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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-7412, Graham v. Florida.

Mr. Gowdy.

ORAL ARGUMENT OF BRYAN S. GOWDY

ON BEHALF OF THE PETITIONER

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

Sentencing an adolescent to life without any possibility of parole condemns him to die in prison and rejects any hope that he will change for the better. This sentence, like the death penalty, cruelly ignores the inherent qualities of youth and the differences between adolescents and adults. At --

JUSTICE GINSBURG: Are you urging that in all cases, including homicide cases? Or are you drawing the line at homicide?

MR. GOWDY: We are -- we are drawing the line, Your Honor, at -- at non-homicide cases because we recognize under the Eighth Amendment that we must look at societal consensus, and society has said that murder is different and has said that in the sentencing practices, as demonstrated by the fact that outside of

1 Florida judges and juries have imposed this sentence on
2 just 30 non-homicide offenders in just 6 States.

3 CHIEF JUSTICE ROBERTS: Thirty-eight States
4 allow this sentence, though, don't they?

5 MR. GOWDY: Thirty --

6 CHIEF JUSTICE ROBERTS: Thirty-eight, 39. I
7 know you have a little dispute, but the vast majority of
8 States allow the imposition of this sentence.

9 MR. GOWDY: The vast majority allow it and
10 they have for some time, and we believe that the fact
11 that it has been allowed for so long and imposed so
12 rarely, as the States themselves have admitted, is -- is
13 strong evidence of societal consensus.

14 JUSTICE ALITO: You're making a --

15 CHIEF JUSTICE ROBERTS: I would have thought
16 that would be strong evidence that they appreciate the
17 gravity of the sentence in the particular circumstances
18 of juveniles and therefore only impose it rarely.

19 MR. GOWDY: Your Honor, I would -- I would
20 disagree. I would -- if -- if there's 30 -- 31 States
21 that have allowed it and have never imposed it, in -- in
22 our judgment, that -- that's evidence that it's very
23 unusual, and you couple that --

24 JUSTICE SCALIA: No sentence can be -- can
25 be imposed rarely?

1 MR. GOWDY: No, Your Honor, it has to --

2 JUSTICE SCALIA: When a sentence is imposed
3 rarely, it becomes unconstitutional?

4 MR. GOWDY: No, Your Honor.

5 JUSTICE SCALIA: That's not your position?
6 What --

7 MR. GOWDY: Our position is that you are
8 looking at two things. One, is it cruel? It's cruel
9 because life without parole is unique, is particularly
10 cruel to adolescents because it -- it gives up on the
11 adolescent and determines that he is forever unfit to
12 live in civil society.

13 JUSTICE SCALIA: It doesn't make it crueler
14 to him. I don't see why it's any crueler to an
15 adolescent than it is to -- what -- where do you draw
16 the line? At 21?

17 MR. GOWDY: We draw the line at 18, the same
18 line that the Court drew in Roper. And it's cruel
19 because of the inherent -- the inherent qualities of
20 youth.

21 JUSTICE ALITO: And you are making a per se
22 argument, no? You can imagine someone who is a month
23 short of his 18th birthday, and you are saying that, no
24 matter what this person does, commits the most horrible
25 series of non-homicide offenses that you can imagine, a

1 whole series of brutal rapes, assaults that render
2 the -- the victim paraplegic but not dead, no matter
3 what, the person is sentenced shows no remorse
4 whatsoever, the worst case you can possibly imagine,
5 cannot -- that person must at some point be made
6 eligible for parole. That's your argument?

7 MR. GOWDY: Your Honor, that's -- that's
8 correct. The life -- yes. A life with parole sentence
9 would be constitutional, and that may mean that person
10 you describe still spends his entire life in prison, but
11 life with parole gives some hope to the adolescent who
12 has an inherent capacity to change. It gives him some
13 hope that later in time he may be released.

14 JUSTICE ALITO: If we agree with you --

15 JUSTICE SCALIA: And so if it's --

16 JUSTICE ALITO: If we agree with you, at
17 what point must the parole consideration be given?
18 There is a suggestion in your brief that maybe the
19 Colorado statute, which says that a person can get
20 parole consideration after 40 years, would be
21 constitutional. Is that your position?

22 MR. GOWDY: Your Honor, our position is that
23 it should be left up to the States to decide. We think
24 that the -- the Colorado provision would probably be
25 constitutional. We will have to see what different

1 States do. I mean, but -- but, yes, even that long
2 amount of time would give at least some hope to the
3 adolescent offender.

4 CHIEF JUSTICE ROBERTS: What about -- what
5 if it's the -- pursuant to the usual State parole
6 system, and it turns out that grants parole to 1 out of
7 20 applicants?

8 MR. GOWDY: I think all that would have to
9 be required, Your Honor -- I think that would be
10 sufficient. All that would have to be required is a
11 meaningful opportunity to the adolescent offender to
12 demonstrate that he has in fact changed, reformed, and
13 is now fit to live in society. It -- that's all.
14 That's all we are asking for.

15 We are not asking that it be automatic right
16 to get back out. If Terrance Graham or Joe Sullivan --

17 CHIEF JUSTICE ROBERTS: It seems to me that
18 your -- your argument suggests that you are, quite
19 rightly, focusing on the particular facts that have life
20 without parole. But if you concede that it's all right
21 to have a sentence of 50 years and then a consideration
22 where 1 out of 20 people are granted parole, I think it
23 suggests that the line you would draw is -- is pretty
24 artificial -- or certainly suggests that the next case
25 we will get is somebody with life with parole after

1 50 years.

2 MR. GOWDY: Your Honor, first, I'm -- I'm
3 not conceding that with 50. The question was asked
4 about 40. But I understand --

5 CHIEF JUSTICE ROBERTS: Are you saying there
6 is something in the Eighth Amendment that draws a
7 distinction between 40 and 50 in that case?

8 MR. GOWDY: Your Honor, I'm saying that this
9 sentence that we are here today before is unequivocally,
10 unmistakably a condemnation that you will never be
11 released from prison, and so this sentence clearly falls
12 on the line of being cruel because it tells an
13 adolescent, for an adolescent mistake, you can never
14 live in civil society.

15 There will be other sentences that people
16 will argue are the equivalent of this sentence, and --
17 and people may argue that with a 50-year sentence. But
18 this sentence here is unequivocal, and there is no
19 question that it's cruel because of -- of the fact that
20 it rejects any hope that the adolescent can be changed.

21 JUSTICE GINSBURG: Is it a fact that --

22 JUSTICE KENNEDY: I'm interested in -- in
23 two different things and you can address them during the
24 course of your argument. One is the assumption of the
25 argument seems to be that there are in place parole --

1 throughout all the States -- parole systems which are
2 effective, which are operating, and that they have the
3 capacity to make accurate judgments about
4 rehabilitation. What can I read -- what -- what studies
5 do you have to -- that -- that comment on that?

6 Secondly, unrelated, at some point I think
7 you ought to talk about the procedural bar, which is
8 something you go over very, very, very -- let's see --
9 that's Sullivan.

10 JUSTICE GINSBURG: That's the other case.

11 JUSTICE KENNEDY: Pardon me. That's
12 Sullivan, yes.

13 MR. GOWDY: With leave, I will let
14 Mr. Stevenson answer about the procedural bar.

15 But on the first question, Your Honor, I
16 would point you to the amicus brief filed by the various
17 correctional officers that talk about the types of
18 programs that can be done. I think that that has -- is
19 very thorough and -- and would answer it far better than
20 I can in a couple minutes up here.

