

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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BRETT JONES, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 18-1259  
 )  
MISSISSIPPI, )  
 )  
 ) Respondent. )  
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Pages: 1 through 87  
Place: Washington, D.C.  
Date: November 3, 2020

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BRETT JONES, )

Petitioner, )

v. ) No. 18-1259

MISSISSIPPI, )

Respondent. )

- - - - -

Washington, D.C.

Tuesday, November 3, 2020

The above-entitled matter came on  
for oral argument before the Supreme Court of the  
United States at 10:00 a.m.

1 APPEARANCES:

2

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4 on behalf of the Petitioner.

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7 on behalf of the Respondent.

8 FREDERICK LIU, Assistant to the Solicitor General,

9 Department of Justice, Washington, D.C.;

10 for the United States, as amicus curiae,

11 supporting the Respondent.

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

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case Number  
5 18-1259, Jones versus Mississippi.

6 Mr. Shapiro.

7 ORAL ARGUMENT OF DAVID M. SHAPIRO

8 ON BEHALF OF THE PETITIONER

9 MR. SHAPIRO: Mr. Chief Justice, and  
10 may it please the Court:

11 Settled law recognizes the scientific,  
12 legal, and moral truth that most children, even  
13 those who commit grievous crimes, are capable of  
14 redemption. After Miller and Montgomery, there  
15 is no denying that the permanent incorrigibility  
16 rule is settled law. Only juvenile homicide  
17 offenders who are permanently incorrigible may  
18 be sentenced to life without parole.

19 A paragraph in Montgomery about formal  
20 fact-finding has created confusion, but it  
21 cannot mean that no determination of permanent  
22 incorrigibility whatsoever is required because  
23 that would obliterate the crux of the decision.  
24 Any rule of law requires deciding if the  
25 defendant fits within the rule.

1                   But Mississippi's courts have denied  
2                   the permanent incorrigibility rule itself, and  
3                   the State continues that denial in this Court.  
4                   In remanding this very case for resentencing,  
5                   the Mississippi Supreme Court did not say a word  
6                   about the permanent incorrigibility rule and  
7                   affirmatively misinterpreted the law by stating  
8                   that LWOP is unconstitutional if and only if the  
9                   sentencing judge does not consider youth-related  
10                  circumstances.

11                  On remand, the sentencing judge made  
12                  clear he was weighing aggravators and  
13                  mitigators, not assessing permanent  
14                  incorrigibility. Even under an implicit finding  
15                  rule that usually assumes the judge knows the  
16                  law and implicitly finds the defendant  
17                  incorrigible when imposing a life-without-parole  
18                  sentence, there is no implicit finding here.  
19                  That's why Mississippi continues to dispute the  
20                  permanent incorrigibility rule itself.

21                  The Court should enforce settled law  
22                  by remanding for an answer to the decisive  
23                  question: Is Brett Jones, who committed a crime  
24                  just weeks after turning 15, permanently  
25                  incorrigible?

1 CHIEF JUSTICE ROBERTS: Mr. Shapiro,  
2 I'm having just a little trouble figuring out  
3 what exactly it is that you're looking for. We  
4 know it can't be a formal finding, as I think  
5 you indicated, because of Miller and  
6 Montgomery's statements.

7 And, obviously, you want more than  
8 just a hearing at which you'd have an  
9 opportunity to raise the -- the arguments. But  
10 what is it in the middle there? Is it just a  
11 statement on the record at some point during --  
12 during a hearing? Is it, I don't know, some  
13 kind of informal hearing -- finding? What  
14 exactly do you -- do you need?

15 MR. SHAPIRO: On the most fundamental  
16 level, Your Honor, what we need is a sentencing  
17 judge who understands that permanent  
18 incorrigibility is the dispositive rule and  
19 determines whether the defendant fits within  
20 that rule.

21 And there are any number of ways that  
22 it could be done. One is through words, not  
23 magic words, but words, but -- that convey in  
24 substance the idea that the defendant is  
25 permanently incorrigible, going to commit more

1 crimes, going to recidivate, et cetera.

2 And the other -- one other is that  
3 usually you can presume an implicit finding  
4 based on the presumption that the judge knows  
5 and applies the law and, therefore, that a  
6 sentence of life without parole implicitly is a  
7 determination of permanent incorrigibility, just  
8 not here, because this is within the context of  
9 a state system that does not recognize the  
10 permanent incorrigibility rule to begin with.

11 CHIEF JUSTICE ROBERTS: Well, at the  
12 hearing that took place here, the -- the  
13 irreparable corruption, I guess, was the label  
14 they used. That was certainly argued by the --  
15 the counsel. You know, he said, you -- you have  
16 to distinguish between a juvenile offender whose  
17 crime reflects unfortunate yet transient  
18 immaturity and the rare offender whose crime  
19 reflects irreparable corruption.

20 The judge certainly referred to  
21 Miller, said he considered each and every factor  
22 that is identifiable in Miller, and concluded  
23 that the Petitioner was not entitled to the  
24 benefit of the leniency provided in Miller.

25 I mean, is the problem really just



1 that the judge didn't quote enough passages from  
2 Miller? He certainly cited it.

3 MR. SHAPIRO: No, Your Honor, that's  
4 not the problem. The fundamental problem is  
5 that the judge does not appear to have  
6 understood that permanent incorrigibility is the  
7 decisive rule that he needed to apply.

8 And, in fact, on -- in remanding the  
9 case, the Mississippi Supreme Court said that  
10 the sentence is unlawful if and only if the  
11 judge does not consider youth-related factors.  
12 And that was an affirmative misstatement of the  
13 law.

14 And then the judge said that he was  
15 weighing aggravators and mitigators rather than  
16 making an assessment of permanent  
17 incorrigibility. This is not about a formal  
18 declaration. It is about a judge correctly  
19 applying the settled rule that this Court has  
20 laid down.

21 CHIEF JUSTICE ROBERTS: Well, this --  
22 the evidence of -- what he said at the hearing,  
23 I think, is not a finding of a historical fact.  
24 And you talk about things like intellectual  
25 disability and -- and the like.

1                   Permanent incorrigibility strikes me  
2 as different. It's more a judgment rather than  
3 a specific fact. And, from that perspective,  
4 I'm just not sure what he said isn't -- isn't  
5 enough.

6                   MR. SHAPIRO: This Court has made it  
7 clear that permanent incorrigibility is  
8 incapacity for rehabilitation. And there is no  
9 way I see on the record to conclude that the  
10 judge made a conclusion about that, not a  
11 finding or -- or -- or even some kind of  
12 predictive judgment.

13                   And, again, he was operating under  
14 instructions that affirmatively said he didn't  
15 have to make that bottom-line determination. He  
16 only needed to consider factors. And as long as  
17 he did so, the sentence was constitutional.

18                   CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20                   Justice Thomas.

21                   JUSTICE THOMAS: Yes. Thank you, Mr.  
22 Chief Justice.

23                   Counsel, following up on the Chief  
24 Justice's line of questioning, what if the judge  
25 did exactly what you said was required and

1 stated on the record that there had to be a  
2 finding of permanent incorrigibility and went on  
3 to do exactly what was done here?

