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IN THE SUPREME COURT OF THE UNITED STATES

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EVAN MILLER, :

Petitioner : No. 10-9646

v. :

ALABAMA. :

- - - - - x

Washington, D.C.

Tuesday, March 20, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:25 a.m.

APPEARANCES:

BRYAN A. STEVENSON, ESQ., Montgomery, Alabama; for Petitioner.

JOHN C. NEIMAN, JR., ESQ., Solicitor General, Montgomery, Alabama; for Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	BRYAN A. STEVENSON, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JOHN C. NEIMAN, JR., ESQ.	
7	On behalf of the Respondent	28
8	REBUTTAL ARGUMENT OF	
9	BRYAN A. STEVENSON, ESQ.	
10	On behalf of the Petitioner	55
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(10:25 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-9646, Miller v. Alabama. Mr. Stevenson.

ORAL ARGUMENT OF BRYAN A. STEVENSON

ON BEHALF OF THE PETITIONER

MR. STEVENSON: Mr. Chief Justice, and may it please the Court:

In Graham v. Florida, this Court recognized that children are inherently characterized by internal attributes and external circumstances that preclude a finding of a degree of culpability that would make a sentence of life imprisonment without the possibility of parole constitutionally permissible under the Court's Eighth Amendment excessiveness analysis.

While the issue in Graham involved juveniles that were convicted of non-homicide offenses, these deficits in maturity and judgment and decision-making are not crime-specific. All children are encumbered with the same barriers that this Court has found to be constitutionally relevant before imposition of a sentence of life imprisonment without parole or the death penalty.

In fact, in Roper, this Court acknowledged

1 that these differences between children and adults exist
2 even in the cases involving the most aggravated murders.
3 These deficits, these differences, are even more
4 pronounced in young children.

5 JUSTICE GINSBURG: Mr. Stevenson, but in
6 Roper, the Court also made the point -- when it ruled
7 out the death penalty, it said, "To the extent the
8 juvenile death penalty might have residual deterrent
9 effect, it is worth noting that the punishment of life
10 imprisonment without the possibility of parole is itself
11 a severe sanction."

12 So, the Court in Roper seemed to be
13 anticipating this case and suggesting that -- that it
14 was all right, it was constitutional.

15 MR. STEVENSON: There's no question, Justice
16 Ginsburg, that the -- the default sentence in Roper was
17 life imprisonment without parole, but we actually think
18 that, specifically with regard to that provision, there
19 is no greater deterrent effect, and these deficits, that
20 these problems that children experience, lend themselves
21 to an analysis that is subject when the punishment is
22 life imprisonment without parole. Like the death
23 penalty --

24 JUSTICE SCALIA: What about 50 years? Is
25 that -- is that too much?

1 MR. STEVENSON: What the Court held in -- in
2 Graham --

3 JUSTICE SCALIA: Well, you know, once --
4 once you depart from the principle that we've enunciated
5 that death is different, why is life without parole
6 categorically different from 60 years or 70 years or --
7 you know, you'd be back here next term with a 60-year
8 sentence?

9 MR. STEVENSON: Justice Scalia, I think
10 you're absolutely right, that there is a point at which
11 a term-of-year sentence could constitute the same kind
12 of judgment --

13 JUSTICE SCALIA: Okay.

14 MR. STEVENSON: -- as life imprisonment
15 without parole.

16 JUSTICE SCALIA: Good.

17 MR. STEVENSON: But there is a distinction
18 obviously between life imprisonment without parole and
19 any other term sentence. Those sentences in most
20 instances, if the sentence is not too extreme, do permit
21 the possibility of release. And what this Court held in
22 Graham is not that the State forfeits the ability to
23 incarcerate for life --

24 JUSTICE SCALIA: I'll change my -- I'll
25 change my question to 50 years without possibility of

1 parole.

2 MR. STEVENSON: I - in --

3 JUSTICE SCALIA: Then you have no -- no
4 distinction, right?

5 MR. STEVENSON: Well, I think there, it
6 would be a tough case. I think imposed on a juvenile, a
7 50-year sentence --

8 JUSTICE SCALIA: Without --

9 MR. STEVENSON: -- would not create the
10 meaningful possibility of release that this Court
11 ordered in the Graham context. It would be right on the
12 line, but I think 50 years would actually be on the
13 other side of a meaningful possibility of release. It
14 would be sort of a cynical reaction, if this Court were
15 to say we ban life without parole for these kinds of
16 offenders, it would be somewhat problematic to suggest
17 that we're going to get as close to death as possible
18 and then facilitate some kind of review. I think what
19 we're interested in --

20 JUSTICE SCALIA: How about 15 years old?
21 15, 60 years; or 14, 70 years?

22 MR. STEVENSON: I think all of the --

23 JUSTICE SCALIA: What -- what's the
24 distinction between 14 and 15?

25 MR. STEVENSON: Well, I think from a

1 sentencing perspective, all of those sentences would be
2 problematic. But the distinction between a 14-year-old
3 and a 15-year-old for constitutional purposes is that,
4 of course, the younger you are, the more compelling are
5 these deficits, these distinctions, that --

6 JUSTICE SCALIA: I understand, but how are
7 we -- how are we to know where to draw those lines? We
8 can't do it on the basis of any historical tradition,
9 certainly.

10 MR. STEVENSON: Well, I think that --

11 JUSTICE SCALIA: The common law left it up
12 to the jury to take account of the youthfulness of the
13 offender.

14 MR. STEVENSON: Well -- well I think --

15 JUSTICE SCALIA: They're all entitled to
16 jury trial, right --

17 MR. STEVENSON: Yes.

18 JUSTICE SCALIA: -- before they're --

19 MR. STEVENSON: Well, that's true. But, of
20 course, in this case, Justice Scalia, and in the other
21 case, there was no discretion for the sentence. Neither
22 the judge nor the jury could give any effect to the age
23 of Evan Miller, who was 14. But I also think that we've
24 identified lots of laws that make these distinctions.
25 We do provide for greater responsibilities --

1 JUSTICE GINSBURG: Would that satisfy you if
2 the -- if it were not a mandatory term and it was left
3 to the trier, and you could put in all the mitigating
4 circumstances?

5 MR. STEVENSON: That would not satisfy me,
6 Justice Ginsburg, for all the reasons that this Court
7 acknowledged in Graham, that -- that the problem with
8 many of these crimes is that the offense itself can
9 overwhelm all of these mitigating factors, all of these
10 aspects of juvenile decision-making that we think are
11 constitutionally permissible. The other problem is that
12 we still can't make good judgments about whether a
13 child -- whether these characteristics are transitory or
14 permanent.

15 JUSTICE KENNEDY: So, you're saying it would
16 be unprincipled for us to say -- or at least unsupported
17 for us to say -- that the sentence cannot be mandatory,
18 but that in some cases, it might still be imposed.

19 MR. STEVENSON: I think it would be
20 principled to -- to kind of strike down mandatory
21 sentences, but I think constitutionally what this Court
22 has recognized in Roper and in Graham, that it would be
23 a -- a mistake to equate kids with adults. And we don't
24 have the ability to make those judgments even if we
25 create a different kind of process.

1 JUSTICE SCALIA: You mean we --

2 JUSTICE KENNEDY: If you take that off the
3 table, then you leave us with nothing but saying that
4 the sentence is never permitted or that it's always
5 permitted.

6 MR. STEVENSON: Well, I -- I don't mean to
7 take it off the table; I just mean to argue, as we did
8 previously, that a categorical ban would be consistent
9 with the Court's understanding about child status and
10 development.

11 JUSTICE ALITO: If you could write the
12 opinion for us, what would you hold?

13 MR. STEVENSON: I would hold that children
14 are categorically prohibited from being subjected to
15 sentences --

16 JUSTICE ALITO: What's -- what's the
17 definition of a child for that purpose?

18 MR. STEVENSON: Well, we presented data in
19 this case that would exclude a youth 14 and younger. No
20 State that has set a minimum age for life without parole
21 has set it beneath the age of 15, other than one. And
22 so, we -- we would make that holding. I do think it
23 would be --

24 JUSTICE ALITO: So, you -- you would hold
25 you can't -- there cannot be a sentence of life

1 imprisonment without parole for anyone under 15, but for
2 anybody over 15, it would be permissible.

3 MR. STEVENSON: No, I would also hold, Your
4 Honor, that a mandatory sentence for that cohort would
5 also be in violation of this Eighth Amendment principle.

6 JUSTICE GINSBURG: Or you could say you
7 reserve that question for another day.

8 MR. STEVENSON: Well, I think that the
9 problem, Justice Ginsburg, is -- is that these cases
10 with the mandatory sentencing aspects to them create
11 kind of a data issue that this Court has usually relied
12 on to kind of generate an interest.

13 I think right now we know that excluding
14 considerations of age and character in a sentencing
15 determination of life imprisonment without parole is
16 problematic. The Court in --

17 JUSTICE ALITO: Well, can you tell us where the
18 age line needs to be drawn for constitutional purposes?

19 MR. STEVENSON: I -- I would draw it at 18,
20 Justice Alito, because we've done that previously; we've
21 done that consistently.

22 JUSTICE ALITO: That's where you think the
23 logic of your argument leads.

24 MR. STEVENSON: That's exactly right.

25 JUSTICE ALITO: And you would say that a

1 17 -- a person of 17 years and 10 months, 11 months, who
2 commits the worst possible string of offenses still --
3 and demonstrates great maturity -- still cannot be
4 sentenced to life imprisonment without parole.

5 MR. STEVENSON: That's right, for the same
6 reasons that we made that determination in Graham and
7 that the Court made that determination in Roper. And I
8 understand that there are some tensions when we draw
9 those kinds of lines --

10 JUSTICE SOTOMAYOR: I'm sorry. I thought
11 you just said a second earlier that you had a bifurcated
12 rule: No life without parole whatsoever for 15 and
13 under, and no mandatory life for 16 -- 15 and over.

14 MR. STEVENSON: That -- that would be -- I'd
15 have two rules, Justice Sotomayor. My preferred rule
16 would be a categorical ban on all juveniles under the
17 age of 18. And I don't want to retreat from that in any
18 way. All of these deficits, all of these
19 characteristics, that we're talking about have been
20 recognized to apply to all youth up until the age of 18.

21 JUSTICE SOTOMAYOR: How do you -- how do you
22 write the opinion to do the bifurcated rule? What
23 justifies an absolute ban at a certain age and a
24 modified ban above an age, and how do you deal with
25 Harmelin with respect to the second part of your rule?

1 MR. STEVENSON: Yes.

2 JUSTICE SOTOMAYOR: Harmelin says we don't
3 look at individualized sentencing.

4 MR. STEVENSON: Yes.

5 JUSTICE SOTOMAYOR: So, how do we get rid of
6 the mandatory if that's what we're were going to do?

7 MR. STEVENSON: It's a challenge, and I --
8 and I concede that. But I -- and so, the first part of
9 my answer would be that I think the easier rule to write
10 would be that there is a categorical ban on all life
11 without parole sentences for all children up until the
12 age of 18, acknowledging --

13 JUSTICE SCALIA: How -- how do I come to
14 that decision? What do I -- just consult my own
15 preferences on this matter? Something like 39 States
16 allow it. I mean, the American people, you know, have
17 decided that that's the rule. They allow it. And the
18 Federal Government allows it.

19 So, I'm supposed to impose my -- my judgment
20 on -- on what seems to be a consensus of the American
21 people?

22 MR. STEVENSON: Well, at least in this case,
23 you'd look to your precedent in Roper and in Graham,
24 which drew that line.

25 JUSTICE SCALIA: Well, that's not going to

1 help me, you know.

2 MR. STEVENSON: Well, I understand --

3 (Laughter.)

4 MR. STEVENSON: I understand,

5 Justice Scalia, but I don't think you can draw much

6 comfort in the fact that 39 jurisdictions make this

7 theoretically possible. That same number existed in the

8 Graham context. Most of those jurisdictions have not

9 addressed a minimum age for life without parole.

10 In fact --

11 JUSTICE ALITO: What do you mean when you

12 say that, that they have not addressed it? If a State

13 law allows it, have they not addressed it?

14 MR. STEVENSON: Yes. That is, what the

15 State permits is that --

16 JUSTICE ALITO: So, legislators don't

17 understand that their law permits this?

18 MR. STEVENSON: I don't think we can read

19 into a transfer judgment, which is the only judgment

20 that they've made. They've said that some children of

21 some age can be treated like adults. They haven't

22 talked about what that -- what the punishment should be.

23 And the reason why I say that, Justice Alito, is that in

24 many of these States, there's no minimum age for trying

25 a child as an adult.

1 JUSTICE ALITO: But I don't really
2 understand this argument. You mean the legislatures
3 have enacted these laws, but they don't realize that,
4 under these laws, a -- a person under the age of 18 may
5 be sentenced to life imprisonment without parole for --
6 for murder. They don't understand that?

7 MR. STEVENSON: They -- they have not
8 considered that or adopted or endorsed it, would be more
9 accurate.

10 JUSTICE KENNEDY: That's difficult because
11 the statistics show there are 2300 prisoners now under
12 sentence of -- with life without parole for juvenile
13 murders and they're -- that were committed under 18;
14 2300 nationwide.

15 MR. STEVENSON: That -- that's correct.

16 JUSTICE KENNEDY: So, it's very difficult to
17 assess your answer to Justice Alito that, oh, the
18 legislatures don't know about this.

19 MR. STEVENSON: Well, in -- that answer --
20 that number, Your Honor, is partly rooted in the fact
21 that these sentences are mandatory. There is no one
22 capable, once the court makes a decision to try the
23 child as an adult, to do anything to consider the status
24 of children.

25 JUSTICE KAGAN: Mr. Stevenson --

1 JUSTICE ALITO: If you think these
2 legislators don't understand what their laws provide,
3 why don't you contact them? And when they -- when you
4 tell them, do you realize that in your State a -- a
5 16-year-old or a 17-year-old may be sentenced to life
6 imprisonment without parole for murder, they'll say:
7 Oh, my gosh, I never realized that; let's change the
8 law.

9 MR. STEVENSON: Well, I -- I mean, I don't
10 think there are any legislatures that are -- that are
11 quick to make their sentences less -- more
12 compassionate, more responsive to -- to juvenile crime
13 of any sort. But --

14 JUSTICE ALITO: So, they've made a decision
15 on this. Now, maybe it's a bad decision --

16 MR. STEVENSON: Yes.

17 JUSTICE ALITO: -- but I really don't
18 understand how you can argue that they have not made a
19 decision on this --

20 MR. STEVENSON: I think --

21 JUSTICE ALITO: -- and they are not aware of
22 what their law provides.

23 MR. STEVENSON: Yes. I think the strength
24 of my argument, Justice Alito, is that the States that
25 have actually considered, discussed, and passed laws

1 setting a minimum age for life without parole have all
2 set that minimum age above 15. That's my primary
3 argument. Thirteen States have done it; all of them
4 except for one have set it at 18 --

5 JUSTICE ALITO: And you think there's a
6 difference between the State that says expressly a
7 juvenile below a certain age may be sentenced to life
8 imprisonment without parole and a State that says that
9 if a person is convicted of capital murder, that
10 sentence may be imposed and, in another -- in another
11 provision, says that juveniles may be transferred for
12 prosecution as adults.