21 But, yes, to answer short, we -- we believe
22 that -- that the parole systems in place can be
23 effective to do this, and in all seven States where
24 there are currently non-homicide juvenile offenders,
25 they all have functioning parole systems.

1 Even Florida has it. Even though it -- it
2 abolished parole in 1983, Florida still has 6,000
3 parole-eligible inmates and last year they heard over --
4 they made over 1,700 parole determinations. So the --
5 the administrative burden to the State of adding these
6 --

7 JUSTICE ALITO: But Florida has abolished
8 parole, has it not, going forward?

9 MR. GOWDY: Going forward, it has abolished
10 parole --

11 JUSTICE ALITO: So eventually, if things are
12 allowed to take their course, the Florida parole board
13 will go out of business.

14 MR. GOWDY: And Florida can choose to make
15 that sentence and instead impose a sentence, as its
16 prosecutor recommended here, a 30-year determinate
17 sentence, if Florida doesn't want to reinstitute parole.
18 We are not saying it has to do parole. That's just one
19 of several constitutional options.

20 JUSTICE KENNEDY: What -- what would you do
21 if there were a crime spree and there were different
22 jurisdictions? One jurisdiction imposes for 35 years,
23 the next jurisdiction for another 35 years, to be served
24 consecutively.

25 MR. GOWDY: Well, Your -- Your Honor, I -- I

1 think that the -- that you would get into the question
2 about whether that sentence is the equivalent of life
3 without parole, and there could be an argument made that
4 if you -- obviously, if you sentence someone to 150,
5 200 years, there's no conceivable hope of ever release,
6 150 years without parole.

7 JUSTICE KENNEDY: So the second jurisdiction
8 has the obligation, but not the first? Is that the way
9 it works?

10 MR. GOWDY: I would think that the -- if you
11 have that -- I would think that the -- that the judge
12 making that sentence would have to take that into
13 consideration, that this sentence is going to -- based
14 on all adolescent conduct -- it has to be all adolescent
15 conduct, not if some of the conduct is post-juvenile.
16 But, yes, I would think that the -- that the second
17 sentencing judge would need to take that into
18 consideration.

19 JUSTICE SCALIA: So he -- he could sentence
20 up to 1 year before the life expectancy of the -- of
21 the person in prison? That -- that would be okay?

22 MR. GOWDY: I -- I wouldn't say that would
23 be okay, Your Honor. I think that --

24 JUSTICE SCALIA: Well, what's he supposed to
25 do? How many years can he give --

1 MR. GOWDY: I think --

2 JUSTICE SCALIA: -- consecutive?

3 MR. GOWDY: I think there has to be some --

4 JUSTICE SCALIA: There obviously does. What
5 do you propose? I propose, you know, 1 year before
6 his life expectancy.

7 MR. GOWDY: Your -- Your Honor, I think that
8 would be coming so close to the -- the constitutional
9 line, it would be -- it would be difficult to see that
10 as constitutional, but -- but --

11 JUSTICE SCALIA: Oh, 1 year before life is
12 also unconstitutional?

13 MR. GOWDY: Your Honor, I'm --

14 JUSTICE SCALIA: Two years before life?

15 MR. GOWDY: Your -- Your Honor, there would
16 definitely be a -- a difficult line to draw at that
17 case. Life without parole, though, is unequivocal. And
18 even that sentence that you are describing, there is
19 some difference between it and life without parole,
20 because only life without parole makes the unequivocal
21 assessment that the adolescent cannot be returned to
22 civil society.

23 CHIEF JUSTICE ROBERTS: We have -- you are
24 arguing for a categorical rule.

25 MR. GOWDY: Yes.

1 CHIEF JUSTICE ROBERTS: Your friend on the
2 other side is arguing for a categorical rule, always
3 permissible. But we have a precedent that suggests in
4 -- in an individual case, you assess the proportionality
5 of the sentence to the crime.

6 Now, we know from Roper that death is
7 different, and we know from Roper that juveniles are
8 different. Wouldn't it make sense to incorporate the
9 consideration of the juvenile status into the
10 proportionality review? So that if you do have a case
11 where it's the 17-year-old who is 1 week shy of his
12 18th birthday and it is the most grievous crime
13 spree you can imagine, you can determine that in that
14 case life without parole may not be disproportionate.

15 But if it's -- and I know you would argue
16 that these are the facts here -- if it's a less grievous
17 crime and there is, for example, a younger defendant
18 involved, then in that case maybe it is
19 disproportionate.

20 Why -- why doesn't that seem more sensitive?
21 And it avoids all of the line-drawing problems we have
22 been discussing.

23 MR. GOWDY: Well, two things: First, Your
24 Honor, Roper states, and the science -- states it based
25 on the science, that at that age we cannot make a

1 determination about whether or not the adolescent will
2 or will not reform. Even an expert psychologist,
3 psychiatrist cannot do it.

4 CHIEF JUSTICE ROBERTS: Oh, I understand.
5 But I don't think they'll say that we can't make that
6 determination at 17 years 51 months, but we can make
7 that determination at 18 years 1 month.

8 MR. GOWDY: Well, anywhere you draw the
9 line, Your Honor, you're going to come up with an
10 example where you are 1 day before or 1 day after, and
11 the Court in Roper struggled with where to draw the line
12 between maturity and immaturity, and it concluded,
13 rightly so, to draw the line at 18 based on both the
14 science and the legislative determinations.

15 CHIEF JUSTICE ROBERTS: But that is because,
16 as they told us, death is different. And you do -- once
17 you decide that, you do have to draw a line somewhere.
18 I'm just wondering why we have to go all the way in with
19 you or all the way with your opponent when our precedent
20 allows us to consider an issue of this sort on a case-
21 by-case basis.

22 MR. GOWDY: I think it's because adolescents
23 are different. Adolescents are different in that we
24 can't tell at this age whether they are going to reform
25 or not. And all we are proposing is that an adolescent

1 not necessarily be released, but that he be given a
2 later opportunity. And it boils -- it just comes down
3 to adolescents are different, Your Honor, and the
4 determination can't be made at age 17 even for the most
5 heinous crimes that are committed.

6 JUSTICE GINSBURG: Is there any difference
7 in the terms of incarceration making this harsher than
8 otherwise? I think you suggested in -- in your brief
9 that educational and vocational training is not given to
10 people who are in for life without parole because they
11 will never be out on the street so they don't need to be
12 transitioned back.

13 MR. GOWDY: If I understand your question,
14 would it be different if those type of programs are made
15 available to life-without- --

16 JUSTICE GINSBURG: My question is, first,
17 you say that they are not available.

18 MR. GOWDY: Yes.

19 JUSTICE GINSBURG: Is that -- that's so?

20 MR. GOWDY: Yes, that is generally true.
21 And the -- and the very Website that the State of
22 Florida cites makes a point of saying that the programs
23 are for the purpose of reentry into society, and so
24 those are obviously the opposite of what life
25 without parole is. You are never going to reenter

1 society. And it's generally true that those programs
2 are not available to offenders who get life without
3 parole, and that's what makes the sentence so
4 particularly cruel, to give up on a kid at that point in
5 his life.

6 JUSTICE GINSBURG: So what are the terms of
7 incarceration? They just stay in their cells and --

8 MR. GOWDY: Well, Your Honor, I think it
9 varies obviously by facility by facility. But the
10 sentence means you are going to stay in your cell and
11 die there. You are going to stay in your cell for 60 or
12 70 years, whenever you reach your natural death, and die
13 there.

