11,12
decency 50:7
decide 9:16 10:6
  10:8 11:6,12
decided 5:22
  11:7
decision 4:13
  6:12 9:11 12:7
  17:25 18:23
  41:7 42:7
  44:14
decisions 13:4
declare 49:23
default 7:7 8:5
  10:21 14:1
defaults 12:14
defendant 36:20
  46:8
defended 15:23
defense 12:13
  14:1
defining 23:13
definition 31:18
demand 11:7
demands 24:1
deny 40:17,18
Department
  27:7
Departments
  27:10
depend 23:25
  49:20
dependent 7:7
  8:13 49:15
depends 23:23
depravity 36:1
desirable 16:10
determination
  4:19 8:18

  33:13 41:8
determinative
  10:17
development
  14:18
deviate 44:12
dictated 9:17
dictates 10:8
  23:4
die 50:4
difference 16:5
  18:24 20:23
  22:18 24:7
  31:15 43:2
differences
  20:10
different 5:9,24
  6:3,5,6,8 16:5
  16:7 18:15
  22:19,20 30:9
  32:19,21 34:23
  42:22
differentiating
  21:23
difficulty 20:16
  24:13
diminished
  23:18,18
direct 17:24
  47:6
directions 34:23
directly 46:21
disagree 47:3
discretion 20:20
discuss 48:23
dismiss 45:17
disposition
  49:14
disproportion...
  27:1
dissonate 44:8
distinction
  19:13 20:13,24
distinctions
  18:11 19:20,20
  20:20,25 21:10
  22:23 23:6

distinguishing
  20:6
distribution
  33:8 35:18
district 39:15,17
  40:15 44:18
  45:7
doing 47:4,5
dramatically
  30:12
draw 20:18
  22:25 23:13
drawing 22:16
drawn 23:11
draws 20:12
  23:5
drew 23:9
drift 35:14
drive 23:1
D.C 1:8

———————

E

E 2:1 3:1,1
earlier 17:5 21:6
easy 30:14
effect 16:24 37:2
effectively 18:23
Eighth 8:14 9:12
  13:4 17:4,7
  22:16,17 23:4
  23:5 32:1
  33:18 37:6
  48:5
either 8:4
eligibility 8:23
  9:9
empowered
  24:20
end-of-the-line
  19:12
enforce 50:8
engage 12:25
engaged 4:20
  8:19 10:19
  11:1
enshrined 18:8
enter 23:1

entire 15:2 34:10 35:11
entitled 5:21 8:4 12:8 37:20 46:9,13
equate 19:2
error 37:18
ESQ 1:15,17 2:3 2:5,8
establish 7:13 10:4 11:12 42:19 44:13
established 8:24 11:11 12:17 15:16 42:3
establishing 41:12 43:17
evaluate 5:18 10:16 14:20
Everybody 22:19
evidence 14:25
exactly 4:19 41:25 44:6 45:9 47:3,4
examine 39:3
example 4:12 24:17 29:13 30:1,16 37:8 47:17 49:8
exceeds 36:24 36:24 37:13
exception 11:8 11:10 13:12,13 13:14 36:14 37:3,20,21 41:24 42:18
exceptions 39:19 40:11
excessive 14:24
excuse 16:21
executed 19:6
exemptions 18:1
exercised 49:23
exist 45:22
exists 5:23
expect 38:5

expiration 38:12
explain 33:3
extend 38:3 41:19
extent 17:18
extreme 32:7 34:11

F

face 37:17 49:14
fact 11:7,12 38:23 41:7
factor 18:5
factors 28:6 32:3 33:9
fail 19:13
failure 39:2,3
fall 41:23
far 28:9 32:7
fast 29:3
favor 14:7
fear 41:11
fearful 41:10
features 26:24
Federal 6:20,23 7:1,8,20,22,22 8:13 10:9,10 10:21,24 11:2 13:10 15:6 41:10,12 49:8 49:21
felonies 21:8
fifth 44:18 45:7
file 38:19 39:1 39:18 42:3,12 42:13 46:15
filed 12:11 17:23 37:13 40:14
find 25:20
finding 15:1
first 4:1,23 6:2 29:20 37:10 38:22 40:15 43:10 47:24
fit 38:10 40:11 50:4
fits 46:20