4 Wouldn't it be implicit in that  
5 sentencing that he made, that the judge made,  
6 the finding of permanent incorrigibility?

7 MR. SHAPIRO: Yes, I -- I think so.  
8 In this case, for the judge to have said that,  
9 it would have been contradicting the  
10 instructions that were given by the Mississippi  
11 Supreme Court in remanding the case, which said  
12 that all you have to do is consider  
13 youth-related factors.

14 But the statement that Your Honor just  
15 alluded to would make it very clear that the  
16 judge understood that he needed to determine  
17 permanent incorrigibility, and then the sentence  
18 of life without parole would implicitly reflect  
19 that determination. It would be an implicit  
20 finding.

21 JUSTICE THOMAS: Would you be -- and  
22 I'm just curious here -- would you be able to  
23 make your argument had we not decided  
24 Montgomery?

25 MR. SHAPIRO: Yes, Your Honor, I -- I

1 believe so. It is certainly -- yes. It is  
2 certainly true that Montgomery made the rule  
3 clearer, the -- the permanent incorrigibility  
4 rule, in interpreting and construing Miller.

5 And it's important to note that one of  
6 the reasons that you can't presume implicit  
7 understanding of Montgomery in this case is that  
8 the judge issued the sentence before Montgomery  
9 was issued.

10 But Miller itself does say on pages  
11 479 to 480 that the judge has to distinguish  
12 between irreparable corruption and transient  
13 immaturity, and then Montgomery repeats that  
14 seven times as an indispensable part of its  
15 conclusion that Miller is retroactive.

16 JUSTICE THOMAS: But did Miller on its  
17 face, without the gloss of Montgomery, did it --  
18 did it actually say a certain finding or a  
19 certain procedure was -- were -- was required?

20 MR. SHAPIRO: It did not say that a --  
21 a certain finding was required. It did say that  
22 there has to be -- the judge has to distinguish  
23 the transiently immature from the irreparably  
24 corrupt.

25 And the only way for that to -- to

1 happen, one must infer, is the Court has to  
2 decide which side of the line the defendant is  
3 on. And that could be an implicit  
4 determination. It can be a more explicit one.  
5 But you have to have -- you have to know that  
6 the judge properly understood the rule and  
7 decided whether the sentence fit within it.

8           Ordinarily, you can presume that the  
9 judge knows and correctly applies the law. But  
10 that presumption does not apply here because of  
11 the affirmative misstatements of the law that I  
12 alluded to.

13           JUSTICE THOMAS: I'd like one more try  
14 at a world without Montgomery.

15           Would you tell me whether or not you  
16 think -- without, again, the gloss of  
17 Montgomery -- you think that Miller is a  
18 substantive rule or a procedural rule? And, if  
19 you think it is substance, again, without the  
20 gloss of Montgomery, give me an -- an indication  
21 of why you think that.

22           MR. SHAPIRO: I think that it is a  
23 substantive rule that only permanently  
24 incorrigible juveniles can be sentenced to life  
25 without parole.

1                   I think that because the Court says on  
2                   479 to 480 of Miller that there has to be a  
3                   distinguishing between the transiently immature  
4                   and irreparably corrupt. And I also contend  
5                   that it follows as a procedural consequence of  
6                   that, that substantive permanent incorrigibility  
7                   rule, that the judge has to determine whether  
8                   the defendant is permanently incorrigible.

9                   JUSTICE THOMAS: Thank you.

10                  CHIEF JUSTICE ROBERTS: Justice  
11                  Breyer.

12                  JUSTICE BREYER: I would follow up on  
13                  Justice Thomas and just say what -- if you were  
14                  writing the opinion for the court in this case,  
15                  how would you put it?

16                  Say part -- the first part, I think,  
17                  is fairly easy. You say, in Miller, we decided  
18                  you can only sentence -- you cannot sentence a  
19                  juvenile to life without parole unless he is  
20                  permanently incorrigible. The State has leeway  
21                  to decide the procedure through which this  
22                  decision will be made. And now what?

23                  MR. SHAPIRO: Yes, Your Honor. I  
24                  would write the decision, if -- if I -- I mean,  
25                  to answer the question, to say that the court

1 has to resolve whether or not the defendant is  
2 permanently incorrigible in order to impose the  
3 sentence and that there are different ways to  
4 tell if the judge resolved that question.

5 One is words that convey in substance,  
6 not magic words, but words that convey in  
7 substance that the defendant is going to commit  
8 more crimes or can't be rehabilitated.

9 The second -- and the Court has  
10 options here. We think that that is the better  
11 rule that requires some sort of explicit  
12 statement, not magic words, but given the  
13 gravity of the constitutional interest or the  
14 deprivation that's occurring here, we think that  
15 is the better rule.

16 The other option that the Court has is  
17 to say that there's an implicit finding rule,  
18 that, ordinarily, you presume that the judge  
19 understands the law, understands the permanent  
20 incorrigibility rule, and that the  
21 life-without-parole sentence reflects a  
22 determination that the defendant is permanently  
23 incorrigible.

24 But that presumption doesn't apply  
25 here because of the affirmative misstatements

1 that I've alluded to.

2 And either way, the Court could make  
3 it clear that there's plenty of room for State  
4 experimentation and innovation as to the  
5 procedure, as to who bears the burden, what is  
6 the standard of proof, what is the standard of  
7 review, et cetera. But the one thing it has to  
8 do is resolve the question of permanent  
9 incorrigibility.

10 JUSTICE BREYER: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Alito.

12 JUSTICE ALITO: Good morning, Mr.  
13 Shapiro. If you have it in front of you, could  
14 you just repeat the first sentence of your  
15 presentation this morning?

16 MR. SHAPIRO: Yes, Your Honor. The  
17 first sentence was: "Settled law recognizes the  
18 scientific, legal, and moral truth that most  
19 children, even those who commit grievous crimes,  
20 are capable of redemption."

21 JUSTICE ALITO: Yeah, I think you are  
22 -- I mean, this is fascinating. You want to  
23 take us and you want us to take the courts of  
24 this country into very deep theological and  
25 psychological waters.



1                   Do you think that there are any human  
2 beings who are not capable of redemption?

3                   MR. SHAPIRO: Well, Your -- Your  
4 Honor, I -- I think that there are many  
5 psychologists who can very much testify and --  
6 and do testify that particular individuals are  
7 permanently incorrigible and -- and can't be  
8 rehabilitated.

9                   And, in fact, as we speak, courts  
10 across the country are resolving the question of  
11 permanent incorrigibility --

12                   JUSTICE ALITO: I mean, there are --  
13 there are a lot of people, they're not  
14 psychologists maybe, but there are a lot of  
15 people who think that every human being is  
16 capable of redemption. There's a -- actually a  
17 famous quote by Gandhi, who says exactly that.  
18 There are a lot of Christians who believe that.  
19 You think of the -- of the good thief on the  
20 cross.