14 You know, they -- they do have some limited
15 freedoms, as the State of Florida has pointed out, the
16 same types of freedoms that people on death row have.
17 But ultimately both sentences mean that you are going to
18 die in a State-controlled institution. And they are
19 very hopeless --

20 JUSTICE SCALIA: I don't think -- the same
21 kind of freedom that people on death row have? I --

22 MR. GOWDY: Well, the State makes the point
23 in their brief, Your Honor, that you have the right to
24 exercise your religion, you have the -- you have the
25 right to petition the courts.

1 JUSTICE SCALIA: Aren't they released into
2 the general population for exercise, for -- which I
3 don't think death row inmates are.

4 MR. GOWDY: Your Honor, I -- obviously
5 everything varies facility by facility, but it's --

6 JUSTICE SCALIA: Well, I doubt whether this
7 varies. I -- I don't know of any principle where if you
8 are in for life, you are in solitary.

9 MR. GOWDY: Well, I'm not -- I'm not -- you
10 are correct. I'm not suggesting they are in solitary
11 confinement. But they are locked up for the rest of
12 their life, and they're not allowed to rejoin civil
13 society even if, as some of the former juvenile
14 offenders who filed a brief in this case, can
15 demonstrate that they have become model citizens.

16 JUSTICE ALITO: And why isn't the -- the
17 most sensible way to deal with the problem that you are
18 raising, the one that the Chief Justice suggested, to
19 permit as-applied proportionality challenges that take
20 into account the particular circumstances of the
21 juvenile in question, rather than this per se rule that
22 you are advocating, which would deprive the State of
23 Florida from reaching the judgment that there are some
24 -- there are some juveniles, some individuals who are
25 short of their 18th birthday, who cannot -- who deserve

1 imprisonment in -- life imprisonment without parole?

2 Some of the actual cases that -- in which
3 this sentence has been imposed in Florida involve
4 factual situations that are so horrible that I couldn't
5 have imagined them if I hadn't actually seen them.
6 Raping an 8-year-old girl and burying her alive. Are
7 you familiar with that case?

8 MR. GOWDY: I am not familiar with that
9 particular case. No.

10 JUSTICE ALITO: Raping a woman in front of
11 her 12-year-old son and then forcing the son to engage
12 in sexual conduct with the mother. Are you familiar
13 with that case?

14 MR. GOWDY: Yes, Your Honor, I am familiar
15 with that case.

16 Your Honor, the reason, first of all, the
17 Court has said and said so clearly in Kennedy that
18 murder is different. In the Kennedy decision, you also
19 said: Horrible facts, someone who raped their
20 stepdaughter. But yet this Court drew a line and
21 exempted from capital punishment adult defendants who
22 commit horrible crimes.

23 But to get to the core of your question as
24 to why not do it on a case-by-case basis, because you
25 can only make the determination about the adolescent

1 later in life. And I -- we would agree that there
2 should be a case-by-case determination as to -- as to
3 whether or not that offender should spend his whole life
4 in prison, but we say it needs to happen later, once he
5 has matured, once he's reached past adulthood, because
6 when you're --

7 JUSTICE SCALIA: You assume -- doesn't your
8 argument assume that the only purpose of punishment is
9 deterrence in the sense of protecting society from this
10 person in the future, so that, you know, once that's no
11 longer a problem, we should let this person out. But
12 that isn't the only purpose of punishment that we've
13 acknowledged. One of the purposes is retribution,
14 punishment for just perfectly horrible actions. And I
15 don't know why that value of retribution diminishes to
16 the point of zero when it's a person who's, you know,
17 17 years 9 months old.

18 MR. GOWDY: We are not suggesting that it
19 goes to the point of zero. We're not -- and we concede
20 the State has a right to -- to exact retribution from
21 the juvenile offender. And in this case, 30 years would
22 have been a lot of retribution for Terrance Graham, both
23 --

24 JUSTICE SCALIA: Most States didn't -- don't
25 think so, or many States don't think so.

1 MR. GOWDY: Well, Your Honor, we -- but a
2 Juvenile is -- not only does he have an inherent
3 capacity to grow; he is less culpable. And so to exact
4 the most -- for a non-homicide crime whether you are
5 adult or juvenile, this is the most severe punishment
6 you can receive, and to exact that most severe
7 punishment for a less culpable offender that the Court
8 has recognized is a less culpable offender doesn't -- is
9 too much retribution. We are not saying the State can't
10 exercise retribution, but that life without parole is --
11 is too much for those types of crimes.

12 JUSTICE STEVENS: Mr. Gowdy, can I ask this
13 question?

14 MR. GOWDY: Yes, Justice.

15 JUSTICE STEVENS: If your client in this
16 case had been processed in the juvenile system instead
17 of the adult system, what would the maximum penalty he
18 could have received been?

19 MR. GOWDY: He would have had to have been
20 released when he was 22 years.

21 JUSTICE STEVENS: So the choice is between
22 that short a term and an indefinite term?

23 MR. GOWDY: No, no, Your Honor. We -- we
24 concede that the State of Florida may continue to
25 prosecute juveniles in adult court and that makes sense

1 in order to get a term of years that is longer than you
2 can get in juvenile court. And in this case, if the
3 judge had gone along with the prosecutor's
4 recommendation, it would have meant a 30-year sentence
5 for my client, which would have been far longer than he
6 could have gotten in the juvenile court. Worse --

7 CHIEF JUSTICE ROBERTS: The logic in Roper
8 was very straightforward. It says, "Death is reserved
9 for the worst of the worst." I think that was the
10 quote. We know that juveniles are not the worst of
11 the worst, for the reasons you have articulated, that
12 they are not fully developed, don't have moral sense to
13 the same extent as an adult. But life without parole is
14 not reserved for the worst of the worst, and so it seems
15 to me that the logic of our precedent suggests that you
16 can't necessarily rely on the juvenile status to exempt
17 them from a penalty that is not reserved for the worst
18 of the worst, but perhaps it makes sense to consider in
19 a particular instance whether the penalty is
20 disproportionate, given the juvenile's characteristics
21 that you suggest.

22 MR. GOWDY: Well, I guess we will come back
23 to the point that I think life with parole would be a
24 long sentence, and I don't -- I don't see how you can do
25 it on a case-by-case basis at age 17. You can certainly

1 do it --

2 JUSTICE GINSBURG: Is there -- is there
3 disproportionality review generally in Florida and
4 particularly for juvenile offenders?

5 MR. GOWDY: There is no -- no. Under
6 Florida law, there is no basis to challenge a sentence
7 as being excessive or disproportionate as long as it's
8 at the statutory maximum.

9 CHIEF JUSTICE ROBERTS: Well, there wasn't
10 prior to our death penalty jurisprudence, either. And I
11 thought we reviewed proportionality as a matter of
12 Federal law in the Solem case.

13 MR. GOWDY: Right. I guess I understood
14 Justice Ginsburg's question as is it under Florida law.

15 JUSTICE GINSBURG: Yes.

16 CHIEF JUSTICE ROBERTS: Right.

17 MR. GOWDY: Can you --

18 CHIEF JUSTICE ROBERTS: Well, so did I, but
19 we are talking about constitutionality under the Eighth
20 Amendment --

21 MR. GOWDY: Right.

22 CHIEF JUSTICE ROBERTS: -- which is Federal
23 law.

24 MR. GOWDY: I guess a -- I know under
25 Federal -- under Federal sentencing law, statutory law,

1 there's a reasonableness review. And I was -- I guess
2 I was trying to draw a comparison with, and maybe I'm
3 not answering the question correctly, that we don't have
4 that in Florida.