five 35:5
Fla 1:15,18
Florida 1:6 3:4 3:23 4:2,9 5:1 6:11,13,14,15 6:16 8:21 9:5 9:22,24 11:9 11:15,19 12:3 12:16 13:6 14:7,10 16:12 16:16 25:14 26:9,17 28:15 28:16 31:11 33:11 36:9,13 36:25 37:14,20 37:25 39:16,23 39:24 40:1,21 41:8,22 42:17 43:21 44:15,21 44:24 45:11,12 46:12,17,24 47:12,12 48:1 48:9
following 28:9 39:18
footnote 41:9 43:22 47:14 48:24
forth 28:6 34:17
forum 43:9
found 8:16 24:18 25:9
four 24:10 39:13 45:25
frankly 44:3 49:12
front 30:22
full 28:7
function 35:18
fundamental 10:3 11:10 37:23 41:18 42:19 43:17

G

G 3:1
general 1:17

34:23 35:12
generally 25:19 34:6
generated 9:10 12:7 27:5,19 28:6,24 29:9
generates 23:21
Gerstein 24:17
getting 33:4 35:17
Ginsburg 3:18 4:6 6:19 9:1 11:21 12:3 20:4,14 21:11 21:22 29:6 32:16 36:11,15 38:13,20 39:1 42:5,14 44:22 48:11,21 49:3
given 42:18
gives 49:16
go 25:3 33:22,23 34:4,22 40:7 46:19,23 49:8
goes 35:20,20
going 22:13,15 22:19 37:22
good 14:9 35:21 44:16
gotten 32:25
Government 15:6
Graham 20:5 29:14 31:22 42:1,6 43:8,17 46:18,19,20
Graham's 16:8 20:6 21:24
great 14:24 35:24
gross 36:1
ground 7:9 9:19 10:12,12 42:9 44:23 45:2,15 48:13
grounds 45:18
guess 17:5 22:22

34:21 39:6 41:16

H

habeas 10:22 38:19 49:8
happen 14:5,6
happened 30:8
happens 29:11 35:25
Harris 1:3 41:9
harsh 33:14
head 36:12
hear 3:3 35:15
heinous 33:5 34:18
held 37:1 47:1
helpful 47:15
hinging 43:8
history 23:9
hit 36:11
hold 40:7 41:17
homicide 19:13 21:12,15 25:6 25:11 26:19 29:11,20 30:9 31:2,6,7
honest 23:22
Honor 9:4 10:13 15:20 18:20 22:3 27:7 47:3
horrendously 17:1
horrible 23:23 23:25 24:6
Hughes 46:7 47:4
human 32:13 34:23
hundreds 22:25 33:10

I

idea 23:5
illegal 4:7 11:23 36:16,17 40:2 47:10

54

implement
24:20
implemented
6:15
implementing
24:16
impose 24:6
imposed 9:6
25:21 35:22
imposing 15:24
21:2
imprisoned 25:8
imprisonment
5:17 21:16
24:3 33:1
inability 23:19
incapable 21:9
incidence 21:14
35:20
including 25:11
inconsistent
17:7
incorrect 36:21
independent 7:9
9:18 10:6,12
42:9
indication 4:9
individual 22:21
29:22 34:10
individualized
18:3
individuals
31:19 34:25
information
27:19
initially 47:15
instance 43:11
instances 31:16
interest 49:5
interested 10:6
interpret 36:12
37:19
interpretation
49:15
interpreted
37:14
interpreting

36:13
intervene 49:6
intervening
48:16
intervention
48:18
introduced
47:17
invalidate 20:3
issue 13:9 30:14
36:8 41:11,13
41:21 43:2
44:7 47:24

—————————
J
—————————
Jacksonville
1:15
jail 30:3 36:5
Joe 1:3 3:10,14
5:21 6:17 8:22
8:25 9:13 14:6
17:21 19:3
24:21 25:14
48:17,19
joint 6:15 38:10
judge 4:7 5:3,7
5:18 6:20 7:12
8:12 9:16 10:8
10:15,17,19
30:22 33:12
38:9
judge's 40:24
judgment 7:6
15:21 20:2,22
23:3 25:21
50:9
jurisdiction
10:22,24 11:2
13:8,9 38:2
41:12 42:17
43:10 48:10
49:17,21,22
jurisdictional
43:2 45:18
49:12
jurisprudence
18:8