13 MR. STEVENSON: I --

14 JUSTICE ALITO: There's a difference between
15 those two?

16 MR. STEVENSON: There is. And that's
17 because the -- the transfer question, which is what
18 informs whether children can be subject to these
19 sentences or not, is a very different question. It's a
20 question about whether the juvenile system that may
21 mandate release at age 18 or age 21 is adequate for an
22 offender. It's not a judgment that that child should
23 therefore be subject to life imprisonment without
24 parole.

25 And so, you have this disconnect. You have

1 transfer judgments, which this Court recognized in
2 Thompson and in Graham were not proxies for sentencing
3 judgments. And because of that, it is a very different
4 calculation.

5 The second point is that if there is no
6 minimum age for trying children as adults or even
7 prosecuting children as adults, I think we'd have to
8 concede that there is an age at which a life without
9 parole sentence would be constitutionally impermissible
10 for any crime. And to the extent that the State hasn't
11 addressed that, which they clearly haven't -- you know,
12 in this cohort of 79 children with life without parole
13 for crimes at 14 and younger, more than half come from
14 States where there's no minimum age for trying children
15 as adults.

16 That means in that State, a 10-year-old
17 child would arguably have been contemplated by the
18 legislature to be an appropriate person for life without
19 parole, or an 8-year-old child and a 6-year-old child,
20 and I think that asks too much of these statutes.

21 JUSTICE SOTOMAYOR: Counsel, there is no
22 question that you're dealing with a much smaller
23 universe of children sentenced to life without parole
24 who are 14 and under. There's an argument that that's
25 because so few of them commit the crimes. But putting

1 that aside, the universe is rather small.

2 MR. STEVENSON: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: All right? There is a
4 much, much larger group, as Justice Kennedy pointed out,
5 for life without parole for juveniles at 15 and above.

6 MR. STEVENSON: Yes.

7 JUSTICE SOTOMAYOR: Go back to my question.

8 MR. STEVENSON: Yes. Yes.

9 JUSTICE SOTOMAYOR: I need an answer to it.

10 MR. STEVENSON: Yes.

11 JUSTICE SOTOMAYOR: Which is, assuming --

12 MR. STEVENSON: Yes.

13 JUSTICE SOTOMAYOR: -- the bifurcated theory
14 that you proffered, tell me how we get around Harmelin.
15 How would you write that decision?

16 MR. STEVENSON: Yes. Well, I think that,
17 first of all, what this Court has relied on when it has
18 looked at these numbers, what it has been trying to
19 figure out, are these objective indicia of society's
20 standards, its mores, its decency meter, if you will.
21 And we've looked at these numbers to inform us, are
22 these sentences that are -- that are consistent with
23 evolving standards of decency, or are they now beyond a
24 maturing society? And we've always found in these data
25 some measures.

1 In the death penalty context, we've looked
2 at that in the Roper area, in the Atkins area, and we've
3 been able to make some judgments. The reason why we
4 could do it in these death penalty cases is that, unlike
5 the cases here, the death penalty determination is
6 discretionary. The sentencer is required to consider
7 and evaluate a range of mitigating circumstances and
8 facts, including age, that help us assess whether the
9 determination that death is the appropriate punishment
10 means something in a society still trying to evolve.

11 Here that's not true. The majority of these
12 sentences are mandatory. So, the number tells us less
13 about what the Constitution requires if it --

14 JUSTICE KAGAN: Mr. Stevenson, do you have
15 statistics about how many of these sentences are imposed
16 on under 18-year-olds in non-mandatory States?

17 MR. STEVENSON: The -- the data on the
18 larger population is not as precise, Justice Kagan, as
19 it is with our younger population, but the majority of
20 States are mandatory States, and the estimates are about
21 that 85 percent of those sentences are mandatory
22 sentences. Certainly, the States that have the largest
23 populations -- Michigan, Pennsylvania -- these
24 States have mandatory regimes.

25 JUSTICE KAGAN: So, you think it would be

1 true, going up to age 18, that 80-plus percent are
2 imposed in States that have mandatory systems?

3 MR. STEVENSON: That -- that's correct.

4 And, in fact, the overwhelming majority of those
5 sentences come from a handful of States where there is
6 very little discretion to impose a sentence other than
7 life imprisonment without parole.

8 And because of that feature, I don't think,
9 Justice Sotomayor, that the -- that the reliance on the
10 number is quite as powerful here as it has been in the
11 death penalty context, where that number represented a
12 very communal judgment with a lot of factors.

13 JUSTICE SOTOMAYOR: There wasn't a majority
14 in theory in Harmelin, and -- but at least three
15 Justices spoke about a gross disproportionality.

16 MR. STEVENSON: Right.

17 JUSTICE SOTOMAYOR: Is it your views that
18 life -- a mandatory life without parole for someone like
19 a juvenile is grossly disproportionate?

20 MR. STEVENSON: It is, for the very reasons
21 that the Court articulates in both Roper and Graham.
22 We're not arguing that life without parole is
23 disproportionate to the crime of aggravated murder.
24 We're arguing that the status of children, with all of
25 the deficits that childhood status creates, makes that

1 kind of judgment cruel.

2 JUSTICE KENNEDY: If we can focus on the
3 mandatory aspect of the case, I think -- I know you'd
4 prefer a more general rule -- it may be that we have to
5 have your general rule. I'm not sure. If I'm the trial
6 judge, and I have to determine whether or not I'm going
7 to give life without parole, and it's discretionary,
8 what -- what do I look at? Are -- can I get social
9 scientists to come in and tell me what the chances of
10 rehabilitation are? Are there -- are there statistics?

11 Now, we have some quite compelling stories
12 of rehabilitation in this case. I don't know if they're
13 isolated; I don't know where they are in the statistical
14 universe of how often rehabilitation is -- is
15 demonstrated and is real. What do I look at? What's a
16 judge supposed to do?

17 MR. STEVENSON: Well, I think one of the
18 problems, Your Honor, with -- with trying to make these
19 judgments is that -- that even psychologists say that we
20 can't make good long-term judgments about the
21 rehabilitation and transitory character of these young
22 people. That's the reason why in Graham this Court
23 didn't permit that kind of discretion. We know that --

24 JUSTICE SCALIA: Well, I thought that modern
25 penology has abandoned that rehabilitation thing, and

1 they -- they no longer call prisons reformatories or
2 whatever, and punishment is the -- is the criterion now.
3 Deserved punishment for crime.

4 MR. STEVENSON: Well --

5 JUSTICE SCALIA: Now, if that's the
6 criterion, is everything that you say irrelevant?

7 MR. STEVENSON: I --

8 JUSTICE SCALIA: Let's assume I don't
9 believe in rehabilitation, as I think sentencing
10 authorities nowadays do not. Both at the Federal and
11 the State levels, it's been made clear.

12 MR. STEVENSON: Well, I -- I -- no. I think
13 it would still be relevant, Justice Scalia, but -- but I
14 also don't think that correctional facilities have
15 identified themselves as having no role to play in the
16 rehabilitative process. I mean, one of the problems
17 with this sentence of life imprisonment without parole
18 is that it actually bans and shields this population
19 from a whole range of services that are specifically
20 designed to rehabilitate: education services, treatment
21 services, anger management programs. All of these
22 programs exist within prisons, including the Federal
23 prisons, because we do care how people perform when they
24 are released. And so, corrections is still very much
25 the heart and soul of what we do.

1 But even if it wasn't, punishment
2 nonetheless has to be proportionate, and recognize that
3 it can be excessive. And what this Court has said is
4 that when you're looking at children, to equate the
5 failings of a child and an adult would be cruel. It
6 would be unfair to -- given our knowledge and
7 understanding of what developmental science has taught
8 us and what we know about kids.

9 JUSTICE KENNEDY: Well, again, it seems
10 you're just forcing us into a -- a bipolar position.
11 We're either going to say that you can't prevail at all
12 or that everyone under 18 is -- cannot get life without
13 parole. I don't see this middle course --

14 MR. STEVENSON: Yes.

15 JUSTICE KENNEDY: -- which you seem to have
16 abandoned, and you can't tell me how a judge would apply
17 it if we -- if we chose not to abandon it.

18 MR. STEVENSON: Well, I -- I don't intend to
19 abandon it, Justice Kennedy. I mean, obviously, I'm
20 arguing for this categorical ban, but I think the Court
21 could obviously do something else.

22 We think that there is a basis for
23 concluding, unquestionably, that a child under the age
24 of 15 should not be exposed to life without parole based
25 on this Court's precedents and on the data that's

1 presented. The Court could set a categorical line there
2 and, at the same time, make a determination that
3 subjecting any child under the age of 18 to life without
4 parole where there is no ability to consider age is
5 fundamentally at odds with what this Court has now
6 constitutionally recognized in both Roper and Graham.

7 JUSTICE GINSBURG: Mr. Stevenson, may I ask
8 you a case -- a question specifically about the Miller
9 case? There were two boys involved in this horrendous
10 crime. The older one took a plea and got life with
11 parole. Was the plea offered to Miller?

12 MR. STEVENSON: No plea was offered to
13 Miller. The -- what tends to happen, and there was some
14 evidence of this that was developed earlier, is that the
15 question was who was going to give a statement first,
16 who was the most cooperative, whose lawyer is most
17 effective at accomplishing that. There were some
18 complaints. There's a postconviction pending now that
19 makes some allegations about what the lawyer didn't do
20 to facilitate a plea. But, no, there was no offer of
21 life with parole made to Evan Miller.

22 And one of the difficulties, of course, in
23 these cases is that, you know, the younger you are, the
24 more vulnerable you are, the less experienced you are,
25 the less capable you are of managing these dynamics

1 in the criminal justice system that sometimes can be
2 very outcome-determinative.

3 CHIEF JUSTICE ROBERTS: Any idea how many
4 juveniles subject to a sentence of life without parole
5 do plead to a lesser sentence?

6 MR. STEVENSON: Well, no, it's very hard to
7 determine, mostly because States don't keep data --

8 CHIEF JUSTICE ROBERTS: Right.

9 MR. STEVENSON: -- on the issue.

10 CHIEF JUSTICE ROBERTS: Is there any reason,
11 just -- I realize it's speculation, but wouldn't you
12 think prosecutors would view that as a particularly
13 attractive offer to someone who's young in the sense
14 that they may regard the sentence as extraordinary
15 themselves, that it may be particularly attractive to
16 someone who's young in a way that it wouldn't be a
17 40-year-old, a -- an offer of 25 years may not be as
18 attractive as it is to a 15-year-old?

19 MR. STEVENSON: Well, they might. And I
20 would concede, Your Honor, that this population is kind
21 of less equipped to make determinations about whether to
22 take a plea or whether to not take a plea than an adult.

23 CHIEF JUSTICE ROBERTS: It might be also a
24 basis for -- to question the statistics you put forward
25 about how often --

1 MR. STEVENSON: Yes.

2 CHIEF JUSTICE ROBERTS: -- this sentence is
3 actually imposed. In other words, the evolving
4 standards of decency you suggest -- the prosecutors in
5 the State may not be immune to that evolution, either.

6 MR. STEVENSON: They may not be, Your Honor,
7 but we haven't found sort of -- at least in this
8 population, any evidence that they are capable of
9 protecting children who, we believe at least, should be
10 protected.

11 And one of the interesting things, at least
12 looking at this cohort of 79, a great number of them
13 have older codefendants. Both of the kids in the cases
14 before the Court today have older codefendants who got
15 sentences that were less than life without parole. In
16 the Kuntrell Jackson case --

17 CHIEF JUSTICE ROBERTS: Well, but those
18 statistics aren't very helpful because we have no idea
19 in the particular cases as to whether or not perhaps the
20 older offender was less -- less guilty than the 16-,
21 17-, 15-year-old.

22 MR. STEVENSON: That -- that's right.
23 Although in some of these cases actually, when you read
24 the opinions, you do see the evidence of the shooter not
25 getting the life without parole sentence and the

1 accomplice getting it. And I guess my point would be is
2 that --

3 JUSTICE SOTOMAYOR: Did that happen in
4 Jackson?

5 MR. STEVENSON: Yes, it did. Yes, it did.
6 And my point would be that it -- this younger population
7 is going to be disadvantaged in managing this aspect of
8 the process that I think is quite important when the
9 Court is trying to consider whether there should be a
10 categorical ban or something less than a categorical
11 ban.

12 And, Justice Kennedy, I don't mean to
13 suggest that the Court cannot, consistent with its
14 precedents, make a categorical ban under 17. But I also
15 don't mean to suggest that if the Court can't do that,
16 that there aren't ways of reconciling the precedents,
17 with drawing a line at 15 and striking down mandatory
18 life without parole. I would urge, for the reasons that
19 we've stated, that in these circumstances it's better to
20 have a sentence where you can make a judgment about
21 rehabilitation and public safety later in life.

22 We're not arguing that the State has to give
23 away the authority to incarcerate someone even for the
24 rest of their life -- life without parole, which is
25 available in this State, Alabama, would facilitate

1 that -- but create the meaningful possibility of release
2 that this Court has ordered to be constitutionally
3 necessary in *Graham v. Florida*.

4 I see my white light is on. I'll reserve
5 the rest of my time for rebuttal.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Mr. Stevenson.

8 Mr. Neiman.

9 ORAL ARGUMENT OF JOHN C. NEIMAN, JR.,
10 ON BEHALF OF THE RESPONDENT

11 MR. NEIMAN: Thank you, Mr. Chief Justice,
12 and may it please the Court:

13 Imposing life without parole sentences on
14 aggravated murder offenders like Evan Miller is in line
15 with the national consensus, is morally justified, and
16 is consistent with legitimate penological goals.

17 I'd like to touch on all three of those
18 points at some juncture today if I can, but I'd like to
19 start if I can with the conversation Mr. Stevenson was
20 having with a few of the Justices about the national
21 consensus issue in this case and more particularly what
22 we can infer about the judgment of legislatures and
23 ultimately the people, based on the statutes we have in
24 this case and the very different set of circumstances
25 we're looking at here than the circumstances the Court

1 was looking at in Graham.

2 Exhibit A on that front is the fact that out
3 of the 39 States or jurisdictions that allow this
4 sentence, as Mr. Stevens has indicated -- or Mr.
5 Stevenson has indicated, a good chunk of them, 27 in
6 all, make the sentence the minimum sentence under the
7 statute. That's an important fact both because it tells
8 us a little bit about the retributive goals that the
9 legislatures were trying to achieve through these
10 statutes, but it also --

11 JUSTICE KENNEDY: Life without parole is the
12 minimum?

13 MR. NEIMAN: Life without parole is the
14 minimum sentence for anyone who commits an aggravated
15 murder or at least certain kinds of aggravated murders
16 in 27 of those jurisdictions.