5 JUSTICE GINSBURG: Yes, that's what I meant,
6 whether you'd have to create a -- a procedure that does
7 not exist in Florida for proportionality review.

8 MR. GOWDY: Well, there would -- it would
9 have to be strictly Federal law. It would have to be a
10 procedure on a -- if you do this case-by-case
11 suggestion, it would -- it would have to be strictly
12 based on Federal constitutional law, because --

13 JUSTICE SCALIA: Oh, sure, but you can make
14 that claim in Florida courts, can't you?

15 MR. GOWDY: You can --

16 JUSTICE SCALIA: Can't you argue in Florida
17 courts that this sentence is disproportionate and
18 violates the Eighth Amendment, whereupon the Florida
19 courts would have to decide? Wouldn't they have to
20 decide that question?

21 MR. GOWDY: You -- you could make that
22 argument. And we do -- we do -- I should point out to
23 the Court that we do have a fallback position in our
24 papers based on Mr. Graham's offense of armed burglary
25 and -- and the fact that in only two States could Mr.

1 Graham have gotten this sentence and that the only State
2 that has actually imposed it for a first-time armed
3 burglary is Florida. And it --

4 JUSTICE GINSBURG: But there is a problem
5 with that argument in this case, because the sentencing
6 judge made it quite plain that he was treating Graham as
7 a recidivist, not as a first-time offender. He said --
8 Graham got a very light sentence, just 12 months in
9 detention and then 3 years' probation, and the judge
10 said: Now, you better toe the line or else you could be
11 put away for a long time.

12 And then he committed -- it really was --
13 the sentence was for the later activities, even though
14 they weren't proved beyond a reasonable doubt. I think
15 that Graham admitted to a couple of -- to more armed
16 robberies. Isn't that so?

17 MR. GOWDY: He -- he admitted to the police,
18 and I don't want to get too much into the facts, but
19 that -- but even if Your Honor concedes that he was
20 convicted of all those crimes, which he was not
21 convicted of, but the judge, as you say, correctly
22 relied upon for this sentence, then we only have two
23 States that we know of that have imposed life without
24 parole for a recidivist robbery or burglary crime, and
25 that's California and Florida.

1 And we -- we've set forth that argument to
2 give the Court that option, but we believe our primary
3 argument, the categorical rule, is more logical because
4 of the fact that you can't do a case-by-case
5 determination of an adolescent at the time -- based on
6 his juvenile offense. And maybe, in these horrible
7 crimes --

8 JUSTICE SOTOMAYOR: But you haven't answered
9 Justice Alito's point, which is: What's the difference
10 a month before he's 18 and a month after? What
11 makes us more capable at the 18th birthday to --

12 MR. GOWDY: Well, you --

13 JUSTICE SOTOMAYOR: -- to affirm a judgment
14 that someone can't be -- can't be -- can't be
15 rehabilitated?

16 MR. GOWDY: There is not much difference,
17 Your Honor, but the line has to be drawn somewhere. And
18 society, as this Court recognized in Roper, has
19 generally drawn that line at 18 --

20 JUSTICE SOTOMAYOR: Well --

21 MR. GOWDY: -- as between the --

22 JUSTICE SCALIA: A line has to be drawn
23 somewhere only if we accept your approach that there has
24 to be a categorical exemption. A line does not have to
25 be drawn somewhere if you adopt the approach of, case by

1 case, decide whether this is proportional, given how old
2 the individual was, given the nature of the crimes, and
3 all of the other factors. You don't have to draw a line
4 then, and that's the attraction of that approach.

5 MR. GOWDY: You -- I -- I think that the --
6 -- based on -- I would just ask to conclude and then I
7 will sit down.

8 Based on the -- on what scientists have told
9 us, the categorical approach is the most logical
10 approach because we can't tell which adolescents are
11 going to change and which aren't.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Gowdy.

14 Mr. Makar.

15 ORAL ARGUMENT OF SCOTT D. MAKAR

16 ON BEHALF OF THE RESPONDENT

17 MR. MAKAR: Mr. Chief Justice, and may it
18 please the Court:

19 The categorical rule that Petitioner seeks
20 here would undermine what Florida and other States have
21 adopted in terms of juvenile justice. And in
22 particular, it would go against three major trends, that
23 being strong punishment for serious violent crimes by
24 juveniles; second trend, transfer laws allowing
25 juveniles to be treated as adults; those laws have been

1 enacted in the last 15 years --

2 JUSTICE GINSBURG: Did that --

3 JUSTICE KENNEDY: I didn't -- I didn't hear
4 the second.

5 MR. GOWDY: I'm sorry.

6 The three trends are: The strong punishment
7 for juveniles that States have enacted over the last 15-
8 20 years; the various transfer and waiver laws that
9 States have enacted over the last 10, 15, 20 years
10 allowing juveniles to be transferred into adult court;
11 and then finally, what is really at issue is parole.
12 Parole has been eliminated in many States. Fifteen
13 States have totally eliminated it in the last 10, 15
14 years. So what they are seeking is a categorical rule
15 that goes against the national consensus and the
16 national trend.

17 The concession here was that Graham's
18 sentence could be even up to life as long as there is
19 the possibility of parole. We believe that's very
20 telling. In their brief, they point out that Graham
21 could have been sentenced to something just short of his
22 actuarial life. His actuarial life is around 64 years
23 old, which means just about a 46-year sentence.

24 And the standard that we suggest here is
25 that there cannot be any categorical rule, for the

1 reasons Justice Alito pointed out. We have --

2 CHIEF JUSTICE ROBERTS: Well, but you are
3 arguing for a categorical rule of your own. You are
4 saying that under a -- under -- juveniles under the age
5 of 18, what, it's never -- it can be never determinative
6 that they are juvenile in setting the sentence as a
7 matter of Federal law?

8 MR. MAKAR: Well, Mr. Chief Justice, we do
9 agree in Florida and other States as well that age does
10 matter, and we ask that there be three things that the
11 Court look at.

12 First, look at the legislative structure.
13 Florida structure doesn't -- Florida structure is a very
14 balanced, thoughtful approach, in waiving children into
15 the adult court only when it's a violent crime and only
16 under certain -- when certain ages are in play. Look at
17 the age. It does play a role. The judicial discretion
18 plays a role. The trial judge --

19 JUSTICE STEVENS: May I ask: Is there a
20 minimum age when a juvenile can be transferred to -- to
21 adult procedures?

22 MR. MAKAR: It's a three-tiered system,
23 Justice Stevens. And let me --

24 JUSTICE STEVENS: Well, I'm just interested
25 in one. Is there a minimum age?

1 MR. MAKAR: Yes. The way in which --

2 JUSTICE STEVENS: Is that an arbitrary line,
3 or how do you -- how do we know it shouldn't be higher
4 or lower than the line?

5 MR. MAKAR: Well, the legislature has set
6 the line at 14-15 for certain crimes and 16-17 for
7 others. And then for indictment, where it goes to a
8 grand jury, there is no age limitation. That has been
9 on our books for the better part of 50, 60 years,
10 allowing indictment -- allowing the grand jury to make a
11 decision about whether the particular juvenile shall be
12 brought into the adult court. So --

13 CHIEF JUSTICE ROBERTS: But then the -- what
14 is your objection to an approach that when you are
15 dealing with life without parole, for the reasons that
16 your brother has articulated, you must as a matter of
17 Federal law consider the juvenile status of the
18 defendant before that sentence is imposed?