Justice 3:3,8,18
3:20 4:6,15,22
5:2,6,22 6:5,19
7:11,20 8:7 9:1
9:15 10:5 11:5
11:16,21 12:2
12:15,19,24
13:11,25 14:14
14:19 15:5,10
15:16 16:3,20
16:23 17:10,16
18:3,14 19:4
19:10,15,22
20:4,14 21:5
21:11,22 22:12
23:2,23 24:4
25:3,25 26:3,5
26:8,11,14,19
27:2,15,22
28:8,12,14,18
28:21 29:1,3,6
29:16,18,24
30:2,5,16,21
31:1,14,21
32:2,9,16,17
32:23 33:20,21
33:22,23,24
34:16,20 35:17
36:11,15 37:5
37:9 38:13,20
39:1,8,14 40:6
40:16,19 41:3
41:15,25 42:5
42:14,21 43:1
43:12,21 44:5
44:22 45:23
46:5,6,16
47:13,20,25
48:11,21 49:3
50:11
justification
34:1
justifies 33:5
justify 35:10
36:1
juvenile 14:15
24:12 46:11

juveniles 6:11
6:22 20:7

—————————
K
—————————
Kennedy 3:20
7:11 12:15,19
12:24 18:3,23
25:24 37:5,9
39:8
Kentucky 21:5
kids 6:3,5 15:2
15:13 17:13
18:11,25 20:10
20:11,21,21
21:1 25:10,11
27:1
killed 30:18
killing 30:19,23
kind 15:15
17:12 19:12
21:17,18 22:10
24:12 34:4
kinds 18:20 23:6
33:9 34:22
know 8:7 16:11
18:17 19:19
24:22 28:15
35:18 38:15
50:5

—————————
L
—————————
lack 15:1
language 44:19
45:8
late 39:11
law 4:3,9,16
6:16,16 7:8
10:11 12:16
14:7,10 17:19
20:3 21:6 34:5
36:24,25 37:1
37:13 39:23
41:8 45:14
47:10 49:21
lawful 35:22
laws 22:25
lawyer 17:23

38:15,16
leave 20:4
lectern 29:7
left 11:24
legal 20:25
legality 44:7
legislature 23:3
47:12
legitimate 44:25
let's 18:6 29:16
29:16,17 31:4
life 3:13,15 5:5,8
5:14,16 6:18
6:21,25 8:23
9:2,3,6,8,13
14:11,22 15:3
15:24 16:2,13
16:17 18:17,21
19:5,8,11,25
21:2,16,25
22:6 24:3,9
25:5,8 26:3
28:10,18 30:4
30:17 31:9,20
33:5 34:11
35:11 36:5
49:7,25
light 27:20
limitation 4:10
11:20 12:5
13:15
limitations 3:23
12:1
limited 36:19
37:21 38:11
limits 36:24,25
37:13
line 20:8,12,12
20:15,18 22:12
22:13,16,20
23:9,11,13
34:1,1 42:3
lines 22:25 47:7
line-drawing
17:5,6
listed 39:25
literature 28:5

little 44:20
47:15
location 30:9
long 4:14 14:17
21:3 35:5
look 15:6 33:7
38:6 40:7 41:7
looked 25:19
39:5 45:8
looking 9:23
41:10
lose 11:2 43:13
48:7
loses 43:4,4
lot 19:4 22:9
47:5
lots 22:23
lower 40:8 45:10
45:10 47:22
48:1

M

Madison 10:7,9
Makar 1:17 2:5
27:24,25 28:2
28:12,16,20,22
29:2,5,8,22,25
30:3,7,20,25
31:12,17,25
32:6,11,19
33:7 34:15
35:16 36:21
37:7,11 38:18
38:25 39:10
40:4,13,18,23
41:4,25 42:12
42:16,25 43:7
43:16 44:1,11
45:3,24 50:12
mandates 8:9
Marbury 10:7,9
matter 1:11
34:23 38:18,23
50:15
maturity 35:2
maximum 4:8
14:12 36:19

mean 10:13
11:22 12:10
15:5 17:21
18:5 20:16
22:9 27:8 32:1
32:17 33:24
38:20,20 39:1
47:9
meaning 32:12
means 4:7
median 21:21
mental 23:13
merits 3:25 8:5
12:8
methodology
33:19
mind 34:13
minimum 15:23
16:12 21:1
minutes 45:25
missing 46:16
Missouri 9:5
mitigating 28:6
Monday 1:9
months 24:11
moral 14:18
34:8,24
morality 34:6
35:10
motion 37:12
38:22 42:4,15
motions 36:23
move 42:17
murder 9:7,8
21:24
murderer 19:6
murderers 19:5
19:7