17 JUSTICE KENNEDY: That's also -- that's also
18 the maximum because there could be no death penalty.

19 MR. NEIMAN: For a juvenile, yes, Justice
20 Kennedy, that's correct. And effectively the message
21 that the legislatures are sending is that with respect
22 to aggravated murders, the worst of the worst kinds of
23 murders, there are effectively two sentences. There is
24 either the death penalty or there is some sort of
25 mitigating circumstance. The person is at least going

1 to serve life without parole in order to --

2 JUSTICE BREYER: Of the numbers, the 79 to
3 82 -- I guess there's some disagreement whether it's 82
4 or 79. Regardless, in your opinion, or maybe it's in
5 the briefs -- I just can't remember it -- of those, say,
6 79, how many are there for reasons of mandatory sentence
7 where they would not -- no one could consider the
8 individualized nature of the crime or the criminal?

9 MR. NEIMAN: We don't have precise
10 statistics, sir. I should say I --

11 JUSTICE BREYER: What's your estimate?

12 MR. NEIMAN: I can't vouch to the statistics
13 on that point.

14 JUSTICE BREYER: That's all right. What's
15 your estimate?

16 MR. NEIMAN: My answer is I don't know, in
17 terms of how many are mandatory and how many are not.
18 Mr. Stevenson --

19 JUSTICE BREYER: Well, how many come from
20 the States that have this mandatory system? That
21 shouldn't be too hard to find out.

22 MR. NEIMAN: Well, overall, Mr. Stevenson
23 cited about 8 who were sentenced pursuant to
24 non-mandatory schemes, of the 79 to 82.

25 JUSTICE BREYER: Non-mandatory. So --

1 MR. NEIMAN: Correct.

2 JUSTICE BREYER: So, you think it's
3 almost -- it's probably 90 percent.

4 MR. NEIMAN: According to Mr. Stevenson's
5 statistics, it's about 90 percent of the cohort that
6 comes from the mandatory jurisdiction.

7 JUSTICE BREYER: And that's -- all right.
8 Say it's about 70 or 71, and I remember reading a statistic
9 somewhere where they managed to count up the number of
10 possibilities, i.e., serious murders committed by those
11 under 15 over 50 years or some long number of years, and
12 it was somewhere in the 70,000s, was it? Or
13 20,000s? What was it?

14 MR. NEIMAN: Your Honor, the statistics I
15 have seen that Mr. Stevenson cited in his reply brief
16 had 7,500 --

17 JUSTICE BREYER: Seventy-five hundred?

18 MR. NEIMAN: -- as the number of arrests of
19 persons under the age of 15 for committing homicide or
20 non-negligent manslaughter.

21 JUSTICE BREYER: That sounds more -- that sounds
22 about reasonable.

23 MR. NEIMAN: But that --

24 JUSTICE BREYER: It's about 1 percent.

25 MR. NEIMAN: It --

26 JUSTICE BREYER: One percent. If I carry

1 that number around in my mind, that 1 percent of those
2 who might have obtained this terrible penalty, 1 percent
3 are actually given it?

4 MR. NEIMAN: Your Honor, as Graham
5 indicated, that denominator is crucial. But the 7500
6 number cannot be the appropriate denominator for
7 determining whether actual sentencing practices indicate
8 a national consensus against this practice. The reason
9 why is because that 7500 number is not the number of
10 convictions; it's not the number of opportunities that
11 judges have had to impose this sentence. It is the
12 number of arrests, and it's the number of arrests over
13 the course of 40 years in every jurisdiction, including
14 those that don't impose life without parole at all.

15 JUSTICE BREYER: I see. All right.

16 JUSTICE SOTOMAYOR: Counsel --

17 JUSTICE ALITO: It's not even for homicide
18 offenses that would qualify for life imprisonment
19 without parole for an adult. It's for any non-negligent
20 homicide; isn't that right?

21 MR. NEIMAN: That's correct, Justice Alito.
22 And the real denominator here, the one the Court ought
23 to look at when it considers the role that actual
24 sentencing practices play in the analysis, ought to be
25 the number of aggravated murder convictions.

1 JUSTICE BREYER: All right, but what is --

2 MR. NEIMAN: That's a number we don't have.

3 JUSTICE BREYER: -- the justification? You are
4 going to get to this, I guess -- so, I'll -- but I want to be
5 sure you do at some point. And I'm not certain it's a
6 -- it's a cruel and unusual punishment argument. It may
7 be more of a due process argument. But I want to know
8 the justification -- giving all those statistics that
9 you've seen and that was in Roper and so forth --
10 procedurally speaking, what is the justification for not
11 giving the defendant any opportunity to point to
12 mitigating features in his lack of development, in his
13 age, in his upbringing, et cetera? That to me is a
14 difficult question, but before we get to that topic, I
15 don't want to --.

16 JUSTICE SOTOMAYOR: Actually, I do want to
17 ask, and it dovetails with what Justice Breyer is
18 asking, the Enmund/Tison line for adults, which is we
19 can't execute someone who hasn't killed, intended to
20 kill, or was reckless in killing. This is a question
21 more in the Jackson case, because I think it's an issue
22 there. But although all murder is heinous and
23 regrettable, there are different kinds of murder.
24 That's why some people are subject to the death penalty
25 and others are not. And I do see a world of difference

1 between the Miller killing and the Jackson killing
2 vis-à-vis the individual defendants' personal liability.

3 So, assuming there are different kinds of --
4 of killings, of murder, should we be looking at the
5 Enmund/Tison line at all? Should we be talking about
6 its application to juveniles in a different way? Being
7 Enmund/Tison basically, okay, felony murder if you know
8 that there's a gun involved, but should that line be the
9 same for juveniles?

10 And, if so, then how do you go back to
11 justifying, as Justice Breyer spoke about, the mandatory
12 nature of life imprisonment without parole, given that
13 not every juvenile is equal and not every murder is
14 equal with respect to them?

15 MR. NEIMAN: Justice Sotomayor, the clearest
16 line the Court could draw on this front would be the
17 line that the Court initially set out in Graham as
18 between homicide and non-homicide offenses. Perhaps
19 there would be some question about whether an
20 Enmund-type felony murder counts as a homicide offense
21 or not, but my suggestion is that it would, at least if
22 the Court is looking for a clear line that wouldn't
23 undermine too much of what the Court set out in Graham
24 in terms of clearly distinguishing between homicide and
25 non-homicide offenders.

1 Nonetheless, I certainly agree that there
2 are fundamental differences between certain kinds of
3 murders, and I think that judgment is reflected in the
4 legislation we have in at least 27 of these States,
5 where aggravated murder in the very -- in the very least
6 carries with it a life without parole sentence for any
7 defendant regardless of the mitigating circumstances or
8 the like.

9 JUSTICE SOTOMAYOR: But that's not an
10 individual legislative determination. That's -- that's
11 just a --

12 MR. NEIMAN: It is a legislative
13 determination that aggravated murder as a class of
14 offenses is so contrary to society's values and so
15 contrary to the dignity that we assume that every victim
16 ought to be afforded, that life without parole is the
17 appropriate sentence.

18 So, I think there is a -- there is an
19 inference to be made there about the legislative
20 judgment, particularly because the sentence is a minimum
21 one. The three-Justice concurrence you mentioned,
22 Justice Sotomayor, from Harmelin makes this point --
23 point quite vividly.

24 In *Solem v. Helm*, the Court had struck down
25 a sentence under the gross disproportionality analysis,

1 and the Harmelin concurrence indicated that the Court
2 was a little more comfortable doing that, because the
3 sentence in that case was above the minimum and, thus,
4 did not reflect the judgment of the legislature.

5 But when we're talking about the minimum
6 sentence, it's fair to infer that that's the sentence
7 that the legislature thought as a class, in terms of a
8 class of offenses, that would be the minimum appropriate
9 sentence for that particular crime. Now,
10 Justice Breyer --

11 CHIEF JUSTICE ROBERTS: Counsel, when you -
12 it's a little confusing to me, but when you refer to
13 "minimum," I assume that was because of the statutes prior
14 to Graham had death as one of the other options, that that
15 is no longer an option. So, it's -- it's a little
16 awkward to refer to it as minimum when it's also the
17 maximum.

18 MR. NEIMAN: That's correct,
19 Mr. Chief Justice.

20 CHIEF JUSTICE ROBERTS: When you have --
21 when an individual is prosecuted for an aggravated
22 murder that carries this sentence, is it typical to also
23 charge lesser included offenses?

24 MR. NEIMAN: Yes, Mr. Chief Justice, and --

25 CHIEF JUSTICE ROBERTS: And -- and in

1 general, what is the distinction between exposure to
2 the -- the maximum crime and a lesser included crime?
3 In other words, what is the difference between
4 aggravated murder and manslaughter? It typically turns
5 on the state of mind, doesn't it?

6 MR. NEIMAN: That's correct,
7 Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: So, is there any
9 reason to think that juries in a case where they have
10 the option for lesser included offenses might be
11 concerned in light of the age of the defendant about
12 whether or not the requisite intent was formed?

13 It seems to me that some of the issues that
14 we've suggested justify a different treatment of
15 juveniles have to do with mental development, and those
16 same issues would be taken into account by a jury in
17 considering which of a list of offenses the juvenile
18 should be convicted of.

19 MR. NEIMAN: Mr. Chief Justice, it's
20 certainly within the realm of reason and possibility
21 for --

22 JUSTICE GINSBURG: Was it -- was it a factor
23 in Miller's case? Was there a lesser -- lesser offense
24 that was charged?

25 MR. NEIMAN: Yes, Justice Ginsburg, there

1 were lesser included charges of at least felony murder,
2 which has a very different intent type element to it.
3 But Miller, at least with respect to the charge on the
4 capital murder committed in the course of arson, which
5 is an intentional murder, was found guilty by the jury
6 on that charge.

7 JUSTICE GINSBURG: He was -- the -- there
8 was also a felony murder charge in the Miller case?

9 MR. NEIMAN: Yes, Justice Ginsburg, there
10 were two felony murder charges, one as to the robbery in
11 the case and one as to the arson in the case.

12 JUSTICE SCALIA: So -- so, it may not be
13 realistic to speak of mandatory life without parole.
14 It's only mandatory if the youth is convicted of the
15 highest charge brought, but it remains within the power
16 of the jury, in light of the youth, to convict him of a
17 -- of a lesser offense which would not produce mandatory
18 life imprisonment without parole.

19 MR. NEIMAN: I suppose that's so,
20 Justice Scalia.

21 JUSTICE KAGAN: But, Mr. Neiman --

22 JUSTICE KENNEDY: Are juries instructed that
23 life without parole is a necessary consequence of their
24 decision? I suppose a defense attorney could argue it.

25 MR. NEIMAN: Justice Kennedy, actually, I

1 think you are right to the extent you're suggesting that
2 juries probably don't -- aren't actually instructed on
3 that point. And, in fact, it would probably be
4 reversible error, I suppose --

5 JUSTICE KENNEDY: I would think so.

6 MR. NEIMAN: -- for a jury to be instructed
7 on that point. Nonetheless, the judgment that
8 legislatures have reached in terms of setting life
9 without parole as the floor for any murderer
10 is one that was -- that's reasonable and justified
11 and --

12 JUSTICE KAGAN: Mr. Neiman, I am wondering if we
13 can go back to the issue that Justice Breyer left on the
14 table, and this doesn't have much to do with how many
15 States do what, but instead just to say that in the
16 death penalty context, we've insisted on individualized
17 sentencing. And in Graham, of course, we equated
18 juveniles who were sentenced to life without parole to
19 people who -- to adults who were sentenced to death and
20 said that those two should be treated equivalently.

21 And I'm wondering whether that doesn't
22 suggest that the rules we have in the death penalty
23 context about individualized sentencing ought to apply
24 to juveniles who are sentenced to life without parole?

25 MR. NEIMAN: Justice Kagan --

1 JUSTICE KAGAN: Regardless of, like, how
2 many States do what and how many times this happened,
3 but just, you know, two facts: We've insisted on this
4 in the death penalty context, and we've equated the
5 death penalty context to juveniles without life --
6 parole in Graham.

7 MR. NEIMAN: Justice Kagan, the answer on
8 that front, I think, is that Harmelin effectively sets a
9 bright line here such that individualized sentencing is
10 only required in a -- in a death penalty case. And it
11 does so --

12 JUSTICE KAGAN: Yes, but of course Harmelin is
13 pre-Graham, and in Graham we equated these two things,
14 adults sentenced to death and juveniles sentenced to
15 life without parole.

16 MR. NEIMAN: Well, the reason why Harmelin
17 drew that line and, I guess more to the point, the
18 reason why *Woodson v. North Carolina* and *Lockett v. Ohio*
19 held that individualized sentencing was required in the
20 death penalty context was not because the sentence
21 happened to be the highest sentence that someone could
22 receive, but because the sentence was death. And there
23 were certain --

24 JUSTICE ALITO: In Graham, didn't the Court
25 reject the idea of individualized sentencing in which

1 youth would be taken into account on a case-by-case
2 basis?

3 MR. NEIMAN: That's correct, Justice Alito.
4 The States were here jumping up and down asking for that
5 precise result, and we did not get it. And the reason
6 why, the result the Court thought was appropriate was
7 rather than allowing the defendant to argue for
8 mitigating circumstances and for the State to respond
9 with aggravating circumstances in one of these cases,
10 the answer was for the juvenile to get a mitigation
11 trump card.

12 And in one of these sentencing proceedings,
13 the juvenile would be able to say: I'm a juvenile, and
14 that means that I don't get the highest sentence I
15 otherwise would get. I win the sentencing phase as --
16 as a matter of law.

17 JUSTICE KAGAN: But the fact that we've said
18 that individualized sentencing was not enough in one
19 context does not suggest that individualized sentencing
20 ought not to be the rule in a different context where
21 there is no categorical bar.

22 MR. NEIMAN: Justice Kagan, the response on
23 that front, I think, is that the rule from Woodson and
24 Lockett requiring individualized sentencing was one
25 that's specifically tailored to the unique aspects of

1 the death penalty, aspects that remain unique,
2 notwithstanding Graham and the rule it imposed with
3 respect to juveniles.

4 But also Woodson and Lockett -- although I
5 realize that the premise of your question is that we
6 should not look at what other States are doing, the
7 premise of Woodson and Lockett was that States had
8 widely rejected mandatory death penalty sentencing, and
9 we know from the legislative record here that States
10 have done quite the contrary when it comes to mandatory
11 life without parole sentencing --

12 JUSTICE BREYER: So, is that -- I have -- I
13 understand their arguments, both sides. I think I've
14 pretty much got the arguments on the question of the
15 individualized sentencing. You can make an argument
16 that it should be individualized, life without parole,
17 up to age 18; say 7 through 17. And there's an argument
18 the other way which you're making. Okay.

19 What I want to know is your argument the
20 opposite way on this one. What's the minimum age, in
21 your opinion, or is there any constitutional minimum at
22 all in respect to which you could give for a murder a
23 child life without parole? I mean, you could have an
24 instance of a 10-year-old or an 8-year-old. I mean, is
25 it totally up to the States, or is there a minimum? And

1 if there is a minimum, what is it in your opinion?