21                   So, I mean, what if a judge says, you  
22 know, wow, the Supreme Court says I have to  
23 determine whether this person is capable of  
24 redemption, I -- I believe that every human  
25 being is capable of redemption? What do you do

1 with that?

2 MR. SHAPIRO: The -- I think the  
3 inquiry is capacity for rehabilitation. And I  
4 think that the judge needs to do what every  
5 judge does and is doing in these cases, which is  
6 to hear evidence, evidence of criminal record  
7 before and after the crime, testimony about the  
8 -- the perpetrator, the crime itself is very  
9 much relevant, and to make a determination as to  
10 whether the defendant is going to recidivate or  
11 have the capacity to be rehabilitated and not to  
12 recidivate.

13 It's not a theological conception. It  
14 is a determination of whether the defendant has  
15 the capacity to rehabilitate and -- and not  
16 recidivate.

17 And in -- in the event that the judge  
18 does make an error and -- and -- and the  
19 person's capacity for rehabilitation is not  
20 realized, they're never getting out. They're  
21 dying in prison anyway, because the ultimate  
22 decision is the -- is made by the parole board  
23 as to whether release actually occurs.

24 JUSTICE ALITO: Now you read both  
25 Miller and Montgomery very broadly, and there

1 certainly is some language in both opinions that  
2 you are able to cite, but, if we look strictly  
3 at the holdings in those cases, what Miller held  
4 -- and this is what it said expressly -- we  
5 therefore hold that the Eighth Amendment forbids  
6 a sentencing scheme that mandates life  
7 imprisonment -- life in prison without the  
8 possibility of parole for juvenile offenders.

9           And what Montgomery said was: We hold  
10 that Miller set out a substantive rule. And  
11 what followed from that was that it was  
12 retroactive.

13           So, if we just follow the holdings of  
14 those cases, we get to a much narrower rule of  
15 law than the one that you're proposing. Isn't  
16 that the case?

17           MR. SHAPIRO: No, Your Honor, and  
18 that's because the holding of a case includes  
19 the indispensable reasoning. The only reason --  
20 the only reason that Montgomery held that Miller  
21 was substantive and thus retroactive is that it  
22 set out a substantive rule that only permanently  
23 incorrigible juveniles can be sentenced to life  
24 without parole. And --

25           JUSTICE ALITO: All right. Well, let

1 me ask you just one -- one more question before  
2 my time has -- has expired. What would you say  
3 to any members of this Court who are concerned  
4 that we have now gotten light years away from  
5 the original meaning of the Eighth Amendment and  
6 who are reluctant to go any further on this  
7 travel into space?

8 MR. SHAPIRO: I don't think this goes  
9 any further, Your Honor. This is just a -- the  
10 -- the Court has laid down a permanent  
11 incorrigibility rule, stated it in Miller,  
12 restated it seven times in Montgomery as an  
13 indispensable part of this whole -- of the -- of  
14 the holding and the conclusion. And simply  
15 saying that a court has to decide whether a  
16 defendant fits within a rule of law already laid  
17 down by this Court is no journey at all.

18 JUSTICE ALITO: Thank you very much.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor.

21 JUSTICE SOTOMAYOR: Counsel, in your  
22 cert petition and in your briefing, you frame  
23 the question presented as a narrow one about the  
24 need for an express finding of permanent  
25 incorrigibility.

1                   You did not seek cert on the question  
2 of what other procedures Miller might require,  
3 correct?

4                   MR. SHAPIRO: I -- I -- I think Your  
5 Honor said "express finding of permanent  
6 incorrigibility," and that is not in the  
7 question presented. It just -- it says  
8 "finding." And it's really my friends on the  
9 other side who are trying to load up the case  
10 with "affirmative," "express," "explicit" --

11                   JUSTICE SOTOMAYOR: All right.

12                   MR. SHAPIRO: -- and all that.

13                   JUSTICE SOTOMAYOR: So, if you  
14 understand that Miller, because it said it,  
15 didn't require an express finding, in  
16 sentencing, for example, in regular sentencing,  
17 a district court judge says: I've considered  
18 the factors in 3553(a) and this is the sentence  
19 that I think is adequate. And we say that's  
20 enough.

21                   Here, the judge said: I've considered  
22 Miller and all of the factors it talks about.  
23 And it's just been told that one of them, most  
24 importantly, is incorrigibility. And I don't  
25 see the State in that transcript arguing

1 otherwise, meaning that incorrigibility is not  
2 significant. In fact, they address it and made  
3 the argument he was incorrigible.

4 So, under those circumstances, why  
5 isn't that the beginning and end of this case,  
6 i.e., the judge made an adequate finding under  
7 Miller?

8 MR. SHAPIRO: The reason, Your Honor,  
9 is that in remanding the case, the Mississippi  
10 Supreme Court said all you have to do is  
11 consider factors, and as long as you consider  
12 factors, the sentence is constitutional. That  
13 means --

14 JUSTICE SOTOMAYOR: But the judge went  
15 further and said: I'm considering the Miller  
16 factors, not the state factors.

17 MR. SHAPIRO: Yes. Considering the  
18 Miller factors, without treating capacity for  
19 rehabilitation, permanent incorrigibility, as  
20 the dispositive rule is not sufficient.

21 JUSTICE SOTOMAYOR: Well, then you're  
22 getting back to you want magic words, because I  
23 don't see how this is any different than a  
24 regular sentencing where a judge says this is --  
25 I've considered the 3553 factors. We don't

1 question whether they did it or didn't do it.  
2 We take them at their word. And that was the  
3 entire argument at the sentencing.

4 MR. SHAPIRO: In the federal  
5 sentencing context, Your Honor, it is usually  
6 the case that you presume, even though the judge  
7 doesn't say it in most cases, that she is  
8 imposing the minimum sufficient sentence. That  
9 -- that is just implicit. And the reason it's  
10 implicit is that one assumes that the judge  
11 correctly understands the law.

12 But what happened in this case was  
13 that the -- the Mississippi Supreme Court said  
14 all you have to do is consider these factors.  
15 Considering the Miller factors is not the same  
16 -- this is a critical point -- is not the same  
17 as a bottom-line determination of permanent  
18 incorrigibility.

19 It would not be sufficient in an  
20 Atkins case, for example, for the judge to  
21 consider intellectual disability but then decide  
22 that the defendant's intellectual disability was  
23 outweighed by some other factors. And it's not  
24 sufficient just to consider the Miller factors  
25 without a bottom-line determination of the

1 eligibility rule, whether the defendant is  
2 capable of rehabilitation or permanently  
3 incorrigible.

4 JUSTICE SOTOMAYOR: Thank you,  
5 counsel.

6 CHIEF JUSTICE ROBERTS: Justice Kagan.

7 JUSTICE KAGAN: Mr. Shapiro, what --  
8 what you just said is exactly what I want to ask  
9 you about, because your argument is that Miller  
10 and Montgomery set out not just a process, not  
11 just a rule that you'd have to be considered,  
12 but, instead, a rule -- a rule -- a substantive  
13 rule that you can give an LWOP sentence only to  
14 a small category of people, call them the  
15 irredeemables or the incorrigibles or what have  
16 you.