N

N 2:1,1 3:1
nail 36:11
nature 10:2 50:5
need 23:17
needs 19:1
negative 23:20
never 16:1 17:22

17:22 48:17
49:7
new 18:1 37:15
37:23 38:3
42:14,14 43:9
43:17
nine 15:2 25:10
35:6
non-homicide
3:16,17 9:14
21:15 25:6,12
25:13 26:1,21
28:10,17,18
29:10,17,21
30:7,10 31:9
non-homicides
18:21 19:11
normal 13:14
16:24
norms 18:13
24:19 25:22
notion 14:4 17:7
21:19 33:16
November 1:9
no-time 7:18
number 25:17
27:11,16 31:12
31:18
numbers 27:10

O

O 2:1 3:1
obligates 50:8
obtained 46:13
obvious 22:13
22:14 40:24
obviously 10:2
36:8
occupies 19:11
occur 35:24
occurrence
35:19
offender 21:25
offenders 24:7
offense 29:11,12
29:20,21 30:9
30:11 31:2,6

32:21
offenses 30:14
30:15 31:9
33:15
Oh 8:7
Ohio 49:19
okay 29:16
30:21 31:1,17
37:19 40:3,6
Oklahoma
49:19
old 35:5
older 3:11 20:11
20:21
once 11:5,12
16:20
open 11:23
opening 48:22
operates 44:17
opinion 20:18
21:4 28:9
41:17
opinions 45:7
opponent 39:16
opportunity
36:6,7 47:16
49:10
opposed 5:14
opposition
40:14
option 14:8
oral 1:11 2:2 3:6
27:25
order 40:24
ought 22:21
outside 25:22
overcome 7:15
override 45:11
overtake 11:22
overtakes 4:10

P

P 3:1
page 2:2 6:14
parole 3:13,15
5:5,8,15,17
6:18,22,25

8:23 9:2,3,7,9
9:13 14:23
15:3,24 16:2
16:14,17 18:17
18:21 19:5,8
19:11,25 21:2
21:16,25 22:6
24:4,10 25:5,9
26:3 28:10,19
30:4,17 31:9
31:20 33:6
36:6 49:7 50:1
part 8:13 15:1
15:15 17:13
34:3 40:2
particular 34:25
48:2
particularly
14:16 19:3
particulars 3:19
PCA 40:15
peer 23:20
peer-reviewed
27:4
penalty 5:14 6:6
18:6 19:1,12
22:24 28:4
pending 28:25
people 9:7 23:16
23:16,17 28:15
32:24 35:7
47:9 48:17,19
perfectly 35:13
period 11:11
14:18 38:12,14
perking 34:13
permitted 17:18
perpetuate
32:13
person 29:25
30:23 32:18
person's 35:11
perspective 22:5
22:5
petition 3:22
42:6 48:12
Petitioner 1:4

1:16 2:4,9 3:7
46:3
Petitioners 48:6
phrase 12:17,20
plain 49:13
play 34:16
pleading 12:11
12:12 27:9
39:5
please 3:9 28:2
plurality 20:17
point 8:6 9:5
10:20 13:17,25
17:9 19:10
31:3 32:2
34:20,21 35:21
36:22 39:9
41:16 46:16
47:21 48:18
points 24:24
policy 23:3
population
26:24
position 7:14
21:13,23
possible 16:15
43:19
possibly 5:24
posture 14:3
post-conviction
3:21 4:10
37:22 38:14,22
39:2 42:4,15
power 27:12
precedent 7:6
25:23 44:13
precluded 13:19
preliminary
7:21
premised 43:16
present 27:12
presentation
24:18
presented 10:25
13:24 33:12
36:8 41:14
45:20

pressures 23:20
presumption
21:7
pretty 34:2
44:16 49:13
prevail 42:6
46:8 48:7
prevailed 42:23
primary 30:14
principles 34:6
prior 8:17
prison 5:5 6:18
9:9 14:9,11
17:24 25:5
50:4
prisoner 9:13
46:11
prisoners 6:17
8:21
pro 39:1,4
probably 39:7
problem 18:2
problems 17:5
46:22
procedural 3:24
5:19 6:10 7:7
7:14,16 10:20
11:9,15 12:14
14:1 40:25
42:24 43:5,14
49:20
procedurally
7:3
proceed 17:11
proportionality
16:25 18:7
32:4 34:17
propriety 4:19
prospectively
42:2
protection 23:17
proud 35:23
provided 11:11
32:24 36:24,25
37:13
provision 11:17
11:22,25 12:3