2 MR. NEIMAN: Yes, Justice Breyer, I think
3 there is a minimum now.

4 JUSTICE BREYER: What is it?

5 MR. NEIMAN: It -- I would be hesitant to
6 commit to a minimum without --

7 JUSTICE BREYER: Well, do your best.

8 MR. NEIMAN: -- without further factual
9 development.

10 JUSTICE BREYER: Do your best.

11 MR. NEIMAN: It would --

12 JUSTICE BREYER: Do you want to say 12?

13 MR. NEIMAN: It would depend --

14 JUSTICE BREYER: Do you want to say 10? Do
15 you want to say 9? Because as soon as whatever you say,
16 I'm going to say: And why not 14?

17 MR. NEIMAN: Okay. Well, I --

18 (Laughter.)

19 MR. NEIMAN: I will say -- I would argue if
20 I were the State up here trying to defend a
21 12-year-old's sentence, I would argue that that was the
22 line. So, a 12 -- well, no -- well, yes. Someone who's
23 either --

24 JUSTICE BREYER: Do you see the difficulty?

25 All right. So, now put yourself in my position, because

1 my --

2 JUSTICE SCALIA: Gee-whiz. You know, I was
3 beginning to agree with you --

4 (Laughter.)

5 JUSTICE SCALIA: -- about this case, because
6 I thought you were appealing to what the American people
7 think about the line or maybe to the common law. Now,
8 the common law had a rule of -- of the age of reason. I
9 think below 12, you couldn't -- at least you couldn't
10 impose the death penalty. Maybe you couldn't even
11 convict for a felony. But you just pluck some number
12 out of the air.

13 MR. NEIMAN: No -- no --

14 JUSTICE SCALIA: Why can't I pluck a number
15 out of the air if you pluck one out of the air?

16 MR. NEIMAN: Justice Scalia, I was about to
17 give Justice Breyer the arguments that I would make if I
18 were the State in those circumstances about why that's
19 the line. Reason number one is national consensus.

20 JUSTICE ALITO: If we look to objective
21 indicia, as all of the cases in this line have, what is
22 the lowest age as to which you can say there is any
23 indication of a societal consensus that this is okay?
24 Wouldn't it be 14?

25 MR. NEIMAN: Well --

1 JUSTICE ALITO: How many States allow it for
2 a 13-year-old or a 12-year-old?

3 MR. NEIMAN: The number of States that allow
4 it for a 12-year-old are somewhere around -- well, I
5 suppose that number is close to 10 or so.

6 JUSTICE GINSBURG: Is --

7 MR. NEIMAN: So, that's one reason why I
8 would draw the line around 12 or so. If you look at,
9 for example, the table --

10 JUSTICE ALITO: So that 10 States will allow
11 it for a 12-year-old. How many would allow it for a
12 13-year-old? Do you happen to know?

13 MR. NEIMAN: At that point, we're getting up
14 to much more substantial numbers. I guess when we get
15 up to 14, we're up to somewhere in the realm of 30 or more.

16 JUSTICE GINSBURG: Is it taken into account
17 when the -- the child is in the juvenile system
18 initially, has to be moved to the adult system. Is the
19 judgment -- is there any cutoff on the transfer? Or can
20 a child be transferred to the adult system at any age?

21 MR. NEIMAN: Well, that I think is the
22 appropriate line in terms of thinking about what the
23 minimum is here. The answer depends on the
24 jurisdiction. In Alabama, 14 is the minimum. But that
25 number is, compared to a lot of other jurisdictions, a

1 little high. There --

2 JUSTICE GINSBURG: So, if you're -- if
3 you're under 14, you can't be transferred out of the
4 juvenile system?

5 MR. NEIMAN: That's correct. In Alabama, if
6 you're under 14, you can't be transferred out. Now,
7 many other States, at age 13, you can be transferred
8 in -- or you can be transferred into the adult system,
9 which is why there are few 13-year-olds serving this
10 sentence. But --

11 JUSTICE GINSBURG: So, if he were only 13,
12 he would get out when? When he was 21?

13 MR. NEIMAN: In Alabama, the juvenile
14 justice system's jurisdiction terminates at 21, yes.

15 JUSTICE BREYER: That's why he's arguing
16 that the legislatures don't focus on it. If you do a
17 public opinion poll, or just ask me, for example, or ask
18 anyone, you say the question is: Should -- at what age
19 should juveniles be able to be transferred out of the
20 juvenile system into the adult system?

21 You might get one answer. Maybe 14, maybe
22 15, maybe 12.

23 But if you put the question, at what age
24 should they be receiving a mandatory life without
25 parole, the answer might be different. And his point is

1 they never ask that question. They ask the first
2 question, not the second. And that disturbs me enough
3 to think that I can't think the answer to this question
4 that I asked you just relies on public opinion polls or
5 even just the number of States. I'm not sure about it.

6 But that's why I want to hear your response,
7 because it sounds like we're arguing between whether it
8 should be 13, 12, or 14, in terms of an absolute cutoff.
9 So, how do I approach that? I'm asking you for help on
10 that one. I know you have a side in this. But I say,
11 well, we're talking about 14, and we have all this
12 scientific literature and so forth.

13 MR. NEIMAN: Justice Breyer, the reason why
14 it's fair to infer that legislatures would have
15 concluded that a 14-year-old, for example, in Alabama
16 would be subject to a mandatory life without parole
17 sentence is precisely because it's mandatory. Surely,
18 the legislatures understood that when they were
19 transferring persons who committed crimes like
20 aggravated murder that were well within the heartland of
21 the crimes for which the transfer statutes were
22 intended, those offenders would be subject to the
23 minimum sentences at least.

24 It's quite another thing to say, well, the
25 legislature might have enacted a statute providing for

1 transfer for a 14-year-old; and for a non-homicide
2 crime, they might have assumed that the person would get
3 less than the maximum in terms of life without parole.
4 But, surely, the legislators understood that those
5 offenders would at least get the minimum.

6 And the reason why the line is more safely
7 drawn at 13 or 12, it's because if you look at, for
8 example, the tables from the Department of Justice
9 reports that both sides and the amici have cited listing
10 the transfer ages, by and large, the number seems to cut
11 off at 12 or so. And 12 would be on the very bottom end
12 of the range; and if I were a defense attorney, I'd be
13 arguing much harder for a line at 13 than 12. I imagine
14 if I were a defense attorney, I'd be arguing for an even
15 higher line than that.

16 But the point is that if we're going to
17 judge this in terms of objective indicia of what society
18 has decided, that seems to be the line that society has
19 drawn. That line is --

20 JUSTICE KENNEDY: In the -- in the
21 Petitioner's briefs, the idea of deterrence kind of
22 drops by the way side. Have there been any studies that
23 show that there is a deterrence value? I remember in
24 Roper, there was actually discussion among the young
25 people before they committed the crime as to whether or

1 not they could get the penalty. It was actually right
2 there in the record. Does the State rely on the
3 deterrence component of the punishment here?

4 MR. NEIMAN: Justice Kennedy, we think that
5 deterrence is in the mix, but it's certainly not the
6 primary goal that these statutes serve when --

7 JUSTICE KENNEDY: Is it retribution?

8 MR. NEIMAN: Retribution, Justice Kennedy,
9 would be the primary goal, bringing society's
10 retributive force to bear on those who commit the worst
11 sort of crimes.

12 JUSTICE KENNEDY: Retribution, of course, is
13 related to personal culpability. We said that in Tison,
14 and that loops back into the minor problem.

15 MR. NEIMAN: That's exactly right,
16 Justice Kennedy, but I think one point on which Mr.
17 Miller and the State fundamentally disagree here is what
18 we can conclude about a juvenile's culpability when the
19 juvenile has committed aggravated murder. The reason
20 why Graham came out as it did, the reason why life
21 without parole was not permissible, was because Graham
22 himself had not committed murder. The Court there said
23 that meant that Graham's culpability was twice
24 diminished, once because he was a juvenile and once
25 because he had not committed murder.

1 Well, here we have the hypothetical from
2 Graham where the one level of diminishment is gone. And
3 Miller has -- Miller is entitled to a one-level
4 diminishment because of his juvenile status, but he's
5 not entitled to that second level of diminishment, which
6 he is what he's seeking here.

7 JUSTICE KENNEDY: Are you aware of any
8 statistics that give us some quantitative sense as to
9 how many juveniles after years and years of prison show
10 significant rehabilitation? Do we know anything about
11 that?

12 MR. NEIMAN: Justice Kennedy, I know of no
13 statistics on that particular front. I imagine that
14 some vignettes could be told about success stories and
15 some vignettes could be told about stories that were not
16 success stories and --

17 JUSTICE SCALIA: Do you have any reason to
18 think that juveniles are any better than anyone else as
19 far as learning from prison is concerned? I mean,
20 recidivism is a big problem, isn't it? People who've
21 been to prison go out and commit the same crimes again,
22 don't they?

23 MR. NEIMAN: That's exactly right,
24 Justice --

25 JUSTICE SCALIA: Is there any reason to

1 think that juveniles are any different?

2 MR. NEIMAN: Justice Scalia, I haven't seen
3 any studies that would suggest that juveniles do better,
4 particularly when they're subjected to the sorts of
5 crimes that I think everyone would have -- or the sorts
6 of offenses, let me say, that I think everyone would
7 agree the Constitution would have to permit a sentence
8 of, say, 40 years minimum or the like.

9 So, I just don't think -- I think society --
10 society's primary goal here or the government's primary
11 goal here is expressing the retributive judgment about
12 the wrongfulness of murder and why it's different from,
13 not homicide, but I think governments are quite
14 legitimate and quite reasonable when they also say that
15 they don't want to roll the dice on convicted murderers.
16 Society acts with particular revulsion when a convicted
17 murderer commits a crime again.

18 And even if -- and even if that difference
19 in terms of recidivism is no different, or even if the
20 possibility for recidivism is no different, the fact
21 that the person committed a murder once and might commit
22 a murder again is reason enough for legislatures to be
23 hesitant to allow for parole in these circumstances.

24 With respect to the penological purposes,
25 there's also an important purpose here with respect to

1 the unique factors and the unique circumstances that
2 murder victims and their families face.

3 I think a lot of people hear about
4 life-without-parole sentences, and if they oppose them
5 on political grounds or policy-based grounds, one of
6 their sort of pragmatic responses is, well, what's the
7 cost to all this? Why not just let these guys get their
8 parole hearings, give them that hope, and likely they
9 won't get parole anyway?

10 And there's really no cost to society at
11 least in allowing that process to occur, but the cost is
12 to the victims and their families who have to endure
13 what are often very painful hearings and parole
14 hearings. And when those come up on a frequent basis,
15 that sort of re-traumatization process is something that
16 governments can legitimately take into account when they
17 decide that for aggravated murder -- and not for other
18 crimes but for aggravated murder -- a
19 life-without-parole sentence is an appropriate sentence.

20 On the moral culpability point, there would
21 be some anomalies created by the rule that Miller is
22 seeking here. Miller's asking the Court to effectively
23 hold him in the same place in terms of his moral
24 culpability as the defendant in Graham. In other words,
25 Graham can only get life with -- life with parole

1 because of his reduced moral culpability. And Miller is
2 saying he should only get life without parole because of
3 his reduced culpability.

4 So, that would mean one of two things:
5 Either the Eighth Amendment would put a murderer on the
6 same moral level as someone who committed a non-homicide
7 crime as in Graham, or Graham himself would be back in
8 this Court or a court of another jurisdiction arguing
9 that because Graham held that Graham himself had
10 categorically less culpability than someone like Miller,
11 then Graham himself is entitled to a lesser punishment
12 than the one that Miller, in fact, received.

13 JUSTICE KAGAN: When you look -- Mr. Neiman,
14 if you look at those two cases and you look at the
15 individuals, the child's actions in the two cases, they
16 really are remarkably similar. They're sort of a piece.
17 Don't you agree? I mean, how -- how is it that the
18 child's actions in this case were any different from
19 that in Graham?

20 MR. NEIMAN: Justice Kagan, I think that
21 Miller's actions were dramatically different from
22 Graham's actions, in part because Miller intended to
23 kill this victim and killed the victim in a rather
24 gruesome way. So, there's not an element of luck here
25 in terms of the fact that, oh, well, Graham was simply

1 lucky that he didn't commit --

2 JUSTICE GINSBURG: That's in -- in the
3 Jackson case. In the Jackson case, the crime was very
4 similar to --

5 JUSTICE KAGAN: I'm sorry. Justice Ginsburg
6 is, of course, right.

7 MR. NEIMAN: Well, I defer to my colleague
8 from Arkansas in terms of the distinctions between
9 Jackson and Graham, but certainly with respect to
10 Miller's crime, his moral culpability is greater, and
11 the law should recognize that.

12 JUSTICE KENNEDY: If the judge were to
13 determine under a rule that the sentence can't be
14 mandatory whether or not life should be imposed, what
15 would be the sorts of factors that he would look at, or
16 do you think those are just too ineffable, too imprecise
17 to be considered?

18 MR. NEIMAN: Well, Justice Kennedy, I think
19 it certainly would be possible to have a regime under
20 which a judge considered mitigating circumstances in a
21 case like this. Many jurisdictions have reasonably
22 opted for that route rather than the one that Alabama
23 and 26 other jurisdictions have, and --

24 JUSTICE KENNEDY: They're the standard sorts
25 of mitigating circumstances that we see in capital

1 cases, you think?

2 MR. NEIMAN: Absolutely. I think that's
3 exactly what would happen. You would have arguments
4 about certain murders being worse than others. And Mr.
5 Miller would have an opportunity to argue about other
6 mitigating circumstances relating to his background and
7 the like, as he's argued in his reply brief here.

8 But at the same time, it's reasonable for
9 legislatures to conclude that they're going to draw a
10 line in the sand with respect to aggravated murder, such
11 that -- as a floor in terms of the appropriate
12 punishment, the defendant is going to get at the very
13 least life without parole, a punishment that's no doubt
14 severe but one that is less severe than the impact that
15 the crime has had on society.

16 And for those reasons, we'd ask the Court to
17 affirm.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Neiman.

20 Mr. Stevenson, you have 4 minutes remaining.

21 REBUTTAL ARGUMENT OF BRYAN A. STEVENSON

22 ON BEHALF OF THE PETITIONER

23 MR. STEVENSON: Thank you,
24 Mr. Chief Justice.

25 I just want to make clear that the rule we

1 seek would not require States to impose the same
2 sentence on juveniles convicted of homicides from
3 juveniles convicted of non-homicides. The States would
4 be free to do that if they chose to, but they could
5 certainly create a regime where it's life with parole
6 where there are different ages for eligibility. In
7 fact, the State of Nevada makes you eligible for parole
8 after 15 years if the crime is a non-homicide, 20 years
9 if it's a homicide.

10 The States would still have a great deal of
11 flexibility to create, consistent with this Court's
12 rule, a regime that makes these distinctions.

13 Justice Kennedy, I did want to point --
14 direct your attention to two amicus briefs that I think
15 respond to two of the questions you've raised. There is
16 an amicus brief submitted by criminologists in this
17 case, and it looks specifically at the question of
18 deterrence. And what they've found is life without
19 parole has not had any measurable deterrent effect. The
20 States that don't put juveniles -- don't subject
21 children to life without parole have actually
22 experienced the same level of decrease in violent crime
23 and homicide as the States that do. And, in fact, in
24 some of those jurisdictions, the decrease is even more
25 significant.