17 And the government and Mississippi  
18 contest that understanding, and I want to get  
19 your reaction to their arguments. What the  
20 government says is that all this talk about  
21 incorrigibles, that's just really a label for  
22 the final judgment that a court reaches after it  
23 considers youth during sentencing.

24 And what Mississippi says, in  
25 addition, is it says that the whole point of



1 Miller was just to prevent against the excessive  
2 risk of -- of -- of disproportionate punishment  
3 but that the essence of it is a procedural  
4 requirement about considering youth.

5 So why aren't they right?

6 MR. SHAPIRO: The reason they're not  
7 right, Your Honor, is, one, that Montgomery says  
8 something very different, and, two, that it  
9 could not have said what they contend and  
10 arrived at the conclusion that Miller is  
11 substantive and thus retroactive.

12 Montgomery reiterates seven times as  
13 an indispensable part of its conclusion that  
14 there is a substantive and thus retroactive  
15 rule, what that substantive rule is. That  
16 substantive rule is that only permanently  
17 incorrigible juveniles can be sentenced to life  
18 without parole.

19 And he could -- and -- and simply  
20 considering a group of factors or -- or -- or  
21 the Miller factors, as they've sometimes been  
22 called, that is a procedural undertaking because  
23 whether you arrive at a life-without-parole  
24 sentence through a mandatory procedural route or  
25 through a discretionary procedural route, that

1 is a procedural question.

2           The substance of the sentence is life  
3 without parole. And merely considering factors  
4 does not fit within either of the Teague  
5 substantive rule categories. It doesn't make  
6 certain primary conduct not criminal, and it  
7 does not take a sentence off the table for a  
8 class of people.

9           The only thing that does that is  
10 exactly what Montgomery says, which is that only  
11 permanently incorrigible juveniles can be  
12 sentenced to life without parole.

13           JUSTICE KAGAN: And, Mr. Shapiro, this  
14 goes back to a question that Justice Thomas  
15 asked you, but let's assume that you're right  
16 about what Montgomery says, and, as you say,  
17 Montgomery said it not one time or two times or  
18 three times but, like, something like seven or  
19 eight times.

20           But suppose you think that that's an  
21 aggressive reading of Miller, that there -- that  
22 although you said, you know, on page 479 Miller  
23 says this, that that wasn't really the thrust of  
24 Miller, and, in fact, Montgomery, you know, read  
25 it quite aggressively and that there's a gap

1 between the two.

2           If -- if that's right -- I mean, you  
3 can first tell me whether you think that's  
4 right, but, if it's right, which opinion should  
5 we look to and why?

6           MR. SHAPIRO: Yes, Your Honor. And --  
7 and -- and -- and so, to the first part, I mean,  
8 the language on 479 to 480 of -- of Miller says  
9 -- you know, it -- it speaks of the distinction  
10 between the juvenile offender whose crime  
11 reflects unfortunate yet transient immaturity  
12 and the rare juvenile offender whose crime  
13 reflects irreparable corruption.

14           And then it says: Although we do not  
15 foreclose a sentencer's ability to make that  
16 judgment -- that judgment referring to the  
17 previous sentence and the distinction between  
18 the two classes -- although we do not foreclose  
19 a sentencer's ability to make that judgment in  
20 homicide cases, we require it to take into  
21 account how children are different.

22           I don't think there's any way to read  
23 that as optional. The Court has to distinguish  
24 under Miller between the permanently  
25 incorrigible and the -- and the transiently

1       immature.

2                   As to the second part of the question,  
3       this Court's construction of its own precedent  
4       is authoritative and becomes part of the edifice  
5       of stare decisis.  And so Montgomery's  
6       construction of Miller is absolutely entitled to  
7       stare decisis deference, and to deny that is to  
8       imperil the interests in the stability of the  
9       law that stare decisis is designed to protect.

10                   JUSTICE KAGAN:  Thank you, Mr.  
11       Shapiro.

12                   CHIEF JUSTICE ROBERTS:  Justice  
13       Gorsuch.

14                   JUSTICE GORSUCH:  Good morning,  
15       counsel.  I'd actually like to pick up more or  
16       less where you left off with Justice Kagan.

17                   Let -- let's assume for the moment  
18       that we might view Miller as a procedural  
19       requirement and a modest one and Montgomery  
20       as -- as significantly expanding and maybe  
21       creating a new substantive right in -- during  
22       the process of purportedly doing the Teague  
23       analysis.

24                   What do we do with that?  I mean, if  
25       -- if it did create a new right -- and just work

1 with me on that assumption -- and a new  
2 substantive right, wouldn't we need then a  
3 subsequent decision deciding whether that new  
4 right should be retroactively applied under the  
5 Teague plurality analysis?

6 MR. SHAPIRO: As to whether it should  
7 be retroactively applied, I -- I -- I do want to  
8 first stress, Justice Gorsuch, that this case is  
9 on direct review. Of course, it's different  
10 than the Malvo case that was on collateral  
11 review.

12 JUSTICE GORSUCH: No, I understand  
13 that, and I've got questions for your -- your  
14 colleague coming up next on that, but if you  
15 could just stick with my -- my question for the  
16 moment.

17 MR. SHAPIRO: Yes, Your Honor. You  
18 know, it's not unheard of, certainly, for the  
19 Court to construe and interpret precedent in --  
20 in -- in a subsequent case, including cases on  
21 direct -- I'm -- I'm -- I'm sorry, including  
22 cases even on collateral review, unlike this  
23 case. I mean, take the -- the Hall case, which  
24 was on collateral review, interpreting the  
25 Atkins requirement.

1                   JUSTICE GORSUCH: But it is a little  
2 unusual in the name of purportedly deciding the  
3 retroactivity question under Teague to then  
4 create a new right and then not consider whether  
5 it should be applied retroactively.

6                   It's a -- it's a little bit of an  
7 anomaly, which maybe raises for me the next  
8 question: What about Teague? I mean, we've  
9 been applying this plurality opinion from Teague  
10 for some time, watershed rules of criminal  
11 procedure, we never found one, and substantive  
12 constitutional rules, and -- and we wind up  
13 turning a procedural rule into a substantive  
14 rule in order to become -- in order to have it  
15 have retroactive effect.

16                   You know, it kind of -- it kind of  
17 brings to mind Justice Jackson in Brown versus  
18 Allen, you know, second-guessing all these state  
19 final judgments.

20                   You know, from original matter at  
21 least, what authority do we have to be  
22 reconsidering state final judgments in this way?

23                   MR. SHAPIRO: Well, I -- the first  
24 thing I want to stress in -- in response to that  
25 question is that this is a majority rule

1 applied, you know, to -- to the vast majority of  
2 -- of states. It's -- it's really Mississippi  
3 that is an outlier in refusing to apply it.