13:20
provisions 13:21
Pugh 24:17
punished 36:4
punishment 4:8
purpose 31:5
purposes 6:6,8
pursue 42:4
put 30:3 31:16
37:25

———————
Q
question 3:19
4:6 5:19 6:10
6:20,22,24,24
7:1,6,21,22,22
8:12 9:10,23
10:10,22,23,25
11:3,3,6 12:16
13:8,10 14:22
16:1 23:21,22
27:13 38:1
45:3 46:10
48:13,14,21
49:2,4,11,13
49:13
questions 12:25
13:5 34:16
45:17,19
quick 38:6 41:7
quite 48:8

———————
R
R 3:1
raise 13:11 29:6
29:7
raised 26:25
36:22 37:16
47:15,24 48:12
48:16,22 49:2
raising 6:25
10:23 41:21
48:3 49:11
ran 3:21
rape 21:20 33:4
raped 32:18
rapes 32:25

rare 14:3 15:18
17:17 35:22
reach 6:24 7:2
11:4
read 49:4
reading 42:24
real 13:7 27:13
really 5:1 8:20
15:22
reason 20:24
28:23 29:2,8
31:15
reasonable 8:25
14:18 16:4
reasoning 5:4,10
5:15
reasons 17:11
22:13,14
rebuttable 21:7
rebuttal 2:7
27:21 46:2
receive 14:12
received 3:16
21:18
recitation 44:16
recognize 14:17
18:10 21:3
24:7
recognized 5:13
21:6
recognizing
20:19
recollection
44:1
recommend
24:25
reconciled 50:5
50:7
record 38:9
reduced 6:18
Reed 41:9
reference 7:14
13:19
referenced 21:5
reflected 18:13
reform 23:21
regard 4:2 12:4

13:2,3 15:12
19:10 24:3,21
26:15 28:7
32:15
regime 5:23
regularity 35:24
regularly 45:4,6
Reiner 49:19
reject 10:18
rejected 22:7,8
25:22
relates 7:19
released 24:11
relevant 6:10
9:21 12:6
reliability 27:14
relied 8:15 29:9
relief 3:22 4:10
8:4 46:12,13
46:14
rely 44:19
relying 27:14
28:23 37:12
40:24
remaining 26:11
46:1
remedy 33:18
remove 34:10
render 6:21
reopened 36:17
repeatedly
49:18
reply 34:13
35:15 36:23
40:21 47:14,16
48:23
report 27:18
representation
38:21
required 9:17
10:9
requires 8:10
requiring 17:3
resentenced
24:23
reserve 27:21
reserved 18:16

18:18,22
resolve 14:22
resolved 14:21
respect 34:3
respected 18:12
respond 14:4
  27:16
Respondent
  1:18 2:6 28:1
responds 48:23
response 27:2
  39:22 40:3
responses 4:1
responsibility
  34:8,24
responsible
  23:19
responsive
  12:11,12
rest 36:5
restriction 7:19
result 8:9 9:17
  11:8 16:7,7
results 4:24 16:5
  26:23
retardation
  23:13
retribution 24:1
retroactive 4:17
  4:25 13:1 38:4
  43:19,24 46:20
retroactively
  37:16,24 41:20
  42:20
retroactivity
  41:13 44:2
returned 24:23
reverse 50:9
review 5:21
  10:24 12:8
  13:9 16:25
  18:3,8 46:9
  48:17 49:10
reviewed 17:22
  17:23
rich 28:5
right 7:12,23