19 MR. MAKAR: Well --

20 CHIEF JUSTICE ROBERTS: In other words, not
21 a -- not a categorical rule that it automatically makes
22 a difference, but not a categorical rule that it can
23 never make a difference?

24 MR. MAKAR: Well, sure. And as I say,
25 there's the three factors I would ask the Court to look

1 at.

2 First, the structure that we have here in
3 Florida, which many States have, that deal with the age.
4 Age does matter. Ninety-nine out of 100 juvenile
5 offenders in our system do not go into adult court, and
6 an even smaller percentage of that ultimately get into
7 the adult sanctions.

8 The trial judges in Florida, unless --
9 unless it's a very violent crime, have some discretion
10 to sentence as to age. If you look at the transcript
11 here in the joint appendix, the trial judge here
12 struggled with this, struggled with age, and said:
13 Juvenile sanctions are inappropriate; youthful offenders
14 -- youthful offender sanctions are inappropriate; I'm
15 going to sentence you to -- to adult.

16 JUSTICE STEVENS: Yes, but could I interrupt
17 with one question? Isn't it correct that the age is
18 relevant on whether or not to transfer the person to the
19 adult system, but once he's in the adult system age, is
20 entirely immaterial?

21 MR. MAKAR: That's not accurate, Justice
22 Stevens. Under the statute 985.226, 227, and 225, we
23 have a system in which the grounds are set for when
24 juveniles can be either mandatorily or discretionarily
25 brought into the adult system.

1 And then under the statute 985, the
2 punishment is graduated. In other words, for the lower
3 offenses, the juvenile sanctions must be considered and
4 the youthful offender sanctions must be considered.
5 It's only in certain limited instances, like indictment,
6 where it's a life offense, where the juvenile has been
7 indicted for life, that the trial judge is forced to do
8 adult sanctions.

9 In this case, Graham was under the
10 discretionary direct -- direct file, meaning that the
11 prosecutor had discretion whether to bring the case or
12 not. He brought it into the adult system. Graham
13 accept being processed as an adult. He was put on
14 probation, and then --

15 JUSTICE STEVENS: I still don't understand.
16 Just to make sure I get the point correct: After the
17 decision has been made to have them prosecuted in the
18 adult system, at that -- after that decision has been
19 made, is the age of the defendant a relevant factor in
20 sentencing?

21 MR. MAKAR: The age -- they get a
22 presentence report. The age is woven in --

23 JUSTICE STEVENS: I understand, but
24 statutorily? As a matter --

25 MR. MAKAR: Well, the statute doesn't

1 specifically say the trial judge --

2 JUSTICE STEVENS: The answer is no. It's --
3 under the statutes, it's totally irrelevant after he has
4 been transferred to the adult stage. Is that correct?

5 MR. MAKAR: Not exactly, because the range
6 of remedies the trial judge can impose is based upon
7 what method by which the juvenile was transferred or
8 waived into the adult court. In Graham's case, he was
9 allowed to have juvenile and youthful offender sanctions
10 considered because of his age. I mean, that's the way
11 --

12 JUSTICE SCALIA: You mean the trial judge
13 under Florida law does not have discretion to choose a
14 lower sentence because of the -- of tender years of the
15 defendant?

16 MR. MAKAR: Well, absolutely, the trial
17 judge does. And you can see the trial judge here
18 grappling with that.

19 JUSTICE STEVENS: But the statute doesn't
20 draw any distinctions once he is in -- in the adult --

21 MR. MAKAR: I guess the answer to your
22 question is there is no specific statute that says the
23 trial judge shall consider age specifically.

24 CHIEF JUSTICE ROBERTS: And -- and
25 there's -- well, I guess that answers my question. He

1 is not required to as a matter of Federal law. He can
2 say: I am not considering the fact that this is a
3 juvenile because I think his crime should be treated as
4 an adult crime.

5 MR. MAKAR: No -- I mean, certainly not
6 under any Federal constitutional principle I am aware
7 of.

8 CHIEF JUSTICE ROBERTS: Well, that's what we
9 are arguing about.

10 MR. MAKAR: Right, right. Well, certainly
11 here, I mean, what we would say, assuming there is no
12 categorical rule and the Court decides to go into the
13 proportionality balance here, we think that certainly
14 Graham's offense certainly is off the scales and would
15 be grossly -- probably be -- it would be --

16 JUSTICE GINSBURG: That's -- that's one of
17 the problems, is the individual sentencing judge might
18 think that Graham is a very bad individual, but the
19 prosecutor had a different judgment of it. And Florida
20 doesn't have any kind of proportionality review, doesn't
21 have any review -- appellate review of the sentences.

22 MR. MAKAR: Well --

23 JUSTICE GINSBURG: This judge, I think,
24 surprised everyone in the courtroom with the -- with the
25 sentence. Certainly it was far beyond what the

1 prosecutor recommended.

2 MR. MAKAR: Well, the prosecutor recommended
3 30 years, that's correct, and the judge here entered
4 life. As I say, that translates into -- essentially a
5 46-year actuarial life sentence. That was within the
6 trial judge's discretion, and particularly given the
7 seriousness of the offenses that Graham committed. We
8 are talking about violence.

9 And violence does matter. This Court has
10 said -- and certainly in oral argument in Solem and
11 others, the -- violence versus non-violent acts plays a
12 major role in sentencing, and it should play a major
13 role as well when it comes to juveniles.

14 I don't read Roper to say that it takes off
15 the table lengthy sentences for violent crimes by
16 juveniles.

17 JUSTICE SOTOMAYOR: Counsel --

18 MR. MAKAR: Yes.

19 JUSTICE SOTOMAYOR: Do you think
20 that it categorically violates the Eighth Amendment for
21 a 10-year-old to be sentenced to life without parole?

22 MR. MAKAR: Well, the answer to that is it
23 certainly raises a concern about the age. Age does
24 matter. And as the age goes down, it does.

25 JUSTICE SOTOMAYOR: So once it matters, the

1 question for me is -- help me draw the line -- if 10 is
2 in my judgment too early, why isn't 14, 16, or 18?
3 Meaning why should a -- someone below the age of 14 be
4 sentenced to life without parole? That's the -- that's
5 the Sullivan case --

6 MR. MAKAR: Right.

7 JUSTICE SOTOMAYOR: -- but it begs the
8 question, which is age is -- matters a lot. And so,
9 take on your adversary's argument that it matters a lot
10 because this is a less culpable person.

11 MR. MAKAR: Sure. It matters -- I think it
12 does matter and it certainly matters from a legislative
13 perspective, from a judicial perspective, and from an
14 Eighth Amendment perspective.

15 JUSTICE SCALIA: What about historical
16 perspective? I mean, you might appeal to the fact that
17 at common law, which was in effect when the Cruel and
18 Unusual Punishments Clause was adopted, 12 years was --
19 was viewed as the year when a -- when a person reaches
20 the age of reason. And -- and the death penalty could
21 not be inflicted on anyone --

22 MR. MAKAR: Well, certainly that historical
23 perspective has --

24 JUSTICE SCALIA: -- and all felonies were
25 the death penalty.

1 MR. MAKAR: Sure. And it has importance.
2 To some extent, the States have displaced the common law
3 with their juvenile justice systems. And we -- as I
4 say, I believe Florida's is -- is very balanced.