4 But -- but, to -- to answer the -- the  
5 question, Justice Gorsuch, there is, of course,  
6 a very long line of cases establishing that this  
7 -- that this Court does have authority to review  
8 state court decisions retroactively.

9 But, again, you know, in this -- in  
10 this case, which isn't on collateral review at  
11 -- at all, I -- I don't think that it bears a  
12 direct relation here.

13 JUSTICE GORSUCH: Thank you, counsel.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you, Chief  
17 Justice.

18 And good morning, Mr. Shapiro. You  
19 started today by referring to settled law, but  
20 then you said that the paragraph in Montgomery  
21 had created confusion.

22 But the paragraph in Montgomery is  
23 part of the -- part of the law, of course, and I  
24 guess I'm not seeing it as that -- as all that  
25 confusing at least on its own.

1                   I know your Teague point, but, on its  
2 own, it seems very clear in saying multiple  
3 times in that paragraph that a finding of fact  
4 about incorrigibility is not required.

5                   First question: Do you agree that a  
6 finding of fact regarding incorrigibility is not  
7 required?

8                   MR. SHAPIRO: No, because that  
9 paragraph is referring to a formal finding. And  
10 I know that it doesn't use that word throughout  
11 the entire paragraph, but I do think it is clear  
12 from the paragraph that the Court is talking  
13 about one thing and not jumping around between  
14 different types of -- of finding. And so the  
15 modifier "formal," a formal finding, is what the  
16 Court is referring to in that paragraph.

17                   JUSTICE KAVANAUGH: But doesn't -- you  
18 -- you noted this, but it does not use the word  
19 "formal" at least the first two times it's used.  
20 And I'd be curious what the distinction between  
21 a formal finding of fact and an informal finding  
22 of fact might be in this con -- serious context.

23                   MR. SHAPIRO: Yes. As to the first  
24 part of the question, I -- I -- the -- I -- I  
25 think the -- the specific controls the general,



1 and the Court should look to the phrase that  
2 provides more information about what the Court  
3 is talking about in that paragraph rather than  
4 less information.

5 And that phrase is "formal  
6 fact-finding." And I think that what -- a  
7 formal fact-finding might even require some kind  
8 of particular verbiage or -- or -- or heightened  
9 explicitness or formality.

10 And what we are saying is that that  
11 would certainly be sufficient to satisfy the  
12 Eighth Amendment. But also, in the ordinary  
13 course, you can have a sort of implicit finding  
14 where you presume the judge knows the law and  
15 that a sentence of permanent incorrigibility  
16 implicitly reflects a determination -- that a  
17 sentence of life without parole implicitly  
18 reflects a determination of permanent  
19 incorrigibility.

20 JUSTICE KAVANAUGH: Okay. So let me  
21 ask you this: When the sentencing scheme is  
22 discretionary, won't the judge necessarily  
23 consider youth and, in particular, because  
24 defense counsel will invariably raise the  
25 defendant's youth as a reason not to impose life

1 without parole, and -- and even apart from that,  
2 that will be the common sense of the situation  
3 when you're dealing with someone who committed a  
4 crime at 15, as we have here, that you'll be  
5 considering that. That'll really be the  
6 centerpiece, you would think, in most cases.

7           So, when the judge then determines  
8 that the sentence should be life without parole,  
9 won't the judge necessarily have made that  
10 informal finding or that judgment or that  
11 conclusion that you're seeking?

12           MR. SHAPIRO: A couple of points, Your  
13 Honor.

14           The -- the -- the first is it's not  
15 enough just to consider the fact that the  
16 defendant is young or to consider youth. The  
17 question, the substantive rule of permanent  
18 incorrigibility, has to be answered, has to be  
19 resolved.

20           And in this case, the judge didn't  
21 resolve it, not implicitly, not explicitly,  
22 because he said he was just weighing aggravators  
23 and mitigators, and the state court system does  
24 not recognize that permanent incorrigibility is  
25 an eligibility rule that has to be resolved.

1 JUSTICE KAVANAUGH: Okay. And by  
2 analogy to the death penalty mitigating  
3 circumstances context, there, as you know, we --  
4 the Court over many years has required  
5 consideration of mitigating circumstances but,  
6 in that context, does not require any particular  
7 finding of fact or any particular conclusion.  
8 It leaves it to the sentencer to make that  
9 judgment based on consideration of all the  
10 circumstances.

11 I'm putting aside for the moment the  
12 -- the requirement that there be one aggravating  
13 circumstance. But, beyond that, there's no  
14 particular finding necessary. Isn't that a  
15 similar situation to what we have here?

16 MR. SHAPIRO: That's not the case when  
17 it is an eligibility rule like we have here,  
18 when it is like the Atkins eligibility rule  
19 based on intellectual disability or the Ford  
20 eligibility rule based on -- on -- on insanity.

21 In those cases, the Court requires a  
22 determination. It may not be a formal finding,  
23 and, again, that is not what we are saying is  
24 required here, but the judge has to determine  
25 whether the defendant fits within the class that

1 can be subjected to the punishment that my  
2 client --

3 JUSTICE KAVANAUGH: Okay. My time's  
4 up. I'm sorry, Mr. Shapiro. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Barrett.

7 JUSTICE BARRETT: Good morning,  
8 Mr. Shapiro. I have a question about an  
9 as-applied Eighth Amendment challenge here. I  
10 -- I take it that you think that Mr. Jones can  
11 bring such a challenge?

12 MR. SHAPIRO: I do, yes.

13 JUSTICE BARRETT: Then why isn't that  
14 the primary protection? You know, if the judge  
15 applied the wrong factors, as you say happened  
16 here, why isn't then the case that he's better  
17 off not challenging the procedure but simply  
18 directly challenging the substantive decision  
19 that he's permanently incorrigible?

20 MR. SHAPIRO: In order to challenge  
21 the substantive procedure that -- that -- that  
22 he's permanently incorrigible, he needs to be  
23 preside -- proceeding in front of a judge who  
24 understands that permanent incorrigibility is  
25 the dispositive rule. And -- and, here, the

1 judge didn't understand that that was what he  
2 had to decide.

3 And so I absolutely believe that Brett  
4 substantively is not permanently incorrigible.  
5 He is -- his grandmother, the wife of the  
6 victim, testified on his behalf. A correctional  
7 officer spoke of his rehabilitation, his -- his  
8 extraordinary record in prison, how he is an  
9 incredible worker and tries to get along with --  
10 with -- with everyone.

11 And beginning from a kid who had just  
12 turned 15 and who committed a murder for the  
13 most immature reason possible -- teenage  
14 infatuation -- there is an extraordinary story  
15 here showing that Brett is -- is an individual  
16 who is fully capable of rehabilitation.

17 But, because that wasn't even treated  
18 as a substantive rule, that's not what the  
19 determination that the judge was making was  
20 about.