11:10 12:16,19
12:22 15:7
22:2 27:4 30:2
30:7 33:20
37:11,15 38:3
38:18,23 41:3
41:18,24,25
42:19 43:15,17
46:18,20
rights 37:23
risk 17:14
road 30:9
robbery 30:18
ROBERTS 3:3
  14:14 15:5,10
  16:3,20,23
  17:16 18:14
  22:12 23:2
  27:22 31:21
  32:2,9 33:21
  33:23 42:21
  43:1 45:23
  50:11
role 34:17
Roper 4:23 5:4
  5:7,11,13,15
  5:19,21,22 6:2
  6:11,21 7:2,12
  7:24,25 8:3,9
  8:15,16,21
  9:11,17,20,21
  10:18 11:1,7
  11:12 12:7
  18:1,4,16
  19:21 23:10
  25:17,23 38:7
  39:20 41:4,7
  41:17 46:13
  49:16
rough 34:5
roughly 34:12
  35:1
row 6:16 8:21
  46:11,12
rule 4:3 7:13,17
  9:24 10:1,3,8
  10:14 13:15

19:22,25 20:5
26:23 38:8
39:16,16 42:2
43:18,24 44:12
44:16,21 46:20
46:25 49:20
rules 7:2 14:7
  36:12,13,22
  37:22 45:5,12
  45:12 47:6
rule-making
  45:13
ruling 10:21
  20:2
rulings 45:11
run 4:14

      S

S 2:1 3:1
sample 39:3
saying 5:9 20:7
  29:19 40:17
  43:3,3,13
  46:17,23
says 11:19,25
  14:10 36:14,16
  37:4 38:8
  39:16,23 40:19
  42:2 46:17
Scalia 5:22 6:5
  7:20 8:7 11:5
  11:16 13:11,25
  15:16 19:4,10
  19:15 21:5
  23:23 24:4
  26:19 29:3,18
  29:24 30:2,5
  43:12
SCOTT 1:17 2:5
  27:25
se 39:1,4
second 4:24
  35:20 48:13
  49:4,11
secondary 30:15
section 40:11,20
see 27:20 34:11

35:12 40:7
43:2
seeking 4:24
semen 39:3
send 41:22
sense 16:11
  31:25
sentence 3:16
  4:4,7,9,13 7:18
  8:15,22 9:3,12
  11:18,19,20,23
  14:3,12 15:6,7
  15:11,15,17,18
  15:24 17:23
  21:18,21 22:1
  22:11 24:3,22
  24:25 30:10
  33:13 35:22
  36:17,18,23
  37:10,12 39:23
  40:2 44:7
  48:20 49:23
  50:2
sentenced 3:12
  3:15 5:16 6:12
  6:17 9:8 14:9
  14:11 15:3
  21:16 24:23
  30:3,17 49:7
  49:25
sentencers
  16:14
sentences 4:2
  6:18 9:6 12:4
  13:13,22 21:2
  21:14 24:6
  25:17,21 33:10
  33:11,14 47:10
sentencing 6:9
  14:8 16:6 37:2
  37:8,17
series 43:22
serious 3:19
serving 5:5
set 15:23,24
  21:1 31:7,8,15
  34:22 45:12

setting 20:7
seven 35:5
severe 32:12
sexual 3:12
  32:20 33:8,10
shielded 20:23
show 32:24
side 31:16
significance
  10:3
significant
  12:21
similarly 5:16
Simmons 9:2,3
  9:4
simply 4:21 7:23
  8:11 37:25
single 20:3
sir 26:21,22
  30:25
situation 42:20
  42:22
situations 37:1
  48:5
six 24:11 26:13
  26:14,17,19
small 25:16
smaller 25:16,18
  32:25
Smith 30:17,18
society 24:1
Solicitor 1:17
sorry 16:22
  28:16 29:1,2
  32:11,16 40:18
Sotomayor 4:15
  4:22 5:2,6 25:3
  27:15 32:17,23
  43:21 44:5
  46:6,16
sought 4:21
  46:12
sound 49:1
sounds 43:3
speaking 29:3
speaks 24:12
specific 11:22,25