1 I also want to address your question,
2 Justice Scalia. There is -- there are some studies that
3 have established that juveniles are more likely or less
4 likely to recidivate after an intervention than adults.
5 Generally speaking, homicide offenders are categorically
6 less likely to recidivate than many non-homicide
7 offenders. Drug offenders and property crime offenders
8 are much more likely to recidivate than -- than homicide
9 offenders.

10 And so, there's a lot to support that a
11 judgment rooted in these penological concerns would be
12 well-supported here.

13 I also want to return, Justice Breyer, to
14 your question. Mr. Neiman has -- argued that we can
15 read into these statutes a commitment to imposing life
16 without parole at a particular age, and that age is the
17 age of transfer. I just want to highlight that the two
18 States with the largest populations of juveniles serving
19 life without parole by a huge margin are Pennsylvania
20 and Michigan, neither of which has a minimum age.

21 That means in those States, a child of any
22 age can be subject to a mandatory sentence of life
23 without parole. It's simply not true -- true that we
24 can read into those statutes in those jurisdictions any
25 kind of conscious commitment to thinking about age.

1 The other point I want to make --

2 JUSTICE ALITO: Do you think the legislators
3 in Pennsylvania and Michigan don't understand what their
4 laws provide?

5 MR. STEVENSON: I -- I think that they
6 haven't thought about it. Yes, I do think that. I
7 mean, for example -- this goes to the next point I was
8 about to make -- my colleague keeps talking about
9 aggravated murder. In the State of Pennsylvania, it's
10 not just aggravated murder that subjects you to a
11 mandatory life without parole; if you're convicted of
12 second-degree murder -- no intent -- diminished -- it's
13 still mandatory life without parole.

14 We have 14-year-old children -- and, again,
15 that's the largest cohort in our group -- in the State
16 of Pennsylvania convicted of clearly unintentional
17 killings that have been subject to mandatory life
18 without parole.

19 South Dakota does the same thing. I think,
20 where there is no minimum age and where you have that
21 kind of regime, I cannot -- I don't think we can
22 conclude that they've thought about, yes, it's
23 appropriate.

24 CHIEF JUSTICE ROBERTS: What if they -- what
25 if they do? I mean, what if, after our decision or even

1 after the argument, States go back and say, look, the
2 decision is based on the fact that they don't think we
3 know our law, that we haven't thought about it; so,
4 let's have a hearing about it, and then we vote that,
5 yes, there should be or, no, there should not be a
6 minimum age; we think at 16 -- whatever age they do.

7 Then does the constitutional rule change?

8 MR. STEVENSON: Yes. I --

9 CHIEF JUSTICE ROBERTS: Once we get 30
10 States saying, look, we've thought about it and this is
11 our answer, then whether the Eighth Amendment prohibits
12 it or not changes?

13 MR. STEVENSON: No, I -- I don't think it
14 changes, because there is an age at which this Court is
15 obligated under the Eighth Amendment to say a sentence
16 of this sort, a permanent judgment that life-long
17 incarceration is -- is required --

18 CHIEF JUSTICE ROBERTS: Right. But one of
19 the things we take into account is societal consensus,
20 and you say we should ignore the 30 -- whatever it is --
21 States that allow this because they didn't really think
22 about it.

23 MR. STEVENSON: Well --

24 CHIEF JUSTICE ROBERTS: So, I'm
25 postulating --

1 MR. STEVENSON: Sure.

2 CHIEF JUSTICE ROBERTS: -- let's make --
3 let's see if they have thought about it.

4 MR. STEVENSON: Yes.

5 Well, in -- in that regard, Justice -
6 Mr. Chief Justice, I think that we do have 13
7 States that have thought about it, that have expressly
8 looked at this question of what the minimum age should
9 be. And in 12 of those 13 States that have set the age
10 above 14, most of those States have set the age at 18.
11 So, if that's the Court's lens, then I think that would
12 support the kind of rule that we're seeking here --

13 JUSTICE SCALIA: What if, instead of
14 striking down the laws in these States, why don't we
15 just require the State legislatures to think about it?
16 All right? And -- and then see how many think about it,
17 and -- and come up with, you know, something that agrees
18 with you or doesn't agree with you.

19 MR. STEVENSON: Well, I think that's in
20 part --

21 JUSTICE SCALIA: Wouldn't that be more
22 democratic somehow?

23 MR. STEVENSON: It might be more democratic,
24 but I don't think it would be consistent with the
25 constitutional obligation that this Court has to protect

1 people who are vulnerable from excessive punishment.

2 And this is a cohort that we contend is the
3 most vulnerable and should be shielded from this
4 excessive punishment.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Stevenson, Mr. Neiman.

7 The case is submitted.

8 (Whereupon, at 11:24 a.m., the case in the
9 above-entitled matter was submitted.)

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A				
abandon 23:17,19	11:23,24 12:12	American 12:16,20	Arkansas 54:8	barriers 3:21
abandoned 21:25	13:9,21,24 14:4	44:6	arrests 31:18 32:12	based 23:24 28:23
23:16	16:1,2,7,21,21	amici 48:9	32:12	59:2
ability 5:22 8:24	17:6,8,14 19:8	amicus 56:14,16	arson 38:4,11	basically 34:7
24:4	20:1 23:23 24:3,4	analysis 3:16 4:21	articulates 20:21	basis 7:8 23:22
able 19:3 41:13	31:19 33:13 37:11	32:24 35:25	aside 18:1	25:24 41:2 52:14
46:19	42:17,20 44:8,22	anger 22:21	asked 47:4	bear 49:10
above-entitled 1:11	45:20 46:7,18,23	anomalies 52:21	asking 33:18 41:4	beginning 44:3
61:9	57:16,16,17,20,22	answer 12:9 14:17	47:9 52:22	behalf 2:4,7,10 3:7
absolute 11:23 47:8	57:25 58:20 59:6,6	14:19 18:9 30:16	asks 17:20	28:10 55:22
absolutely 5:10 55:2	59:14 60:8,9,10	40:7 41:10 45:23	aspect 21:3 27:7	believe 22:9 26:9
accomplice 27:1	ages 48:10 56:6	46:21,25 47:3	aspects 8:10 10:10	beneath 9:21
accomplishing	aggravated 4:2	59:11	41:25 42:1	best 43:7,10
24:17	20:23 28:14 29:14	anticipating 4:13	assess 14:17 19:8	better 27:19 50:18
account 7:12 37:16	29:15,22 32:25	anybody 10:2	assume 22:8 35:15	51:3
41:1 45:16 52:16	35:5,13 36:21 37:4	anyway 52:9	36:13	beyond 18:23
59:19	47:20 49:19 52:17	appealing 44:6	assumed 48:2	bifurcated 11:11,22
accurate 14:9	52:18 55:10 58:9	APPEARANCES	assuming 18:11	18:13
achieve 29:9	58:10	1:14	34:3	big 50:20
acknowledged 3:25	aggravating 41:9	application 34:6	Atkins 19:2	bipolar 23:10
8:7	agree 35:1 44:3 51:7	apply 11:20 23:16	attention 56:14	bit 29:8
acknowledging	53:17 60:18	39:23	attorney 38:24	bottom 48:11
12:12	agrees 60:17	approach 47:9	48:12,14	boys 24:9
actions 53:15,18,21	air 44:12,15,15	appropriate 17:18	attractive 25:13,15	Breyer 30:2,11,14
53:22	Alabama 1:6,15,18	19:9 32:6 35:17	25:18	30:19,25 31:2,7,17
acts 51:16	3:4 27:25 45:24	36:8 41:6 45:22	attributes 3:12	31:21,24,26 32:15
actual 32:7,23	46:5,13 47:15	52:19 55:11 58:23	authorities 22:10	33:1,3,17 34:11
address 57:1	54:22	area 19:2,2	authority 27:23	36:10 39:13 42:12
addressed 13:9,12	Alito 9:11,16,24	arguably 17:17	available 27:25	43:2,4,7,10,12,14
13:13 17:11	10:17,20,22,25	argue 9:7 15:18	aware 15:21 50:7	43:24 44:17 46:15
adequate 16:21	13:11,16,23 14:1	38:24 41:7 43:19	awkward 36:16	47:13 57:13
adopted 14:8	14:17 15:1,14,17	43:21 55:5	a.m 1:13 3:2 61:8	brief 31:15 55:7
adult 13:25 14:23	15:21,24 16:5,14	argued 55:7 57:14		56:16
23:5 25:22 32:19	32:17,21 40:24	arguing 20:22,24	B	briefs 30:5 48:21
45:18,20 46:8,20	41:3 44:20 45:1,10	23:20 27:22 46:15	back 5:7 18:7 34:10	56:14
adults 4:1 8:23	58:2	47:7 48:13,14 53:8	39:13 49:14 53:7	bright 40:9
13:21 16:12 17:6,7	allegations 24:19	argument 1:12 2:2,5	59:1	bringing 49:9
17:15 33:18 39:19	allow 12:16,17 29:3	2:8 3:3,6 10:23	background 55:6	brought 38:15
40:14 57:4	45:1,3,10,11 51:23	14:2 15:24 16:3	bad 15:15	BRYAN 1:15 2:3,9
affirm 55:17	59:21	17:24 28:9 33:6,7	ban 6:15 9:8 11:16	3:6 55:21
afforded 35:16	allowing 41:7 52:11	42:15,17,19 55:21	11:23,24 12:10	C
age 7:22 9:20,21	allows 12:18 13:13	59:1	23:20 27:10,11,14	C 1:17 2:1,6 3:1 28:9
10:14,18 11:17,20	Amendment 3:16	arguments 42:13,14	bans 22:18	calculation 17:4
	10:5 53:5 59:11,15	44:17 55:3	bar 41:21	