21 JUSTICE BARRETT: Then why can't you  
22 appeal that? Why can't you then -- you know, if  
23 you argued below that he was not permanently  
24 incorrigible and, essentially, you know, one way  
25 of looking at what the trial court did is did

1 not make a finding, did not say he was  
2 permanently incorrigible, and you're saying as a  
3 matter this is a violation of the Eighth  
4 Amendment then to sentence him to life without  
5 parole, why can't you just raise that challenge,  
6 you've preserved it, and raise it on appeal?

7 MR. SHAPIRO: We did, Your Honor, but  
8 the -- the problem is that the Mississippi  
9 courts don't recognize that permanent  
10 incorrigibility is a rule. So just saying that  
11 and showing that your client is capable of  
12 rehabilitation isn't sufficient to demonstrate  
13 that the sentence is off limits for him.

14 And that's the very problem in -- in  
15 this case. There's just no determination that  
16 the rule is -- actually, the rule applies to my  
17 client.

18 JUSTICE BARRETT: But let me just  
19 interrupt you then. If it's clear in the cases  
20 or if we make clear in this case that it  
21 violates the Eighth Amendment to sentence a  
22 juvenile to life without parole if that juvenile  
23 is not permanently incorrigible, then the law is  
24 clear, and I guess I still don't understand --  
25 or let's -- let's talk about collateral review.

1           You know, if this goes to a federal  
2 court on 2254 and there is no factual finding  
3 for the federal court to defer to and the law  
4 has been misapplied, what about that? Then can  
5 you get relief on collateral review?

6           MR. SHAPIRO: To answer the -- the --  
7 the first part of your question, Your Honor,  
8 yes, going forward, absent extraordinary  
9 evidence to the contrary, like I'm going to  
10 sentence you, I don't care what the Supreme  
11 Court says, yes, you absolutely would be able to  
12 presume, absent evidence to the -- to the  
13 contrary, that the judge correctly understands  
14 the law and that the sentence reflects an  
15 implicit finding of permanent incorrigibility.

16           As to the collateral review context,  
17 this is a substantive rule, the permanent  
18 incorrigibility rule, going all the way back to  
19 -- to Miller. It is the majority rule among the  
20 -- the -- the states. And in large part, the  
21 statutes of limitation have run.

22           JUSTICE BARRETT: Thank you.

23           CHIEF JUSTICE ROBERTS: Mr. Shapiro,  
24 do you want to take a minute to wrap up?

25           MR. SHAPIRO: Thank you, Mr. Chief

1 Justice.

2 Mississippi and its courts do not  
3 recognize the permanent incorrigibility rule.  
4 In this very case, the state supreme court's  
5 remand opinion did not mention that rule and,  
6 instead, said that a life-without-parole  
7 sentence is lawful so long as the sentencing  
8 court considers youth-related factors.

9 Brett never really had a chance to  
10 show that he wasn't permanently incorrigible in  
11 any kind of meaningful way because the court had  
12 been told that it doesn't need to resolve that  
13 question against him in order to sentence him to  
14 life without parole.

15 And to allow the permanent  
16 incorrigibility rule to be flouted is to discard  
17 Miller and Montgomery and to undermine stare  
18 decisis and the interest in stability that it  
19 protects. This Court does not announce rules  
20 for them to be ignored.

21 So whatever form the determination  
22 should take, Mississippi's courts need to answer  
23 the question they have evaded: Is Brett Jones  
24 permanently incorrigible?

25 Thank you.



1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Ms. Nobile.

4 ORAL ARGUMENT OF KRISSY C. NOBILE  
5 ON BEHALF OF THE RESPONDENT

6 MS. NOBILE: Mr. Chief Justice, and  
7 may it please the Court:

8 In 2013, Jones's mandatory  
9 life-without-parole sentence for the brutal  
10 murder of his grandfather was set aside after  
11 the Mississippi Supreme Court held that Miller  
12 versus Alabama announced a substantive rule of  
13 constitutional law prior to this Court holding  
14 the same in Montgomery versus Louisiana.

15 Miller held that mandatory juvenile  
16 life-without-parole sentences are  
17 unconstitutional because they pose too great a  
18 risk of disproportionate punishment. The  
19 constitutional flaw in such mandatory schemes is  
20 that they make youth and all that accompanies it  
21 irrelevant.

22 To address that flaw, sentencers must  
23 consider how youth and its attendant  
24 characteristics may diminish the penological  
25 justifications for punishment before imposing a

1 life-without-parole sentence.

2           After Miller, Petitioner Jones  
3 received an individual life sentencing hearing  
4 where the sentencing court considered the  
5 mitigating circumstances of Jones's youth and  
6 its attendant characteristics before exercising  
7 discretion to impose a life-without-parole  
8 sentence.

9           Jones received what this Court in the  
10 Eighth Amendment requires. Jones now contends  
11 that his sentence is still unconstitutional  
12 because the sentencing court did not also make a  
13 finding that Jones is permanently incorrigible.

14           But that premise is wrong for three  
15 main reasons. Miller implicitly holds and  
16 Montgomery explicitly states that a finding of  
17 incorrigibility isn't required. Second, the  
18 individual life sentencing line of cases on  
19 which Miller relied demonstrates why Jones's  
20 position is unavailing. And, lastly, whether a  
21 crime reflects permanent incorrigibility or  
22 transient immaturity isn't a separate inquiry  
23 apart from the consideration of youth.

24           Instead, this Court has used this  
25 terminology descriptively as a way to describe a

1 crime the circumstances of which either do or do  
2 not make a life-without-parole sentence grossly  
3 disproportionate.

4 And as this Court explained in *Kansas*  
5 versus *Carr*, whether mitigating circumstances  
6 exist to sufficiently warrant a lesser sentence  
7 is a judgment call or perhaps a value call.  
8 That is, it is a normative judgment reached  
9 after Miller's evaluative process. That process  
10 was followed here.

11 CHIEF JUSTICE ROBERTS: Counsel, I  
12 asked Mr. Shapiro starting out what exactly it  
13 was he was looking for, and I have to say it  
14 didn't seem like very much. I -- I think one  
15 sentence sort of articulating the holding of  
16 Miller and another sentence saying that that's  
17 what I've determined or that's what I find. As  
18 I understand him anyway, I think that would be  
19 enough.

20 Why -- why isn't that acceptable to  
21 the State --

22 MS. NOBILE: Well --

23 CHIEF JUSTICE ROBERTS: -- if the  
24 question is have they applied Miller, just a  
25 sentence saying they have? As Justice Sotomayor

1 said, sentencing judges all the time refer to  
2 what findings are required, and we don't  
3 question their -- their statements that they've  
4 considered those.

5 MS. NOBILE: I think the -- the  
6 primary disagreement that we have with  
7 Petitioner Jones's argument is he continuously  
8 relates this to Atkins and Ford, that permanent  
9 incorrigibility really in abstract is an  
10 objective type of a fact.