speculate 24:22
sphere 23:14
spree 30:8
squarely 41:23
squishy 44:20
stage 38:24
stand 40:5 44:3
standards 42:22
  42:23 50:7,9
Stanford 21:4
state 4:12,20
  6:11 7:9,23,24
  8:3 9:16,18,22
  10:11,21,23
  11:3 12:11,23
  13:18,20,25
  17:19 20:3
  22:7 27:8,8,12
  37:21 38:8
  39:1 40:14,16
  40:19 42:9
  43:14 44:15
  45:2,14 46:7
  47:16,21 48:13
  48:24,25 49:20
stated 35:13
states 1:1,12
  9:25 14:8 15:7
  15:14,19,25
  16:12 18:9
  20:25 21:17
  22:8,10 24:16
  24:19 25:9,20
  26:12 27:16,18
  27:19 30:13,14
  50:1
State's 7:25 27:3
  27:7
stating 12:10
statistics 25:4
  27:3,4,6 32:24
status 19:12
statute 3:23
  11:25 40:2,9
  40:10,21 41:23
Stevenson 1:15
  2:3,8 3:5,6,8

3:18 4:1,11,18
5:2,12 6:1,7
7:5,17 8:2,11
9:4,20 10:13
11:16 12:2,18
12:22 13:17
14:19 15:9,12
15:20 16:9,22
17:9,20 18:19
19:9,17,24
20:9,16 21:13
22:2,22 23:8
24:2 25:7 26:2
26:4,7,10,13
26:15,21 27:6
27:17,23 36:18
45:25 46:2,4
47:2,19 48:4
48:15 49:3
50:12
street 29:14
strong 35:10
study 27:18
  28:23 29:9
subject 16:2
submit 45:5
submitted 50:13
  50:15
subsection 48:2
suggested 3:20
suggests 17:17
  22:18,20
Sullivan 1:3 3:4
  3:10 5:21 6:17
  8:17,22,25
  9:14 14:6
  17:22 19:3
  24:21 25:14
  31:24 36:3
  38:17 42:3,7
  42:10 48:17,19
summer 28:24
  29:10
Summers 4:12
  12:23
support 14:25
  20:9,11,22

22:4
supported 20:1
suppose 7:11
  31:4
supposed 34:4
Supreme 1:1,12
  9:24,25 13:6
  39:25 44:15
  45:11
Sure 35:16
suspect 28:7,8
swallow 36:13
  37:20
system 17:14
  28:14

—————
T
—————
T 2:1,1
take 16:24 31:4
  33:16 37:10
  38:6 49:4
taken 15:25 39:3
talked 13:21
talking 18:21
  23:4 26:16
  35:14 36:7
  37:9
Tallahassee
  1:17
teens 39:11
tell 36:3,15,15
  44:4
ten 21:21
terms 16:6 22:7
  22:9 25:17
  32:25
Thank 27:22
  45:22,23 46:4
  50:10,11
theory 8:5,5,5
thereabouts
  39:13
thing 5:3,9
  34:10 35:21,25
things 9:23 12:1
  16:15 35:17
think 5:4,23 6:7

8:10 13:7
14:21,21,24
15:12,13,20
17:10,21 18:2
18:13,19 19:18
20:1,12 21:19
22:3 23:21,22
24:2,5,16
27:13 31:1
32:6 33:1,24
34:17 35:16
37:8,25 39:11
39:13 40:23
41:4,4,6 43:5,7
44:11,13,16
45:10 46:10
47:12 48:8
49:16,22
thinking 35:8,8
Thompson
  20:14,17 23:9
thought 5:24 9:1
  9:1,2 17:16,17
  32:18 48:11
  49:11,12
three 9:23 10:3
  12:1 35:5
  39:19,20 40:11
threshold 7:22
throw 45:14
time 3:21 4:4,10
  4:14 6:3,17
  11:19,24 12:5
  13:5,23 14:9
  17:2 23:12
  24:15,18 27:21
  36:17 37:2,8
  37:13,14,17
  38:14 47:24
  50:10
time-barred
  49:9
today 43:9
told 33:1 36:4
traditions 21:3
treatment 24:12
treats 44:25

trial 4:5 5:18,20
  5:20 8:12
  10:25 11:6
  12:12 33:12
  36:9 37:25
  38:2,4,5,15
  39:4 40:24,25
  41:1,2,9 43:10
  47:23 49:14
tried 21:8
triggered 6:9
  8:19
true 11:5
trying 16:13
  21:1 35:12
  40:1 43:1
twice 32:14,18
two 3:11,14 4:1
  10:1 16:5
  17:11 25:13
  27:18 32:14,19
  32:20,21 35:17
  36:21 39:18,20
  39:24 45:7
  46:15
two-year 3:23
  11:25 38:12
  40:9,10,20
two-years 13:15
Tyler 41:12
type 15:10
typical 17:2