<p>call 22:1</p> <p>capable 14:22 24:25 26:8</p> <p>capital 16:9 38:4 54:25</p> <p>card 41:11</p> <p>care 22:23</p> <p>Carolina 40:18</p> <p>carries 35:6 36:22</p> <p>carry 31:26</p> <p>case 3:4 4:13 6:6 7:20,21 9:19 12:22 21:3,12 24:8,9 26:16 28:21,24 33:21 36:3 37:9,23 38:8,11,11 40:10 44:5 53:18 54:3,3 54:21 56:17 61:7,8</p> <p>cases 4:2 8:18 10:9 19:4,5 24:23 26:13 26:19,23 41:9 44:21 53:14,15 55:1</p> <p>case-by-case 41:1</p> <p>categorical 9:8 11:16 12:10 23:20 24:1 27:10,10,14 41:21</p> <p>categorically 5:6 9:14 53:10 57:5</p> <p>certain 11:23 16:7 29:15 33:5 35:2 40:23 55:4</p> <p>certainly 7:9 19:22 35:1 37:20 49:5 54:9,19 56:5</p> <p>cetera 33:13</p> <p>challenge 12:7</p> <p>chances 21:9</p> <p>change 5:24,25 15:7 59:7</p> <p>changes 59:12,14</p> <p>character 10:14 21:21</p>	<p>characteristics 8:13 11:19</p> <p>characterized 3:11</p> <p>charge 36:23 38:3,6 38:8,15</p> <p>charged 37:24</p> <p>charges 38:1,10</p> <p>Chief 3:3,8 25:3,8 25:10,23 26:2,17 28:6,11 36:11,19 36:20,24,25 37:7,8 37:19 55:18,24 58:24 59:9,18,24 60:2,6 61:5</p> <p>child 8:13 9:9,17 13:25 14:23 16:22 17:17,19,19 23:5 23:23 24:3 42:23 45:17,20 57:21</p> <p>childhood 20:25</p> <p>children 3:11,20 4:1 4:4,20 9:13 12:11 13:20 14:24 16:18 17:6,7,12,14,23 20:24 23:4 26:9 56:21 58:14</p> <p>child's 53:15,18</p> <p>chose 23:17 56:4</p> <p>chunk 29:5</p> <p>circumstance 29:25</p> <p>circumstances 3:12 8:4 19:7 27:19 28:24,25 35:7 41:8 41:9 44:18 51:23 52:1 54:20,25 55:6</p> <p>cited 30:23 31:15 48:9</p> <p>class 35:13 36:7,8</p> <p>clear 22:11 34:22 55:25</p> <p>clearest 34:15</p> <p>clearly 17:11 34:24 58:16</p> <p>close 6:17 45:5</p>	<p>codefendants 26:13 26:14</p> <p>cohort 10:4 17:12 26:12 31:5 58:15 61:2</p> <p>colleague 54:7 58:8</p> <p>come 12:13 17:13 20:5 21:9 30:19 52:14 60:17</p> <p>comes 31:6 42:10</p> <p>comfort 13:6</p> <p>comfortable 36:2</p> <p>commit 17:25 43:6 49:10 50:21 51:21 54:1</p> <p>commitment 57:15 57:25</p> <p>commits 11:2 29:14 51:17</p> <p>committed 14:13 31:10 38:4 47:19 48:25 49:19,22,25 51:21 53:6</p> <p>committing 31:19</p> <p>common 7:11 44:7,8</p> <p>communal 20:12</p> <p>compared 45:25</p> <p>compassionate 15:12</p> <p>compelling 7:4 21:11</p> <p>complaints 24:18</p> <p>component 49:3</p> <p>concede 12:8 17:8 25:20</p> <p>concerned 37:11 50:19</p> <p>concerns 57:11</p> <p>conclude 49:18 55:9 58:22</p> <p>concluded 47:15</p> <p>concluding 23:23</p> <p>concurrence 35:21 36:1</p>	<p>confusing 36:12</p> <p>conscious 57:25</p> <p>consensus 12:20 28:15,21 32:8 44:19,23 59:19</p> <p>consequence 38:23</p> <p>consider 14:23 19:6 24:4 27:9 30:7</p> <p>considerations 10:14</p> <p>considered 14:8 15:25 54:17,20</p> <p>considering 37:17</p> <p>considers 32:23</p> <p>consistent 9:8 18:22 27:13 28:16 56:11 60:24</p> <p>consistently 10:21</p> <p>constitute 5:11</p> <p>Constitution 19:13 51:7</p> <p>constitutional 4:14 7:3 10:18 42:21 59:7 60:25</p> <p>constitutionally 3:15,22 8:11,21 17:9 24:6 28:2</p> <p>consult 12:14</p> <p>contact 15:3</p> <p>contemplated 17:17</p> <p>contend 61:2</p> <p>context 6:11 13:8 19:1 20:11 39:16 39:23 40:4,5,20 41:19,20</p> <p>contrary 35:14,15 42:10</p> <p>conversation 28:19</p> <p>convict 38:16 44:11</p> <p>convicted 3:18 16:9 37:18 38:14 51:15 51:16 56:2,3 58:11 58:16</p> <p>convictions 32:10</p>	<p>32:25</p> <p>cooperative 24:16</p> <p>correct 14:15 20:3 29:20 31:1 32:21 36:18 37:6 41:3 46:5</p> <p>correctional 22:14</p> <p>corrections 22:24</p> <p>cost 52:7,10,11</p> <p>Counsel 17:21 32:16 36:11</p> <p>count 31:9</p> <p>counts 34:20</p> <p>course 7:4,20 23:13 24:22 32:13 38:4 39:17 40:12 49:12 54:6</p> <p>court 1:1,12 3:9,10 3:21,25 4:6,12 5:1 5:21 6:10,14 8:6 8:21 10:11,16 11:7 14:22 17:1 18:17 20:21 21:22 23:3 23:20 24:1,5 26:14 27:9,13,15 28:2,12 28:25 32:22 34:16 34:17,22,23 35:24 36:1 40:24 41:6 49:22 52:22 53:8,8 55:16 59:14 60:25</p> <p>Court's 3:15 23:25 56:11 60:11</p> <p>Court's 9:9</p> <p>create 6:9 8:25 10:10 28:1 56:5,11</p> <p>created 52:21</p> <p>creates 20:25</p> <p>crime 15:12 17:10 20:23 22:3 24:10 30:8 36:9 37:2,2 48:2,25 51:17 53:7 54:3,10 55:15 56:8 56:22 57:7</p> <p>crimes 8:8 17:13,25</p>
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<p>47:19,21 49:11 50:21 51:5 52:18 crime-specific 3:20 criminal 25:1 30:8 criminologists 56:16 criterion 22:2,6 crucial 32:5 cruel 21:1 23:5 33:6 culpability 3:13 49:13,18,23 52:20 52:24 53:1,3,10 54:10 cut 48:10 cutoff 45:19 47:8 cynical 6:14</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 Dakota 58:19 data 9:18 10:11 18:24 19:17 23:25 25:7 day 10:7 deal 11:24 56:10 dealing 17:22 death 3:24 4:7,8,22 5:5 6:17 19:1,4,5,9 20:11 29:18,24 33:24 36:14 39:16 39:19,22 40:4,5,10 40:14,20,22 42:1,8 44:10 decency 18:20,23 26:4 decide 52:17 decided 12:17 48:18 decision 12:14 14:22 15:14,15,19 18:15 38:24 58:25 59:2 decision-making 3:19 8:10 decrease 56:22,24 default 4:16</p>	<p>defend 43:20 defendant 33:11 35:7 37:11 41:7 52:24 55:12 defendants 34:2 defense 38:24 48:12 48:14 defer 54:7 deficits 3:19 4:3,19 7:5 11:18 20:25 definition 9:17 degree 3:13 democratic 60:22 60:23 demonstrated 21:15 demonstrates 11:3 denominator 32:5,6 32:22 depart 5:4 Department 48:8 depend 43:13 depends 45:23 Deserved 22:3 designed 22:20 determination 10:15 11:6,7 19:5,9 24:2 35:10,13 determinations 25:21 determine 21:6 25:7 54:13 determining 32:7 deterrence 48:21,23 49:3,5 56:18 deterrent 4:8,19 56:19 developed 24:14 development 9:10 33:12 37:15 43:9 developmental 23:7 dice 51:15 difference 16:6,14 33:25 37:3 51:18 differences 4:1,3</p>	<p>35:2 different 5:5,6 8:25 16:19 17:3 28:24 33:23 34:3,6 37:14 38:2 41:20 46:25 51:1,12,19,20 53:18,21 56:6 difficult 14:10,16 33:14 difficulties 24:22 difficulty 43:24 dignity 35:15 diminished 49:24 58:12 diminishment 50:2,4 50:5 direct 56:14 disadvantaged 27:7 disagree 49:17 disagreement 30:3 disconnect 16:25 discretion 7:21 20:6 21:23 discretionary 19:6 21:7 discussed 15:25 discussion 48:24 disproportionality 20:15 35:25 disproportionate 20:19,23 distinction 5:17 6:4 6:24 7:2 37:1 distinctions 7:5,24 54:8 56:12 distinguishing 34:24 disturbs 47:2 doing 36:2 42:6 don't 33:15 doubt 55:13 dovetails 33:17 dramatically 53:21 draw 7:7 10:19 11:8 13:5 34:16 45:8</p>	<p>55:9 drawing 27:17 drawn 10:18 48:7,19 drew 12:24 40:17 drops 48:22 Drug 57:7 due 33:7 dynamics 24:25 D.C 1:8</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 11:11 24:14 easier 12:9 education 22:20 effect 4:9,19 7:22 56:19 effective 24:17 effectively 29:20,23 40:8 52:22 Eighth 3:16 10:5 53:5 59:11,15 either 23:11 26:5 29:24 43:23 53:5 element 38:2 53:24 eligibility 56:6 eligible 56:7 enacted 14:3 47:25 encumbered 3:20 endorsed 14:8 endure 52:12 Enmund-type 34:20 Enmund/Tison 33:18 34:5,7 entitled 7:15 50:3,5 53:11 enunciated 5:4 equal 34:13,14 equate 8:23 23:4 equated 39:17 40:4 40:13 equipped 25:21 equivalently 39:20 error 39:4</p>	<p>ESQ 1:15,17 2:3,6,9 established 57:3 estimate 30:11,15 estimates 19:20 et 33:13 evaluate 19:7 Evan 1:3 7:23 24:21 28:14 evidence 24:14 26:8 26:24 evolution 26:5 evolve 19:10 evolving 18:23 26:3 exactly 10:24 49:15 50:23 55:3 example 45:9 46:17 47:15 48:8 58:7 excessive 23:3 61:1 61:4 excessiveness 3:16 exclude 9:19 excluding 10:13 execute 33:19 Exhibit 29:2 exist 4:1 22:22 existed 13:7 experience 4:20 experienced 24:24 56:22 exposed 23:24 exposure 37:1 expressing 51:11 expressly 16:6 60:7 extent 4:7 17:10 39:1 external 3:12 extraordinary 25:14 extreme 5:20</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 52:2 facilitate 6:18 24:20 27:25 facilities 22:14</p>
---	---	---	--	---

<p>fact 3:25 13:6,10 14:20 20:4 29:2,7 39:3 41:17 51:20 53:12,25 56:7,23 59:2</p> <p>factor 37:22</p> <p>factors 8:9 20:12 52:1 54:15</p> <p>facts 19:8 40:3</p> <p>factual 43:8</p> <p>failings 23:5</p> <p>fair 36:6 47:14</p> <p>families 52:2,12</p> <p>far 50:19</p> <p>feature 20:8</p> <p>features 33:12</p> <p>Federal 12:18 22:10 22:22</p> <p>felony 34:7,20 38:1 38:8,10 44:11</p> <p>figure 18:19</p> <p>find 30:21</p> <p>finding 3:13</p> <p>first 3:4 12:8 18:17 24:15 47:1</p> <p>flexibility 56:11</p> <p>floor 39:9 55:11</p> <p>Florida 3:10 28:3</p> <p>focus 21:2 46:16</p> <p>force 49:10</p> <p>forcing 23:10</p> <p>forfeits 5:22</p> <p>formed 37:12</p> <p>forth 33:9 47:12</p> <p>forward 25:24</p> <p>found 3:21 18:24 26:7 38:5 56:18</p> <p>free 56:4</p> <p>frequent 52:14</p> <p>front 29:2 34:16 40:8 41:23 50:13</p> <p>fundamental 35:2</p> <p>fundamentally 24:5 49:17</p>	<p>further 43:8</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1</p> <p>Gee-whiz 44:2</p> <p>general 1:17 21:4,5 37:1</p> <p>Generally 57:5</p> <p>generate 10:12</p> <p>getting 26:25 27:1 45:13</p> <p>Ginsburg 4:5,16 8:1 8:6 10:6,9 24:7 37:22,25 38:7,9 45:6,16 46:2,11 54:2,5</p> <p>give 7:22 21:7 24:15 27:22 42:22 44:17 50:8 52:8</p> <p>given 23:6 32:3 34:12</p> <p>giving 33:8,11</p> <p>go 18:7 34:10 39:13 50:21 59:1</p> <p>goal 49:6,9 51:10,11</p> <p>goals 28:16 29:8</p> <p>goes 58:7</p> <p>going 6:17 12:6,25 20:1 21:6 23:11 24:15 27:7 29:25 33:4 43:16 48:16 55:9,12</p> <p>good 5:16 8:12 21:20 29:5</p> <p>gosh 15:7</p> <p>Government 12:18</p> <p>governments 51:13 52:16</p> <p>government's 51:10</p> <p>Graham 3:10,17 5:2 5:22 6:11 8:7,22 11:6 12:23 13:8 17:2 20:21 21:22 24:6 28:3 29:1</p>	<p>32:4 34:17,23 36:14 39:17 40:6 40:13,24 42:2 49:20,21 50:2 52:24,25 53:7,7,9 53:9,11,19,25 54:9</p> <p>Graham's 49:23 53:22</p> <p>great 11:3 26:12 56:10</p> <p>greater 4:19 7:25 54:10</p> <p>gross 20:15 35:25</p> <p>grossly 20:19</p> <p>grounds 52:5,5</p> <p>group 18:4 58:15</p> <p>gruesome 53:24</p> <p>guess 27:1 30:3 33:4 40:17 45:14</p> <p>guilty 26:20 38:5</p> <p>gun 34:8</p> <p>guys 52:7</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 17:13</p> <p>handful 20:5</p> <p>happen 24:13 27:3 45:12 55:3</p> <p>happened 40:2,21</p> <p>hard 25:6 30:21</p> <p>harder 48:13</p> <p>Harmelin 11:25 12:2 18:14 20:14 35:22 36:1 40:8,12 40:16</p> <p>hear 3:3 47:6 52:3</p> <p>hearing 59:4</p> <p>hearings 52:8,13,14</p> <p>heart 22:25</p> <p>heartland 47:20</p> <p>heinous 33:22</p> <p>held 5:1,21 40:19 53:9</p> <p>Helm 35:24</p>	<p>help 13:1 19:8 47:9</p> <p>helpful 26:18</p> <p>hesitant 43:5 51:23</p> <p>high 46:1</p> <p>higher 48:15</p> <p>highest 38:15 40:21 41:14</p> <p>highlight 57:17</p> <p>historical 7:8</p> <p>hold 9:12,13,24 10:3 52:23</p> <p>holding 9:22</p> <p>homicide 31:19 32:17,20 34:18,20 34:24 51:13 56:9 56:23 57:5,8</p> <p>homicides 56:2</p> <p>Honor 10:4 14:20 18:2 21:18 25:20 26:6 31:14 32:4</p> <p>hope 52:8</p> <p>horrendous 24:9</p> <p>huge 57:19</p> <p>hundred 31:17</p> <p>hypothetical 50:1</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 25:3 26:18 40:25 48:21</p> <p>identified 7:24 22:15</p> <p>ignore 59:20</p> <p>imagine 48:13 50:13</p> <p>immune 26:5</p> <p>impact 55:14</p> <p>impermissible 17:9</p> <p>important 27:8 29:7 51:25</p> <p>impose 12:19 20:6 32:11,14 44:10 56:1</p> <p>imposed 6:6 8:18 16:10 19:15 20:2 26:3 42:2 54:14</p>	<p>imposing 28:13 57:15</p> <p>imposition 3:22</p> <p>imprecise 54:16</p> <p>imprisonment 3:14 3:23 4:10,17,22 5:14,18 10:1,15 11:4 14:5 15:6 16:8,23 20:7 22:17 32:18 34:12 38:18</p> <p>incarcerate 5:23 27:23</p> <p>incarceration 59:17</p> <p>included 36:23 37:2 37:10 38:1</p> <p>including 19:8 22:22 32:13</p> <p>indicate 32:7</p> <p>indicated 29:4,5 32:5 36:1</p> <p>indication 44:23</p> <p>indicia 18:19 44:21 48:17</p> <p>individual 34:2 35:10 36:21</p> <p>individualized 12:3 30:8 39:16,23 40:9 40:19,25 41:18,19 41:24 42:15,16</p> <p>individuals 53:15</p> <p>ineffable 54:16</p> <p>infer 28:22 36:6 47:14</p> <p>inference 35:19</p> <p>inform 18:21</p> <p>informs 16:18</p> <p>inherently 3:11</p> <p>initially 34:17 45:18</p> <p>insisted 39:16 40:3</p> <p>instance 42:24</p> <p>instances 5:20</p> <p>instructed 38:22 39:2,6</p> <p>intend 23:18</p>
---	---	---	---	--