11 And it isn't. It is a way to describe  
12 what is a grossly disproportionate sentence.  
13 This Court always anchors whether or not  
14 permanent -- something is permanently  
15 incorrigible to whether or not the crime  
16 reflects it. And so I think you --

17 CHIEF JUSTICE ROBERTS: Well, is it --

18 MS. NOBILE: -- could see --

19 CHIEF JUSTICE ROBERTS: -- if you look  
20 at the -- the transcript of the hearing, it --  
21 it seems to me that what the judge is doing is  
22 the kind of sentencing, weighing, considering a  
23 variety of factors. I mean, I think he -- he  
24 says that, you know, the factors in Miller, the  
25 Miller factors. It doesn't sound like the

1 consideration of a specific direction from  
2 Miller.

3 MS. NOBILE: I think Miller goes a  
4 long way to answering and does answer this  
5 question. On page 473, the Court tells  
6 sentencers what they -- what they must do and  
7 why they must do it. They must consider the way  
8 mitigating circumstances of youth may weaken the  
9 rationale for punishment.

10 That is exactly what the Court did  
11 here. And that's what our trial courts are used  
12 to doing. They consider mitigating  
13 circumstances and try to determine whether or  
14 not all of the circumstances would make a lesser  
15 sentence appropriate. And I think --

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Justice Thomas.

19 JUSTICE THOMAS: Yes. Thank you, Mr.  
20 Chief Justice.

21 Counsel, can -- do you think that you  
22 can reconcile Montgomery and Miller?

23 MS. NOBILE: I think that we have  
24 tried in good faith to recon -- to reconcile  
25 both of them and to not quarrel with either of

1 the decisions. Again, Mississippi found  
2 Montgomery -- found Miller announced a  
3 substantive rule three years prior to this  
4 Court.

5           And I think the way to do that is  
6 this: I think the substantive right at issue in  
7 Miller is the protection against grossly  
8 disproportionate punishment. The question then  
9 becomes, what is the process Miller prescribes  
10 for reducing the risk of a grossly  
11 disproportionate? And it isn't by wordsmithing  
12 a sentencing transcript or flyspecking them  
13 after the fact. It's by individualized  
14 sentencing.

15           So what Miller adds to gross  
16 disproportionality is the consideration of  
17 youth. And if you read page 734 of Montgomery,  
18 which Petitioner cites often, to simply describe  
19 grossly disproportionate punishment, I think  
20 they can be reconciled.

21           And I think you can see this because  
22 the Court vacillates between various adjectives.  
23 Crime reflects permanent incorrigibility, crime  
24 reflects irreparable corruption, crime reflects  
25 transient immaturity, which shows that the Court

1 is using these terms as a shorthand descriptor,  
2 as is the fact that the Court rejects the notion  
3 that a finding of incorrigibility is required on  
4 page 735.

5 JUSTICE THOMAS: So how would it --  
6 other than the fact that it would not have been  
7 retroactive if Montgomery had not been decided  
8 if the reasoning -- if Montgomery was not on the  
9 books, how would you apply -- would Miller  
10 change -- have changed your procedures much?

11 MS. NOBILE: No, Your Honor. If I'm  
12 understanding the -- the -- the question  
13 correctly, that the State would have been  
14 applying Miller, it certainly changed the  
15 procedures after Miller, because Mississippi, as  
16 determined by the Mississippi Supreme Court in  
17 Parker versus State, said that the State had a  
18 mandatory sentencing scheme.

19 And so now the State has done what  
20 Miller requires. And, really, I think our  
21 bottom-line conclusion -- you can look at it  
22 this way -- is that the 15 jurisdictions that  
23 Miller kind of highlights as what is  
24 constitutional, for example, in Footnote 10,  
25 none of them required a finding of permanent

1 incorrigibility.

2           So what we're saying is that the  
3 constitutional regimes Miller said are  
4 constitutional are, indeed, constitutional. And  
5 Mississippi is in line with those regimes.

6           JUSTICE THOMAS: Thank you.

7           CHIEF JUSTICE ROBERTS: Justice  
8 Breyer.

9           JUSTICE BREYER: Well, it seems to me  
10 now there are two questions: Does Miller, after  
11 Montgomery, say that in order to sentence a  
12 juvenile to life without parole, he must be  
13 incorrigible, all right, permanently  
14 incorrigible? Did the Court say that? I think  
15 yes, okay? So assume I'm right on that, yes,  
16 that's a substantive rule.

17           But then my question is the same as  
18 Justice Barrett's. Why isn't that the end of  
19 the case? Judges do decide substantive rules  
20 all the time.

21           And the question is, well, did they  
22 get the rule right? And so, if the lawyer tells  
23 the judge the rule -- and maybe he's inadequate  
24 if he doesn't -- and then the judge starts  
25 talking about balancing factors, and then the



1 Supreme Court starts talking about balancing  
2 factors in that state, well, they haven't got  
3 the law right, substantive law.

4 And the same thing happens. You do it  
5 again under the right law. End of case.

6 Now does that -- what's wrong with  
7 what I just said?

8 MS. NOBILE: I think I -- I -- I -- I  
9 think the beginning of the proposition that  
10 permanent incorrigibility somehow in -- in the  
11 abstract, not anchored to the crime, somehow  
12 became a permanent -- a -- a -- a substantive  
13 rule. Unless we --

14 JUSTICE BREYER: I'm sorry, I know  
15 that you disagreed with that, and so I asked you  
16 to assume that. Assume that I'm right on that.

17 MS. NOBILE: If -- if Your Honor is  
18 right on that, then I would still say that the  
19 substantive law here was applied correctly  
20 because what we are concerned about, even in the  
21 permanent incorrigibility type of a context, is  
22 a grossly disproportionate sentence. And you --

23 JUSTICE BREYER: So then you're --

24 MS. NOBILE: -- will see --

25 JUSTICE BREYER: -- remaking -- I'm

1       sorry to interrupt you, but you're -- what I'm  
2       interested in is on the assumption there's an  
3       absolute rule. No incorrigibility, no life  
4       without parole. Okay? Absolute rule.

5                       Now we can't -- can we say: State,  
6       you enforce that rule just like you enforce any  
7       other rule of law. You go look at what the  
8       judge said, you go look at the conditions, and  
9       you say, did he have the law right in his mind  
10      when he did that? And however Mississippi  
11      chooses to do that within the realm of reason,  
12      that's up to Mississippi.

13                      MS. NOBILE: I -- I agree at that  
14      point that the procedure to enforce the rule  
15      would at that point be up to Mississippi. And,  
16      here, I do think it was argued specifically, if  
17      you look on Joint Appendix 144, specifically,  
18      Jones's argument was that transient immaturity  
19      "quite likely was involved here."

20                      And the judge rejected that. So I  
21      think what we're arguing over here is more of a  
22      procedural issue. But, if that is a substantive  
23      issue, Mississippi applied it, and the judge --

24                      CHIEF JUSTICE ROBERTS: Thank you,  
25      counsel.

1 MS. NOBILE: -- rejected the argument.

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: Counsel, my problems  
4 with this case go a lot deeper than these  
5 procedural questions that have rightly occupied  
6 -- well, have occupied most of the argument.