—————
U
—————
ultimately 3:12
  23:15
uncertain 14:5
  34:24
uncertainty
  14:6 34:8
unconstitutio...
  6:21 14:23
  15:11 49:24
undercount
  30:11
underlying 33:9
understand 15:8

17:9 23:7 29:4
29:19,19 31:2
43:12
unfair 5:6
unfathomable
32:8
unfortunate
35:25
unique 33:11
United 1:1,12
9:24
universe 25:15
26:16
unquestionably
49:24
unreliable 28:4
unusual 7:1 24:8
34:2 49:24
50:2
urge 8:9
use 12:17 31:18

V
---

v 1:5 3:4 4:12
6:14 10:7,9
12:23 13:20
21:4 24:17
44:15 46:7
49:19,19
vacate 37:12
vacating 13:13
vast 13:4
vastly 5:9
versus 41:9,13
view 28:3
violative 24:19
25:2
violence 32:10
32:11,12
violent 17:1
32:13
virtually 22:7
vulnerability
23:19
vulnerable
17:14 23:16

W

Wait 29:18
walk 33:17
want 8:20 14:4
33:24,25 35:6
38:1,7 39:14
47:20
Washington 1:8
wasn't 4:25
34:20,21 43:24
way 13:19,24
15:22 16:24
17:10 19:17
29:7,17 33:17
35:8 36:12
37:19 47:21
48:9 49:1
ways 17:21
32:21
went 29:13,15
we're 26:16
we've 26:24
whatsoever
36:10
white 27:20
win 43:14 46:18
46:19
winning 43:8,9
wins 43:4,4
woman 32:19,22
words 31:5 37:3
worked 17:12
17:19
world 16:15
worse 19:15,16
31:22,25
worst 18:16,17
18:18,18,22,22
19:7,7,7,8,16
19:16
worth 12:10
wouldn't 10:15
10:16,17 16:10
17:25 20:2
37:5
wrestle 23:12
wrong 7:4 33:19

40:9 44:5
wrote 18:3

X
---

x 1:2,7

Y
---

yeah 35:4,4
years 3:10,17
8:24 9:9,13
14:9,12,16,17
17:24 21:21
24:10,24,25
25:1 28:6 33:2
33:4 35:5
36:19 39:12,19
39:24 46:15
yellow 43:23
young 14:16
15:13,25 21:23
36:2
younger 17:2
20:11,21 21:8
23:10 25:8,10
25:15 26:16,17
35:19
youth 32:3
youthful 21:25

0

08-7621 1:5 3:4

1
---

10 33:2,4 35:4
41:9
11 35:4
11:01 1:13 3:2
11:51 50:14
111 26:7,8,8
12 35:6
13 3:10 9:14
15:25 16:1,17
20:10 21:15
22:6,11,12
24:3 25:10
49:6,25 50:4
13-year-old 19:2
21:12 24:9

31:23 33:4,5
34:9,18
14 20:1,5,8,10
21:3,7 22:25
25:4,7,15
26:17 35:6
39:25
15 3:11 22:15
23:10 36:19
15-year-old
22:14 24:11
150 28:20 31:12
16 20:15 21:2
22:13,18 35:4
39:11
16-year-old
31:22
17 3:11 21:3
22:19 23:11
35:4 39:13
17-year-old
22:15 24:10
18 3:17 20:12
23:11 25:9,20
26:5 28:11,19
31:10 42:2
1993 3:22 8:18

2
---

2 46:21
20 17:24 36:20
2007 3:22 38:16
38:21
2009 1:9
25 8:24 9:9,13
19:2
27 2:6 24:25

3
---

3 2:4
3.850 4:3 11:17
3.850(b)(2)
36:14 37:4,7
38:8 40:25
42:4 45:4
30-year-old 19:3
35 47:14

38 6:14 15:7
39(a) 4:16 5:1
39.a 46:19

4
---

40 14:9,12,16,17
24:24 25:1
44 21:17 50:1
46 2:9

5
---

5 16:18
56 38:10
57 38:10
58 38:10

6
---

6 16:18

7
---

73 25:7
77 26:10,11
28:21,22 31:13
31:19
775.082 14:11

8
---

89 39:12

9
---

9 1:9
90 39:12