<p>intended 33:19 47:22 53:22 intent 37:12 38:2 58:12 intentional 38:5 interest 10:12 interested 6:19 interesting 26:11 internal 3:11 intervention 57:4 involved 3:17 24:9 34:8 involving 4:2 irrelevant 22:6 isolated 21:13 issue 3:17 10:11 25:9 28:21 33:21 39:13 issues 37:13,16 i.e 31:10</p> <hr/> <p style="text-align: center;">J</p> <p>Jackson 26:16 27:4 33:21 34:1 54:3,3 54:9 JOHN 1:17 2:6 28:9 JR 1:17 2:6 28:9 judge 7:22 21:6,16 23:16 48:17 54:12 54:20 judges 32:11 judgment 3:19 5:12 12:19 13:19,19 16:22 20:12 21:1 27:20 28:22 35:3 35:20 36:4 39:7 45:19 51:11 57:11 59:16 judgments 8:12,24 17:1,3 19:3 21:19 21:20 jumping 41:4 junction 28:18 juries 37:9 38:22</p>	<p>39:2 jurisdiction 31:6 32:13 45:24 46:14 53:8 jurisdictions 13:6,8 29:3,16 45:25 54:21,23 56:24 57:24 jury 7:12,16,22 37:16 38:5,16 39:6 justice 3:3,8 4:5,15 4:24 5:3,9,13,16 5:24 6:3,8,20,23 7:6,11,15,18,20 8:1,6,15 9:1,2,11 9:16,24 10:6,9,17 10:20,22,25 11:10 11:15,21 12:2,5,13 12:25 13:5,11,16 13:23 14:1,10,16 14:17,25 15:1,14 15:17,21,24 16:5 16:14 17:21 18:3,4 18:7,9,11,13 19:14 19:18,25 20:9,13 20:17 21:2,24 22:5 22:8,13 23:9,15,19 24:7 25:1,3,8,10 25:23 26:2,17 27:3 27:12 28:6,11 29:11,17,19 30:2 30:11,14,19,25 31:2,7,17,21,24 31:26 32:15,16,17 32:21 33:1,3,16,17 34:11,15 35:9,22 36:10,11,19,20,24 36:25 37:7,8,19,22 37:25 38:7,9,12,20 38:21,22,25 39:5 39:12,13,25 40:1,7 40:12,24 41:3,17 41:22 42:12 43:2,4 43:7,10,12,14,24</p>	<p>44:2,5,14,16,17 44:20 45:1,6,10,16 46:2,11,14,15 47:13 48:8,20 49:4 49:7,8,12,16 50:7 50:12,17,24,25 51:2 53:13,20 54:2 54:5,5,12,18,24 55:18,24 56:13 57:2,13 58:2,24 59:9,18,24 60:2,5 60:6,13,21 61:5 Justices 20:15 28:20 justification 33:3,8 33:10 justified 28:15 39:10 justifies 11:23 justify 37:14 justifying 34:11 juvenile 4:8 6:6 8:10 14:12 15:12 16:7 16:20 20:19 29:19 34:13 37:17 41:10 41:13,13 45:17 46:4,13,20 49:19 49:24 50:4 juveniles 3:17 11:16 16:11 18:5 25:4 34:6,9 37:15 39:18 39:24 40:5,14 42:3 46:19 50:9,18 51:1 51:3 56:2,3,20 57:3,18 juvenile's 49:18</p> <hr/> <p style="text-align: center;">K</p> <p>Kagan 14:25 19:14 19:18,25 38:21 39:12,25 40:1,7,12 41:17,22 53:13,20 54:5 keep 25:7 keeps 58:8</p>	<p>Kennedy 8:15 9:2 14:10,16 18:4 21:2 23:9,15,19 27:12 29:11,17,20 38:22 38:25 39:5 48:20 49:4,7,8,12,16 50:7,12 54:12,18 54:24 56:13 kids 8:23 23:8 26:13 kill 33:20 53:23 killed 33:19 53:23 killing 33:20 34:1,1 killings 34:4 58:17 kind 5:11 6:18 8:20 8:25 10:11,12 21:1 21:23 25:20 48:21 57:25 58:21 60:12 kinds 6:15 11:9 29:15,22 33:23 34:3 35:2 know 5:3,7 7:7 10:13 12:16 13:1 14:18 17:11 21:3 21:12,13,23 23:8 24:23 30:16 33:7 34:7 40:3 42:9,19 44:2 45:12 47:10 50:10,12 59:3 60:17 knowledge 23:6 Kuntrell 26:16</p> <hr/> <p style="text-align: center;">L</p> <p>lack 33:12 large 48:10 larger 18:4 19:18 largest 19:22 57:18 58:15 Laughter 13:3 43:18 44:4 law 7:11 13:13,17 15:8,22 41:16 44:7 44:8 54:11 59:3 laws 7:24 14:3,4</p>	<p>15:2,25 58:4 60:14 lawyer 24:16,19 leads 10:23 learning 50:19 leave 9:3 left 7:11 8:2 39:13 legislation 35:4 legislative 35:10,12 35:19 42:9 legislators 13:16 15:2 48:4 58:2 legislature 17:18 36:4,7 47:25 legislatures 14:2,18 15:10 28:22 29:9 29:21 39:8 46:16 47:14,18 51:22 55:9 60:15 legitimate 28:16 51:14 legitimately 52:16 lend 4:20 lens 60:11 lesser 25:5 36:23 37:2,10,23,23 38:1 38:17 53:11 let's 15:7 22:8 59:4 60:2,3 level 50:2,5 53:6 56:22 levels 22:11 liability 34:2 life 3:14,23 4:9,17 4:22 5:5,14,18,23 6:15 9:20,25 10:15 11:4,12,13 12:10 13:9 14:5,12 15:5 16:1,7,23 17:8,12 17:18,23 18:5 20:7 20:18,18,22 21:7 22:17 23:12,24 24:3,10,21 25:4 26:15,25 27:18,21 27:24,24 28:13</p>
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<p>29:11,13 30:1 32:14,18 34:12 35:6,16 38:13,18 38:23 39:8,18,24 40:5,15 42:11,16 42:23 46:24 47:16 48:3 49:20 52:25 52:25 53:2 54:14 55:13 56:5,18,21 57:15,19,22 58:11 58:13,17 life-long 59:16 life-without-parole 52:4,19 light 28:4 37:11 38:16 line 6:12 10:18 12:24 24:1 27:17 28:14 33:18 34:5,8 34:16,17,22 40:9 40:17 43:22 44:7 44:19,21 45:8,22 48:6,13,15,18,19 55:10 lines 7:7 11:9 list 37:17 listing 48:9 literature 47:12 little 20:6 29:8 36:2 36:12,15 46:1 Lockett 40:18 41:24 42:4,7 logic 10:23 long 31:11 longer 22:1 36:15 long-term 21:20 look 12:3,23 21:8,15 32:23 42:6 44:20 45:8 48:7 53:13,14 53:14 54:15 59:1 59:10 looked 18:18,21 19:1 60:8 looking 23:4 26:12</p>	<p>28:25 29:1 34:4,22 looks 56:17 loops 49:14 lot 20:12 45:25 52:3 57:10 lots 7:24 lowest 44:22 luck 53:24 lucky 54:1</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>majority 19:11,19 20:4,13 making 42:18 managed 31:9 management 22:21 managing 24:25 27:7 mandate 16:21 mandatory 8:2,17 8:20 10:4,10 11:13 12:6 14:21 19:12 19:20,21,24 20:2 20:18 21:3 27:17 30:6,17,20 31:6 34:11 38:13,14,17 42:8,10 46:24 47:16,17 54:14 57:22 58:11,13,17 manslaughter 31:20 37:4 March 1:9 margin 57:19 matter 1:11 12:15 41:16 61:9 maturing 18:24 maturity 3:19 11:3 maximum 29:18 36:17 37:2 48:3 mean 9:1,6,7 12:16 13:11 14:2 15:9 22:16 23:19 27:12 27:15 42:23,24 50:19 53:4,17 58:7</p>	<p>58:25 meaningful 6:10,13 28:1 means 17:16 19:10 41:14 57:21 meant 49:23 measurable 56:19 measures 18:25 mental 37:15 mentioned 35:21 message 29:20 meter 18:20 Michigan 19:23 57:20 58:3 middle 23:13 Miller 1:3 3:4 7:23 24:8,11,13,21 28:14 34:1 38:3,8 49:17 50:3,3 52:21 53:1,10,12,22 55:5 Miller's 37:23 52:22 53:21 54:10 mind 32:1 37:5 minimum 9:20 13:9 13:24 16:1,2 17:6 17:14 29:6,12,14 35:20 36:3,5,8,13 36:16 42:20,21,25 43:1,3,6 45:23,24 47:23 48:5 51:8 57:20 58:20 59:6 60:8 minor 49:14 minutes 55:20 mistake 8:23 mitigating 8:3,9 19:7 29:25 33:12 35:7 41:8 54:20,25 55:6 mitigation 41:10 mix 49:5 modern 21:24 modified 11:24 Montgomery 1:15</p>	<p>1:18 months 11:1,1 moral 52:20,23 53:1 53:6 54:10 morally 28:15 mores 18:20 morning 3:4 moved 45:18 murder 14:6 15:6 16:9 20:23 28:14 29:15 32:25 33:22 33:23 34:4,7,13,20 35:5,13 36:22 37:4 38:1,4,5,8,10 42:22 47:20 49:19 49:22,25 51:12,21 51:22 52:2,17,18 55:10 58:9,10,12 murderer 39:9 51:17 53:5 murderers 51:15 murders 4:2 14:13 29:15,22,23 31:10 35:3 55:4</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 national 28:15,20 32:8 44:19 nationwide 14:14 nature 30:8 34:12 necessary 28:3 38:23 need 18:9 needs 10:18 Neiman 1:17 2:6 28:8,9,11 29:13,19 30:9,12,16,22 31:1 31:4,14,18,23,25 32:4,21 33:2 34:15 35:12 36:18,24 37:6,19,25 38:9,19 38:21,25 39:6,12 39:25 40:7,16 41:3</p>	<p>41:22 43:2,5,8,11 43:13,17,19 44:13 44:16,25 45:3,7,13 45:21 46:5,13 47:13 49:4,8,15 50:12,23 51:2 53:13,20 54:7,18 55:2,19 57:14 61:6 neither 7:21 57:20 Nevada 56:7 never 9:4 15:7 47:1 non-homicide 3:18 34:18,25 48:1 53:6 56:8 57:6 non-homicides 56:3 non-mandatory 19:16 30:24,25 non-negligent 31:20 32:19 North 40:18 noting 4:9 notwithstanding 42:2 nowadays 22:10 number 13:7 14:20 19:12 20:10,11 26:12 31:9,11,18 32:1,6,9,9,10,12 32:12,25 33:2 44:11,14,19 45:3,5 45:25 47:5 48:10 numbers 18:18,21 30:2 45:14</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objective 18:19 44:20 48:17 obligated 59:15 obligation 60:25 obtained 32:2 obviously 5:18 23:19,21 occur 52:11</p>
---	--	--	---	---

<p>odds 24:5 offender 7:13 16:22 26:20 offenders 6:16 28:14 34:25 47:22 48:5 57:5,7,7,9 offense 8:8 34:20 37:23 38:17 offenses 3:18 11:2 32:18 34:18 35:14 36:8,23 37:10,17 51:6 offer 24:20 25:13,17 offered 24:11,12 oh 14:17 15:7 53:25 Ohio 40:18 okay 5:13 34:7 42:18 43:17 44:23 old 6:20 older 24:10 26:13 26:14,20 once 5:3,4 14:22 49:24,24 51:21 59:9 one-level 50:3 opinion 9:12 11:22 30:4 42:21 43:1 46:17 47:4 opinions 26:24 opportunities 32:10 opportunity 33:11 55:5 oppose 52:4 opposite 42:20 opted 54:22 option 36:15 37:10 options 36:14 oral 1:11 2:2,5 3:6 28:9 order 30:1 ordered 6:11 28:2 ought 32:22,24 35:16 39:23 41:20 outcome-determi...</p>	<p>25:2 overall 30:22 overwhelm 8:9 overwhelming 20:4</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 PAGE 2:2 painful 52:13 parole 3:15,23 4:10 4:17,22 5:5,15,18 6:1,15 9:20 10:1 10:15 11:4,12 12:11 13:9 14:5,12 15:6 16:1,8,24 17:9,12,19,23 18:5 20:7,18,22 21:7 22:17 23:13,24 24:4,11,21 25:4 26:15,25 27:18,24 28:13 29:11,13 30:1 32:14,19 34:12 35:6,16 38:13,18,23 39:9 39:18,24 40:6,15 42:11,16,23 46:25 47:16 48:3 49:21 51:23 52:8,9,13,25 53:2 55:13 56:5,7 56:19,21 57:16,19 57:23 58:11,13,18 part 11:25 12:8 53:22 60:20 particular 26:19 36:9 50:13 51:16 57:16 particularly 25:12 25:15 28:21 35:20 51:4 partly 14:20 passed 15:25 penalty 3:24 4:7,8 4:23 19:1,4,5 20:11 29:18,24</p>	<p>32:2 33:24 39:16 39:22 40:4,5,10,20 42:1,8 44:10 49:1 pending 24:18 Pennsylvania 19:23 57:19 58:3,9,16 penological 28:16 51:24 57:11 penology 21:25 people 12:16,21 21:22 22:23 28:23 33:24 39:19 44:6 48:25 50:20 52:3 61:1 percent 19:21 20:1 31:3,5,24,26 32:1 32:2 perform 22:23 permanent 8:14 59:16 permissible 3:15 8:11 10:2 49:21 permit 5:20 21:23 51:7 permits 13:15,17 permitted 9:4,5 person 11:1 14:4 16:9 17:18 29:25 48:2 51:21 personal 34:2 49:13 persons 31:19 47:19 perspective 7:1 Petitioner 1:4,16 2:4 2:10 3:7 55:22 Petitioner's 48:21 phase 41:15 piece 53:16 place 52:23 play 22:15 32:24 plea 24:10,11,12,20 25:22,22 plead 25:5 please 3:9 28:12 pluck 44:11,14,15</p>	<p>point 4:6 5:10 17:5 27:1,6 30:13 33:5 33:11 35:22,23 39:3,7 40:17 45:13 46:25 48:16 49:16 52:20 56:13 58:1,7 pointed 18:4 points 28:18 policy-based 52:5 political 52:5 poll 46:17 polls 47:4 population 19:18,19 22:18 25:20 26:8 27:6 populations 19:23 57:18 position 23:10 43:25 possibilities 31:10 possibility 3:14 4:10 5:21,25 6:10,13 28:1 37:20 51:20 possible 6:17 11:2 13:7 54:19 postconviction 24:18 postulating 59:25 power 38:15 powerful 20:10 practice 32:8 practices 32:7,24 pragmatic 52:6 precedent 12:23 precedents 23:25 27:14,16 precise 19:18 30:9 41:5 precisely 47:17 preclude 3:12 prefer 21:4 preferences 12:15 preferred 11:15 premise 42:5,7 presented 9:18 24:1</p>	<p>pretty 42:14 prevail 23:11 previously 9:8 10:20 pre-Graham 40:13 primary 16:2 49:6,9 51:10,10 principle 5:4 10:5 principled 8:20 prior 36:13 prison 50:9,19,21 prisoners 14:11 prisons 22:1,22,23 probably 31:3 39:2 39:3 problem 8:7,11 10:9 49:14 50:20 problematic 6:16 7:2 10:16 problems 4:20 21:18 22:16 procedurally 33:10 proceedings 41:12 process 8:25 22:16 27:8 33:7 52:11,15 produce 38:17 proffered 18:14 programs 22:21,22 prohibited 9:14 prohibits 59:11 pronounced 4:4 property 57:7 proportionate 23:2 prosecuted 36:21 prosecuting 17:7 prosecution 16:12 prosecutors 25:12 26:4 protect 60:25 protected 26:10 protecting 26:9 provide 7:25 15:2 58:4 provides 15:22 providing 47:25</p>
---	--	---	---	--