5 Going back to your question, Justice
6 Sotomayor, I think that the way age plays a role is that
7 we -- in our system in Florida, we have no one under the
8 age of 13. And that's sort of provides us --

9 JUSTICE GINSBURG: You have no one? What
10 was your answer?

11 MR. MAKAR: I'm sorry. No -- no one in our
12 system is under the age of 13 with life without parole.
13 You know, there are very --

14 JUSTICE SOTOMAYOR: Is that because judges
15 haven't chosen to impose it or because your legal system
16 doesn't permit it?

17 MR. MAKAR: No, the legal system permits it.
18 I --

19 JUSTICE SOTOMAYOR: How young could the
20 youngest person in Florida be to be prosecuted as an
21 adult and be eligible for life --

22 MR. MAKAR: Well --

23 JUSTICE SOTOMAYOR: -- without parole?

24 MR. MAKAR: Under the indictment statute,
25 there is no age limitation. So, theoretically --

1 JUSTICE SOTOMAYOR: So a 5-year-old could be
2 put away for life?

3 MR. MAKAR: That is theoretically. We would
4 hope that the system would not allow that to occur. And
5 that that would be certainly violative of the --

6 CHIEF JUSTICE ROBERTS: In -- in your
7 earlier response to Justice Sotomayor's question, you
8 said age certainly matters. As -- as a -- as a matter
9 of what law?

10 In other words, I understood your submission
11 to be that there was nothing in Federal law that
12 requires different consideration of age. So when you
13 say age matters, why?

14 MR. MAKAR: Well, we suggest that it may
15 matter in a particular case, and when you get to the
16 gross disproportionality --

17 CHIEF JUSTICE ROBERTS: Under the authority
18 of what law? Age matters in a particular case because
19 of --

20 MR. MAKAR: Well, I -- I -- I think our --
21 country's traditions recognize it --

22 CHIEF JUSTICE ROBERTS: Because of the
23 Eighth Amendment?

24 MR. MAKAR: Well, I believe it could be
25 certainly a part of the Eighth Amendment analysis. I

1 think just -- certainly age matters in the legislative
2 branch, judicial branch, executive branch. It matters
3 that we look at the age and make considerations about it
4 when Florida has made those considered judgments.

5 What we are saying is that if the Court
6 decides to go down the path that's perhaps fraught with
7 more line-drawing than one can imagine and decides that
8 age will be a part of the proportionality, it creates
9 serious problems. But here --

10 CHIEF JUSTICE ROBERTS: I'm sorry. Why is
11 that? If you go down on a case-by-case basis, there are
12 no line-drawing problems. You just simply say age has
13 to be considered as a matter of the Eighth Amendment.

14 JUSTICE SCALIA: And then we apply a
15 totality of the circumstances test --

16 MR. MAKAR: Well -- well --

17 JUSTICE SCALIA: -- which means whatever
18 seems -- seems like a good idea.

19 CHIEF JUSTICE ROBERTS: Well, we apply the
20 proportionality review that we articulated in Harmelin,
21 and Solem and Ewing.

22 MR. MAKAR: Well, of course --

23 CHIEF JUSTICE ROBERTS: It's already there.

24 MR. MAKAR: Well, if that's applied, and
25 even if you consider age in these cases that are before

1 the Court, they are on the violent side of the line.
2 They are out in the tail of the distribution in terms of
3 seriousness of the offense. So it would be the same
4 result in either case. I think perhaps --

5 JUSTICE SOTOMAYOR: You are not seriously
6 suggesting that the crimes at issue here are comparable
7 to a rape or a permanent infliction of serious
8 disability or any of those other very violent crimes
9 that are close to homicide that Justice Alito spoke
10 about? There is a quantitative and qualitative
11 difference between those, isn't there?

12 MR. MAKAR: There is, but the legislatures
13 make the judgment about how they are going to punish
14 those. And in Florida, we have --

15 JUSTICE SOTOMAYOR: Well, if we -- if we
16 have already said that you can't impose death on an
17 adult who hasn't committed a homicide, an intentional
18 death, and so for an adult the most serious sentence
19 that we can give them is life without parole, why should
20 that same sentence be given to a juvenile who we have
21 recognized as being less capable than an adult? And why
22 should we permit it for a crime that's not comparable to
23 a homicide and/or something akin in seriousness to that?

24 MR. MAKAR: Because it is still a very
25 serious, violent crime. We are talking about weapons

1 and guns and people's lives at risk. And the
2 legislature has made the judgment in Florida and other
3 States to say that that type of crime --

4 JUSTICE SOTOMAYOR: But isn't it true -- and
5 I think one of my colleagues already questioned you --
6 that the prosecutor didn't think that this merited life
7 without parole. Didn't the parole supervisor say that
8 this young man, Mr. Graham, was compliant with other
9 conditions of his probation? He went to school. He did
10 other things. It does suggest some hope for him.

11 MR. MAKAR: Well, I think the prosecutor
12 certainly offered up to 30 years. And the trial judge
13 who, as you can tell from the transcript, was familiar
14 that there were these home invasions going on around our
15 county, that there had been a task force established,
16 and so forth, the -- the trial judge was aware of that
17 and the seriousness of it. In one instance, one of
18 Graham's codefendants actually killed someone as a part
19 of a home invasion. These were serious problems
20 afflicting our community in Jacksonville.

21 JUSTICE GINSBURG: Do we know why the
22 co-perpetrators got so -- their sentences were
23 dramatically lower. Do we know why that was so?

24 MR. MAKAR: Is this as to the home invasion
25 or the armed --

1 JUSTICE GINSBURG: Yes.

2 MR. MAKAR: The home invasion -- there was
3 an 11-year sentence for the codefendant.

4 JUSTICE GINSBURG: Yes.

5 MR. MAKAR: He helped -- helped and
6 testified and basically assisted the prosecution, so I
7 believe he got a lower sentence.

8 JUSTICE GINSBURG: Because he assisted the
9 prosecutor.

10 MR. MAKAR: Right. The third one is in
11 jail, life without parole on a murder charge, life
12 without parole on the same charge Graham has for another
13 home invasion, and then has the other serious sentences.
14 So he -- for his home invasions, he is -- he is life
15 without prison --

16 JUSTICE GINSBURG: I didn't think he --

17 MR. MAKAR: I mean, life without parole.

18 JUSTICE GINSBURG: For this very offense,
19 this home invasion, I didn't think that anyone other
20 than Graham had gotten life without parole.

21 MR. MAKAR: Well -- well, Graham got life
22 without parole, and it relates back to his armed
23 burglary with assault and battery. He got the life
24 sentence under that charge, which is then all part and
25 parcel of the violation-of-probation hearing. There

1 were these secondary -- these second incidences of home
2 invasions where Meigo Bailey was the codefendant who got
3 life for murder and also for armed burglary as a part of
4 one of the home invasions. So they -- you know, they
5 got serious punishment. This is a serious punishment
6 that was meted out to them.

7 JUSTICE GINSBURG: Did he -- how do you
8 answer the argument that unlike an adult, because of the
9 immaturity, you can't really judge a person -- judge a
10 teenager at the point of sentencing? That it's only
11 after a period of time has gone by, and you see, has
12 this person overcome those youthful disabilities?
13 That's why a proportionality review on the spot doesn't
14 accommodate the -- what is the driving force of the --
15 your -- the Petitioner's argument is that you can't make
16 a judgment until years later to see how that person has
17 -- has done.

18 MR. MAKAR: Well, Justice Ginsburg, we
19 respect that, and certainly in Roper that was the
20 linchpin to the decision. Here we are in a different
21 context that deals with these -- these terms of years,
22 and there -- there's no constitutional right to parole.
23 And certainly that is a purely legislative decision to
24 be made, and States have said we are not going to have
25 parole.

1 JUSTICE SCALIA: I suppose you could say the
2 same thing of -- of adults, of somebody over 18. You
3 really can't tell how redeemable this individual is
4 until he is in prison for some time; and, therefore, you
5 should not give anybody life without parole. They --
6 they may all be savable. So we should defer -- defer.
7 We shouldn't have any non-parole sentences. Everybody
8 should be evaluated, which was indeed the approach that
9 -- that many jurisdictions used to take. Wasn't that so
10 --

11 MR. MAKAR: True.

12 JUSTICE SCALIA: -- when there was parole
13 for everybody?

14 MR. MAKAR: And it --- and it goes to the
15 core of the State's sovereignty to decide what laws to
16 enact.

17 JUSTICE GINSBURG: But Florida does -- and
18 every State -- recognize the difference between an adult
19 and a minor. And you have to make the line. We have it
20 at 18. But think of the teenager can't drink, can't
21 drive, can't marry. There are so many limitations on
22 children just because they are children.

23 MR. MAKAR: And, Justice Ginsburg, we ask
24 that the same respect for our juvenile justice system be
25 given to those laws enacted in Florida that protect the

1 -- the juveniles. It is the legislature on the ground
2 there and seeing what's going on in our State that makes
3 these decisions about who can drive, who gets the right
4 to have a tattoo, or who gets --

5 JUSTICE GINSBURG: But they don't make it on
6 a case-by-case basis. They say no juvenile can drink --
7 no juvenile.

8 MR. MAKAR: That's true but at the same --
9 by the same token, the juvenile justice system in
10 Florida -- and keep in mind we had a juvenile justice
11 division -- department established in 1994 because of
12 the severe problems as we outlined in our brief -- that
13 Florida has a -- has committed resources and -- and
14 programs and so forth to the juvenile justice system.
15 So given all of that, that what the Court -- I am sorry
16 -- what the State has done as -- as to age, that's why
17 we say that it matters.

18 What we are concerned about is that to
19 pursue the categorical rule that they seek, the Court
20 would have to, of course, abandon the various firewalls
21 that would stand between terms of years and also the
22 death penalty.

23 But, in addition, if the Court decides to go
24 down the proportionality route, my concern is the five
25 principles in the Harmelin concurrence about the States

1 having the ability to have diverse juvenile justice
2 programs and not have the -- sort of a lawnmower coming
3 through and making them all uniform. The Harmelin
4 concurrence, Justice Kennedy, talked about the deference
5 in structuring these. And there's going to be
6 differences. Some States are going to have the most
7 harsh laws. The Eighth Amendment doesn't dictate any
8 particular penological theory. There's great -- and it
9 -- it would turn the Eighth Amendment analysis on its
10 head to first allow this diversity among the States and
11 allow strong medicine for certain types of violent
12 crimes and then to kind of compare them and say, well,
13 gosh, Florida is unusual; it's different; and that
14 shouldn't be the case whatsoever.

15 JUSTICE KENNEDY: If we look just at
16 deterrence, my initial instinct is that the difference
17 in life and life without -- life with parole and life
18 without parole is just not a factor in deterrence. I --
19 I don't know how I'd confirm that one way or the other,
20 but let's -- let's assume that there is some basis for
21 that intuition.

22 Then, insofar as the deterrence prong is
23 concerned, since it's not a deterrent, and if you assume
24 that there is rehabilitation, what is the State's
25 interest in keeping the accused, the -- the

1 defendant in custody for the rest of his life if he has
2 been rehabilitated and is no longer a real danger?
3 What's the State's interest?

4 MR. MAKAR: Well --

5 JUSTICE KENNEDY: And you could say
6 retribution, but then you have judges on a case-by-case
7 basis deciding when there should be retribution.

8 MR. MAKAR: Well, I think certainly the
9 State of Florida's interest as among other States is
10 first of all to punish. Certainly I think deterrence
11 plays a role. We recognize that deterrence may have
12 less impact on some juveniles, but it doesn't have -- it
13 doesn't have zero impact. It does have some impact --

14 JUSTICE KENNEDY: But it seems to me the
15 deterrence interest is quite minimal if you assume
16 rehabilitation or strong evidence of rehabilitation.

17 MR. MAKAR: Well, but the deterrence goes to
18 those who would commit the same act. Rather than
19 deterring this particular individual, it goes to others
20 who --

21 JUSTICE GINSBURG: I thought the question
22 is: Will the difference between life with parole and
23 life without parole deter anybody? I mean any -- that
24 -- that's what we are talking about. And I don't think
25 you really were urging that that difference will deter

1 the teenager so he might think, oh, if I commit this
2 violent crime, then I will have life without parole.

3 MR. MAKAR: Well, I don't -- I have not seen
4 empiricism on this at all to say, you know, what -- does
5 it really matter or not. I think that as a matter of on
6 the street people do talk about these things. I mean,
7 would they --

8 JUSTICE SCALIA: I guess there's also no
9 empiricism on whether the committed juvenile feels a lot
10 better knowing that he will get out when he is 75 years
11 old than he would feel knowing that he was there for
12 life.

13 MR. MAKAR: Well, I --

14 JUSTICE SCALIA: Do we have empirical
15 studies about how much that improves the spirits of the
16 committed juvenile?

17 MR. MAKAR: I -- I have seen none, and it --
18 it goes to the question here, which is that Graham will
19 be serving a lengthy prison term. And what he is
20 seeking is essentially the right to get out at some
21 point in the future and even saying that 40 years would
22 be --

23 JUSTICE STEVENS: May I ask this question?
24 There are an awful lot of amicus briefs in this case,
25 and I haven't been able to read them all by any means.

1 Do any of the briefs or any of the materials with which
2 you are familiar discuss the rate of -- the difference
3 between the danger of recidivism of a young offender and
4 one who is, say, 40 or 50 years old?

5 MR. MAKAR: I -- I don't have that at my
6 grasp, but --

7 JUSTICE STEVENS: But it seems to me sort of
8 -- as a matter of intuition, Justice Kennedy made the
9 same sort of point. It seems to me that the older
10 people are less likely to be recidivists than the
11 younger ones, but is -- is there any empirical evidence
12 that says that's an incorrect or correct judgment?

13 MR. MAKAR: Well, in terms of recidivism, I
14 think, number one, violence matters. I think there are
15 studies -- I can't quite put my finger on -- that
16 says that the violent offenders tend to recidivate more
17 than the non-violent. And that as one ages -- I think
18 Judge Posner has written a book called "Aging and Old
19 Age" that talks about -- in one of its chapters about
20 how age matters, and that crime rates go down as -- as
21 the population ages. So I mean there are those sorts of
22 things out there that --

23 CHIEF JUSTICE ROBERTS: Well, along those
24 lines -- and, again, maybe this was in the amicus
25 briefs. Do you have a study about what age cohort is

1 responsible for most violent crime?

2 MR. MAKAR: There are -- there are studies,
3 and I have looked at many of them, and it appears that
4 it certainly increases from age 13, and it goes up to
5 14. And it keeps going up until about 16, 17, and 18.
6 It peaks. It depends on the crime, and it depends upon
7 what jurisdiction, and so forth. But it tends to peak
8 in the early 20s, the late teens or early 20s. So
9 that's -- that's -- I think that's typical.

10 One thing I would point out that I haven't
11 had a chance to say: The empirical question in this
12 case, I think, is very important because they are asking
13 that a constitutional rule be established on studies
14 that have just been generated literally over this summer
15 and have not been subject to meaningful review.