<p>provision 4:18 16:11 proxies 17:2 psychologists 21:19 public 27:21 46:17 47:4 punishment 4:9,21 13:22 19:9 22:2,3 23:1 33:6 49:3 53:11 55:12,13 61:1,4 purpose 9:17 51:25 purposes 7:3 10:18 51:24 pursuant 30:23 put 8:3 25:24 43:25 46:23 53:5 56:20 putting 17:25</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify 32:18 quantitative 50:8 question 4:15 5:25 10:7 16:17,19,20 17:22 18:7 24:8,15 25:24 33:14,20 34:19 42:5,14 46:18,23 47:1,2,3 56:17 57:1,14 60:8 questions 56:15 quick 15:11 quite 20:10 21:11 27:8 35:23 42:10 47:24 51:13,14</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raised 56:15 range 19:7 22:19 48:12 reached 39:8 reaction 6:14 read 13:18 26:23 57:15,24 reading 31:8</p>	<p>real 21:15 32:22 realistic 38:13 realize 14:3 15:4 25:11 42:5 realized 15:7 really 14:1 15:17 52:10 53:16 59:21 realm 37:20 45:15 reason 13:23 19:3 21:22 25:10 32:8 37:9,20 40:16,18 41:5 44:8,19 45:7 47:13 48:6 49:19 49:20 50:17,25 51:22 reasonable 31:22 39:10 51:14 55:8 reasonably 54:21 reasons 8:6 11:6 20:20 27:18 30:6 55:16 rebuttal 2:8 28:5 55:21 receive 40:22 received 53:12 receiving 46:24 recidivate 57:4,6,8 recidivism 50:20 51:19,20 reckless 33:20 recognize 23:2 54:11 recognized 3:10 8:22 11:20 17:1 24:6 reconciling 27:16 record 42:9 49:2 reduced 53:1,3 refer 36:12,16 reflect 36:4 reflected 35:3 reformatories 22:1 regard 4:18 25:14 60:5</p>	<p>regardless 30:4 35:7 40:1 regime 54:19 56:5 56:12 58:21 regimes 19:24 regrettable 33:23 rehabilitate 22:20 rehabilitation 21:10 21:12,14,21,25 22:9 27:21 50:10 rehabilitative 22:16 reject 40:25 rejected 42:8 related 49:13 relating 55:6 release 5:21 6:10,13 16:21 28:1 released 22:24 relevant 3:22 22:13 reliance 20:9 relied 10:11 18:17 relies 47:4 rely 49:2 remain 42:1 remaining 55:20 remains 38:15 remarkably 53:16 remember 30:5 31:8 48:23 reply 31:15 55:7 reports 48:9 represented 20:11 require 56:1 60:15 required 19:6 40:10 40:19 59:17 requires 19:13 requiring 41:24 requisite 37:12 reserve 10:7 28:4 residual 4:8 respect 11:25 29:21 34:14 38:3 42:3,22 51:24,25 54:9 55:10</p>	<p>respond 41:8 56:15 Respondent 1:18 2:7 28:10 response 41:22 47:6 responses 52:6 responsibilities 7:25 responsive 15:12 rest 27:24 28:5 result 41:5,6 retreat 11:17 retribution 49:7,8 49:12 retributive 29:8 49:10 51:11 return 57:13 reversible 39:4 review 6:18 revulsion 51:16 re-traumatization 52:15 rid 12:5 right 4:14 5:10 6:4 6:11 7:16 10:13,24 11:5 18:3 20:16 25:8 26:22 30:14 31:7 32:15,20 33:1 39:1 43:25 49:1,15 50:23 54:6 59:18 60:16 robbery 38:10 ROBERTS 3:3 25:3 25:8,10,23 26:2,17 28:6 36:11,20,25 37:8 55:18 58:24 59:9,18,24 60:2 61:5 role 22:15 32:23 roll 51:15 rooted 14:20 57:11 Roper 3:25 4:6,12 4:16 8:22 11:7 12:23 19:2 20:21 24:6 33:9 48:24 route 54:22</p>	<p>rule 11:12,15,22,25 12:9,17 21:4,5 41:20,23 42:2 44:8 52:21 54:13 55:25 56:12 59:7 60:12 ruled 4:6 rules 11:15 39:22</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 safely 48:6 safety 27:21 sanction 4:11 sand 55:10 satisfy 8:1,5 saying 8:15 9:3 53:2 59:10 says 12:2 16:6,8,11 Scalia 4:24 5:3,9,13 5:16,24 6:3,8,20 6:23 7:6,11,15,18 7:20 9:1 12:13,25 13:5 21:24 22:5,8 22:13 38:12,20 44:2,5,14,16 50:17 50:25 51:2 57:2 60:13,21 schemes 30:24 science 23:7 scientific 47:12 scientists 21:9 second 11:11,25 17:5 47:2 50:5 second-degree 58:12 see 23:13 26:24 28:4 32:15 33:25 43:24 54:25 60:3 60:16 seek 56:1 seeking 50:6 52:22 60:12 seen 31:15 33:9 51:2</p>
--	--	---	--	---

<p>sending 29:21 sense 25:13 50:8 sentence 3:14,23 4:16 5:8,11,19,20 6:7 7:21 8:17 9:4 9:25 10:4 14:12 16:10 17:9 20:6 22:17 25:4,5,14 26:2,25 27:20 29:4 29:6,6,14 30:6 32:11 35:6,17,20 35:25 36:3,6,6,9 36:22 40:20,21,22 41:14 43:21 46:10 47:17 51:7 52:19 52:19 54:13 56:2 57:22 59:15 sentenced 11:4 14:5 15:5 16:7 17:23 30:23 39:18,19,24 40:14,14 sentencer 19:6 sentences 5:19 7:1 8:21 9:15 12:11 14:21 15:11 16:19 18:22 19:12,15,21 19:22 20:5 26:15 28:13 29:23 47:23 52:4 sentencing 7:1 10:10,14 12:3 17:2 22:9 32:7,24 39:17 39:23 40:9,19,25 41:12,15,18,19,24 42:8,11,15 serious 31:10 serve 30:1 49:6 services 22:19,20 22:21 servicing 46:9 57:18 set 9:20,21 16:2,4 24:1 28:24 34:17 34:23 60:9,10 sets 40:8</p>	<p>setting 16:1 39:8 Seventy-five 31:17 severe 4:11 55:14 55:14 shielded 61:3 shields 22:18 shooter 26:24 show 14:11 48:23 50:9 side 6:13 47:10 48:22 sides 42:13 48:9 significant 50:10 56:25 similar 53:16 54:4 simply 53:25 57:23 sir 30:10 small 18:1 smaller 17:22 social 21:8 societal 44:23 59:19 society 18:24 19:10 48:17,18 51:9,16 52:10 55:15 society's 18:19 35:14 49:9 51:10 Solem 35:24 Solicitor 1:17 somewhat 6:16 soon 43:15 sorry 11:10 54:5 sort 6:14 15:13 26:7 29:24 49:11 52:6 52:15 53:16 59:16 sorts 51:4,5 54:15 54:24 Sotomayor 11:10,15 11:21 12:2,5 17:21 18:3,7,9,11,13 20:9,13,17 27:3 32:16 33:16 34:15 35:9,22 soul 22:25 sounds 31:21,21</p>	<p>47:7 South 58:19 speak 38:13 speaking 33:10 57:5 specifically 4:18 22:19 24:8 41:25 56:17 speculation 25:11 spoke 20:15 34:11 standard 54:24 standards 18:20,23 26:4 start 28:19 state 5:22 9:20 13:12,15 15:4 16:6 16:8 17:10,16 22:11 26:5 27:22 27:25 37:5 41:8 43:20 44:18 49:2 49:17 56:7 58:9,15 60:15 stated 27:19 statement 24:15 States 1:1,12 12:15 13:24 15:24 16:3 17:14 19:16,20,20 19:22,24 20:2,5 25:7 29:3 30:20 35:4 39:15 40:2 41:4 42:6,7,9,25 45:1,3,10 46:7 47:5 56:1,3,10,20 56:23 57:18,21 59:1,10,21 60:7,9 60:10,14 statistic 31:8 statistical 21:13 statistics 14:11 19:15 21:10 25:24 26:18 30:10,12 31:5,14 33:8 50:8 50:13 status 9:9 14:23 20:24,25 50:4</p>	<p>statute 29:7 47:25 statutes 17:20 28:23 29:10 36:13 47:21 49:6 57:15,24 Stevens 29:4 Stevenson 1:15 2:3 2:9 3:5,6,8 4:5,15 5:1,9,14,17 6:2,5,9 6:22,25 7:10,14,17 7:19 8:5,19 9:6,13 9:18 10:3,8,19,24 11:5,14 12:1,4,7 12:22 13:2,4,14,18 14:7,15,19,25 15:9 15:16,20,23 16:13 16:16 18:2,6,8,10 18:12,16 19:14,17 20:3,16,20 21:17 22:4,7,12 23:14,18 24:7,12 25:6,9,19 26:1,6,22 27:5 28:7,19 29:5 30:18 30:22 31:15 55:20 55:21,23 58:5 59:8 59:13,23 60:1,4,19 60:23 61:6 Stevenson's 31:4 stories 21:11 50:14 50:15,16 strength 15:23 strike 8:20 striking 27:17 60:14 string 11:2 struck 35:24 studies 48:22 51:3 57:2 subject 4:21 16:18 16:23 25:4 33:24 47:16,22 56:20 57:22 58:17 subjected 9:14 51:4 subjecting 24:3 subjects 58:10 submitted 56:16</p>	<p>61:7,9 substantial 45:14 success 50:14,16 suggest 6:16 26:4 27:13,15 39:22 41:19 51:3 suggested 37:14 suggesting 4:13 39:1 suggestion 34:21 support 57:10 60:12 suppose 38:19,24 39:4 45:5 supposed 12:19 21:16 Supreme 1:1,12 sure 21:5 33:5 47:5 60:1 surely 47:17 48:4 system 16:20 25:1 30:20 45:17,18,20 46:4,8,20,20 systems 20:2 system's 46:14</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 table 9:3,7 39:14 45:9 tables 48:8 tailored 41:25 take 7:12 9:2,7 25:22,22 52:16 59:19 taken 37:16 41:1 45:16 talked 13:22 talking 11:19 34:5 36:5 47:11 58:8 taught 23:7 tell 10:17 15:4 18:14 21:9 23:16 tells 19:12 29:7 tends 24:13</p>
---	--	---	--	---

<p>tensions 11:8 term 5:7,19 8:2 terminates 46:14 terms 30:17 34:24 36:7 39:8 45:22 47:8 48:3,17 51:19 52:23 53:25 54:8 55:11 term-of-year 5:11 terrible 32:2 Thank 28:6,11 55:18,23 61:5 theoretically 13:7 theory 18:13 20:14 thing 21:25 47:24 58:19 things 26:11 40:13 53:4 59:19 think 4:17 5:9 6:5,6 6:12,18,22,25 7:10 7:14,23 8:10,19,21 9:22 10:8,13,22 12:9 13:5,18 15:1 15:10,20,23 16:5 17:7,20 18:16 19:25 20:8 21:3,17 22:9,12,14 23:20 23:22 25:12 27:8 31:2 33:21 35:3,18 37:9 39:1,5 40:8 41:23 42:13 43:2 44:7,9 45:21 47:3 47:3 49:4,16 50:18 51:1,5,6,9,13 52:3 53:20 54:16 54:18 55:1,2 56:14 58:2,5,6,19,21 59:2,6,13,21 60:6 60:11,15,16,19,24 thinking 45:22 57:25 Thirteen 16:3 Thompson 17:2 thought 11:10 21:24</p>	<p>36:7 41:6 44:6 58:6,22 59:3,10 60:3,7 three 20:14 28:17 three-Justice 35:21 time 24:2 28:5 55:8 times 40:2 Tison 49:13 today 26:14 28:18 told 50:14,15 topic 33:14 totally 42:25 touch 28:17 tough 6:6 tradition 7:8 transfer 13:19 16:17 17:1 45:19 47:21 48:1,10 57:17 transferred 16:11 45:20 46:3,6,7,8 46:19 transferring 47:19 transitory 8:13 21:21 treated 13:21 39:20 treatment 22:20 37:14 trial 7:16 21:5 trier 8:3 true 7:19 19:11 20:1 57:23,23 trump 41:11 try 14:22 trying 13:24 17:6,14 18:18 19:10 21:18 27:9 29:9 43:20 Tuesday 1:9 turns 37:4 twice 49:23 two 11:15 16:15 24:9 29:23 38:10 39:20 40:3,13 53:4 53:14,15 56:14,15 57:17</p>	<p>type 38:2 typical 36:22 typically 37:4</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 28:23 undermine 34:23 understand 7:6 11:8 13:2,4,17 14:2,6 15:2,18 42:13 58:3 understanding 9:9 23:7 understood 47:18 48:4 unfair 23:6 unintentional 58:16 unique 41:25 42:1 52:1,1 United 1:1,12 universe 17:23 18:1 21:14 unprincipled 8:16 unquestionably 23:23 unsupported 8:16 unusual 33:6 upbringing 33:13 urge 27:18 usually 10:11</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4,10 28:3 35:24 40:18,18 value 48:23 values 35:14 victim 35:15 53:23 53:23 victims 52:2,12 view 25:12 views 20:17 vignettes 50:14,15 violation 10:5 violent 56:22 vis-à-vis 34:2</p>	<p>vividly 35:23 vote 59:4 vouch 30:12 vulnerable 24:24 61:1,3</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>want 11:17 33:4,7 33:15,16 42:19 43:12,14,15 47:6 51:15 55:25 56:13 57:1,13,17 58:1 Washington 1:8 wasn't 20:13 23:1 way 11:18 25:16 34:6 42:18,20 48:22 53:24 ways 27:16 well-supported 57:12 We'll 3:3 we're 6:17,19 11:19 12:6 20:22,24 23:11 27:22 28:25 36:5 45:13,15 47:7 47:11 48:16 60:12 we've 5:4 7:23 10:20 10:20 18:21,24 19:1,2 27:19 37:14 39:16 40:3,4 41:17 59:10 whatsoever 11:12 white 28:4 who've 50:20 widely 42:8 win 41:15 wondering 39:12,21 Woodson 40:18 41:23 42:4,7 words 26:3 37:3 52:24 world 33:25 worse 55:4 worst 11:2 29:22,22</p>	<p>49:10 worth 4:9 wouldn't 25:11,16 34:22 44:24 60:21 write 9:11 11:22 12:9 18:15 wrongfulness 51:12</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>years 4:24 5:6,6,25 6:12,20,21,21 11:1 25:17 31:11,11 32:13 50:9,9 51:8 56:8,8 young 4:4 21:21 25:13,16 48:24 younger 7:4 9:19 17:13 19:19 24:23 27:6 youth 9:19 11:20 38:14,16 41:1 youthfulness 7:12</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 31:24 32:1,2 10 11:1 43:14 45:5 45:10 10-year-old 17:16 42:24 10-9646 1:4 3:4 10:25 1:13 3:2 11 11:1 11:24 61:8 12 43:12,22 44:9 45:8 46:22 47:8 48:7,11,11,13 60:9 12-year-old 45:2,4 45:11 12-year-old's 43:21 13 46:7,11 47:8 48:7 48:13 60:6,9 13-year-old 45:2,12</p>
---	--	--	---	---

<p>13-year-olds 46:9 14 6:21,24 7:23 9:19 17:13,24 43:16 44:24 45:15,24 46:3,6,21 47:8,11 60:10 14-year-old 7:2 47:15 48:1 58:14 15 6:20,21,24 9:21 10:1,2 11:12,13 16:2 18:5 23:24 27:17 31:11,19 46:22 56:8 15-year-old 7:3 25:18 26:21 16 11:13 26:20 59:6 16-year-old 15:5 17 11:1,1 26:21 27:14 42:17 17-year-old 15:5 18 10:19 11:17,20 12:12 14:4,13 16:4 16:21 20:1 23:12 24:3 42:17 60:10 18-year-olds 19:16</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>20 1:9 56:8 20,000s 31:13 2012 1:9 21 16:21 46:12,14 2300 14:11,14 25 25:17 26 54:23 27 29:5,16 35:4 28 2:7</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 30 45:15 59:9,20 39 12:15 13:6 29:3</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 55:20 40 32:13 51:8</p>	<p>40-year-old 25:17</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>50 4:24 5:25 6:12 31:11 50-year 6:7 55 2:10</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6-year-old 17:19 60 5:6 6:21 60-year 5:7</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 42:17 7,500 31:16 70 5:6 6:21 31:8 70,000s 31:12 71 31:8 7500 32:5,9 79 17:12 26:12 30:2 30:4,6,24</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 30:23 8-year-old 17:19 42:24 80-plus 20:1 82 30:3,3,24 85 19:21</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9 43:15 90 31:3,5</p>			
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