16 We have a concern with that. We think that
17 the definitional questions that they have raised, you
18 know, about the offenses and what is life -- is life --
19 the studies tend to focus on life. But what is life?
20 Well, in Florida we have some juveniles who are serving
21 prison terms that have 50-, 60-, 70-, 80-year sentences,
22 but they are not included within that study.

23 We also have in this case, for example,
24 Graham, he had a -- let's say that the judge decided to
25 give him 30 years for the main offense and 15 for the

1 second and made them consecutive. That's 45 years.
2 Graham's actuarial life --

3 JUSTICE SCALIA: Well, we are not sure that
4 those 70-year sentences are any good, either, because
5 your -- your friend on the other side, you know, is not
6 willing to -- to pick a number at which the sentence
7 amounts to life without parole. Maybe a 70-year
8 sentence does.

9 MR. MAKAR: Well, they've conceded, in their
10 brief, that what this all boils down to is that if
11 Graham wins and he gets to go back and be resentenced,
12 that either the Florida legislature has to pass a law to
13 reinstitute parole for this category of offenders, or
14 the trial judge could say, okay, the actuarial table
15 says you are going to live to be 64.2, we're going to --
16 I'm going to sentence you to something less --

17 JUSTICE GINSBURG: I thought that there was
18 a parole system still functioning, so -- although it
19 will be phased out over time, but for people who
20 were incarcerated under the old version -- and I think
21 the suggestion was that that system would take care of
22 the handful of people, not more than that, that this
23 decision would involve.

24 MR. MAKAR: There is still a parole board.
25 Its functions have been minimized greatly. It has not

1 been applicable to anyone since 1983. It would take a
2 legislative act or perhaps even an executive act of some
3 sort to reinstitute that board and to take account of
4 these cases.

5 JUSTICE KENNEDY: Can you tell us just a
6 little bit about the Florida correctional systems, the
7 policies with respect to rehabilitation programs? If
8 they don't have parole, then you might say, well, they
9 don't need rehabilitation programs or that they might
10 need them more.

11 Have the rehabilitation programs been
12 increased or decreased since the phasing out of parole?
13 Or is it about the same? Or are they -- are they
14 non-existent?

15 MR. MAKAR: No, no. They are in existence.
16 I cannot specifically answer that, Justice Kennedy,
17 because I don't know all the different programs that are
18 available. There's the various programs that deal with
19 drug offenses and alcoholism and so forth.

20 And there -- there are certain educational
21 programs. For example, when Graham was in the county
22 jail -- that was the county versus the State -- he was
23 able to go to school.

24 I don't believe there is anywhere near sort
25 of the total absence and deprivation, sort of a Weems

1 case, sort of we put you in a cell and you rot there for
2 the rest of your life, at all in our system. There's
3 all these various rights that we pointed out in our
4 brief that are -- enable -- they are able to have
5 familial relationships. They can have the Maslow's
6 hierarchy. I mean, they -- physiological needs and
7 emotional needs and so forth are still available to be
8 met in prison.

9 So I can't give you specific programs,
10 Justice Kennedy, but in Florida's system, they do
11 exist.

12 If there's no further questions --

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Makar.

15 Mr. Gowdy, you have 4 minutes remaining.

16 JUSTICE KENNEDY: Why does a juvenile have a
17 constitutional right to hope, but an adult does not?

18 REBUTTAL ARGUMENT OF BRYAN S. GOWDY

19 ON BEHALF OF THE PETITIONER

20 MR. GOWDY: Because the juvenile is
21 different than an adult. A juvenile is less culpable.
22 He's -- we know over time he will change and -- and
23 potentially reform, as opposed to an adult. Once you
24 are fully formed, you are more culpable and you don't
25 have that same inherent capacity to change.

1 JUSTICE ALITO: But do you know anybody who
2 is willing to say that, as a categorical matter, that --
3 you know, the 18th birthday is the magical date for
4 every single person?

5 MR. GOWDY: No, Your Honor, and nobody was
6 willing to say that in Roper, but, yet, the Court still
7 drew the line at 18 for the death penalty in Roper.

8 JUSTICE ALITO: Because the Court, up to
9 this point, has said that death is different, and the
10 rules -- the Eighth Amendment rules in capital cases are
11 entirely different from the Eighth Amendment rules in --
12 in all other cases.

13 MR. GOWDY: We are not -- we were not --

14 JUSTICE ALITO: If we -- you know, if we
15 abandon that, then one of two things has to happen,
16 either the rules for noncapital cases have to change
17 dramatically, or the rules for capital cases have to
18 change dramatically, unless death is different, in fact.

19 MR. GOWDY: Well, I -- first, we -- we are
20 not asking that the procedural rules in the intricate
21 individualized death penalty sentencing scheme be
22 transported or moved over to the noncapital cases.

23 JUSTICE ALITO: I know you are not
24 asking for that, but that -- isn't that where this,
25 logically, is going? If death is not different, then

1 there should be uniform rules across the board.

2 MR. GOWDY: Absolutely not, Your Honor,
3 because those rules make no sense when you are talking
4 about adolescents, who are different, because those --
5 which a Court recognized in Roper, that those rules
6 can't be applied to adolescents because we -- you can't,
7 as a sentencer, predict the future.

8 And so, though death is different, it's not
9 different in any critical respects here because the
10 punishment, life without parole, just like death, says
11 that the offender is forever irredeemable, is forever
12 unfit to live in society, and must die in prison.

13 JUSTICE ALITO: Why does it say that? Why
14 doesn't it just say that, in this particular case, what
15 this individual has done is so bad that, even if this
16 person can be rehabilitated and would not present a
17 danger to -- to society at age 60 or 70, that this
18 person is -- should be sentenced to life without parole?
19 That's -- that's what it means for an adult offender.

20 MR. GOWDY: Your -- Your Honor, I think the
21 only difference here is -- between life without parole
22 and life with parole, is that there will be a
23 determination later, at age 30 or 40 or sometime
24 thereafter, as to whether that is the right sentence.

25 And the -- the parole official, just like

1 the judge, can consider the offense as the offender, as
2 a juvenile. We're just saying that you can't make that
3 complete determination at such a young age, and --

4 CHIEF JUSTICE ROBERTS: One reason States --

5 MR. GOWDY: -- and you will have a more
6 accurate determination later.

7 CHIEF JUSTICE ROBERTS: One reason States
8 and the Federal government moved to abolish parole in --
9 in recent decades was, with depressing regularity,
10 prisoners released on parole committed crimes again.

11 And I'm just -- is there any empirical
12 evidence that tells us how often people, say, from 17 --
13 17-year-olds, when released, commit crimes again, as
14 opposed to 18- to 20-year-olds?

15 MR. GOWDY: Your Honor, as my brother noted,
16 I think that the evidence shows that, as people get
17 older, they are less likely to recommit crimes.

18 CHIEF JUSTICE ROBERTS: But isn't that -- I
19 remember some of those studies that -- I mean, the
20 cutoff, there's sort of a magic age at some point,
21 where people over the age of 35, or whatever, typically
22 don't engage in violent activity.

23 MR. GOWDY: It -- it decreases over time,
24 undoubtedly, and that's -- that supports, I think, our
25 argument here, that the -- that Terrance Graham, at age

1 47, will not be the person he was at age 17.

2 I see my time is up. I'll sit down.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 10:59 a.m., the case in the
6 above-entitled matter was submitted.)

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