7 I don't really understand exactly what  
8 we are talking about. There are a lot of  
9 statements in Miller and Montgomery, and one of  
10 them, which a lot of the argument has focused  
11 on, is the statement that a judge has to  
12 determine whether a particular defendant's  
13 crime, a particular minor's crime reflects  
14 transient immaturity or incorrigibility, as if  
15 those are the opposite sides of the -- of the  
16 same coin.

17 But they're not. A crime could  
18 reflect transient -- a -- a -- a crime could  
19 reflect transient immaturity. A person -- a --  
20 a minor could be completely mature and yet  
21 capable of being rehabilitated.

22 So what are we talking about? And --  
23 and keep in mind that, of the three purposes of  
24 punishment that the Court identified and applied  
25 in Miller and Montgomery, the first, which is

1 retribution, had nothing whatsoever to do with  
2 rehabilitation.

3 MS. NOBILE: I think the best way  
4 Montgomery puts it is on page 734, and that's  
5 that Miller requires a sentencer to consider a  
6 juvenile's youth and its attendant  
7 characteristics before determining that a life  
8 without parole is a proportionate sentence.

9 So, if you look at the substantive  
10 right being the protection against grossly  
11 disproportionate, the way we understand page 734  
12 of Montgomery is to say that a crime reflects  
13 transient immaturity. That simply describes a  
14 crime the circumstances of which make a life  
15 without parole grossly disproportionate.

16 But you -- Miller is an  
17 all-things-considered type of an analysis. It's  
18 not a myopic focus on one particular fact. One  
19 particular fact and or particular piece of  
20 evidence is not going to ipso facto make a life  
21 without parole either proper or improper.

22 It truly is a all-things-considered  
23 and see if mitigating circumstances are going to  
24 diminish all of the penological justifications  
25 for the punishment.

1 I think that --

2 JUSTICE ALITO: Thank -- all right.

3 Thank you. Thank you, counsel.

4 CHIEF JUSTICE ROBERTS: Justice

5 Sotomayor.

6 JUSTICE SOTOMAYOR: Counsel --

7 counsel, Montgomery says repeatedly on 734 and

8 in other places that Miller did more than

9 require a sentencer to consider a juvenile

10 offender's youth before life without parole.

11 So merely considering youth can't be

12 enough under Montgomery. It established that

13 the penological justification for life without

14 parole collapsed in light of the distinct --

15 distinctive attributes of youth.

16 More than once, it says: "Even if a

17 court considers a child's age before sentencing

18 him or her to a lifetime in prison, that

19 sentence still violates the Eighth Amendment for

20 a child whose crime reflects unfortunate yet

21 transient immaturity."

22 Proportionality of sentencing looks at

23 the nature of the crime. But Miller and

24 Montgomery made very clear that we're looking at

25 the nature of the offender.

1                   So is it your position that if a  
2                   sentencing court says I considered the Miller  
3                   factors, but I think the crime -- and the crime  
4                   does not reflect permanent incorrigibility, but  
5                   I'm going to sentence him to LWOP anyway because  
6                   the crime was really horrific?

7                   MS. NOBILE: Not if you understand "a  
8                   crime that reflects transient immaturity" simply  
9                   to describe a crime the circumstances of which  
10                  make a life without parole grossly  
11                  disproportionate.

12                  And if I can, I would like to take the  
13                  two sentences in that --

14                  JUSTICE SOTOMAYOR: But how do you --  
15                  counsel, I -- I -- but that would mean most  
16                  would be, because Montgomery says it's the rare  
17                  juvenile offender whose crime reflects  
18                  irreparable corruption. Multiple, multiple  
19                  times in Miller and in Montgomery, the Court  
20                  says it should be rare.

21                  MS. NOBILE: I -- I agree with that,  
22                  Your Honor. And I think I -- the best way to  
23                  read that is to say that this Court, looking at  
24                  the whole -- for example, it looks at statistics  
25                  on Footnote 10 -- was envisioning that many

1 times mitigating circumstances would -- the  
2 mitigating circumstances of youth and all the  
3 surrounding circumstances would, indeed, make a  
4 life-without-parole sentence grossly --

5 JUSTICE SOTOMAYOR: So if a judge --

6 MS. NOBILE: -- disproportionate.

7 JUSTICE SOTOMAYOR: -- said what I  
8 said, he's not permanently incorrigible, but I  
9 think the crime is serious, would that violate  
10 Miller and Montgomery in your view?

11 MS. NOBILE: Your Honor, I -- I -- I  
12 may be misunderstanding, but I think I look at  
13 those two questions a little bit differently.  
14 If a --

15 JUSTICE SOTOMAYOR: I know you don't,  
16 but answer mine.

17 MS. NOBILE: If a --

18 JUSTICE SOTOMAYOR: If a judge says  
19 this is not a permanently incorrigible human  
20 person --

21 MS. NOBILE: Yes, if this Court is  
22 using "permanently incorrigible" not anchored  
23 from the crime, perhaps so. Perhaps a  
24 life-without-parole judgment would be  
25 proportionate.

1                   I don't think corrigibility is some  
2   discrete objective fact in the abstract about a  
3   person. And that is why the Court time again  
4   anchors it to what a crime reflects: Can the  
5   crime be sufficiently diminished by or explained  
6   by some quality of youth?

7                   And, again, nor do I think that --

8                   CHIEF JUSTICE ROBERTS: Thank you,  
9   counsel.

10                  Justice Kagan.

11                  JUSTICE KAGAN: Ms. Nobile, I guess  
12   what I'm struggling with here is how, on your  
13   theory, we could have labeled Miller a  
14   substantive rule in Montgomery, because I always  
15   thought that a substantive rule under Teague  
16   meant that there was a class of people who you  
17   couldn't -- you know, you either couldn't  
18   criminalize their conduct or you couldn't  
19   sentence them to a certain way.

20                  But that that was the question, that  
21   there was a class of people for whom a  
22   particular punishment was impermissible. And --  
23   and you're saying that that's not what  
24   Montgomery does.

25                  But, if it's not what Montgomery does,



1 if Montgomery is only basically ensuring that a  
2 certain kind of process is accomplished, then  
3 how could Montgomery be saying that Miller was  
4 retroactive?

5 MS. NOBILE: Two -- two ways.

6 First, Miller is substantive because  
7 it is premised on the protection against grossly  
8 disproportionate punishment, that there was a  
9 grave risk that a life-without-parole sentence  
10 would be grossly disproportionate in any given  
11 case. Miller says that on page 470.

12 Second --

13 JUSTICE KAGAN: And if I could just  
14 interrupt you there, Ms. Nobile, do you mean to  
15 say that it satisfies Teague if there is a  
16 process rule that has an effect on substantive  
17 outcomes?

18 MS. NOBILE: I think that the key  
19 portion of -- of Miller is that there was a  
20 grave risk of a disproportionate sentence. So,  
21 if you look at page 731 or 733 of Montgomery, it  
22 says, "Protection against disproportionate  
23 punishment goes far beyond the manner of  
24 determining a defendant's sentence." But the  
25 class issue --

1 JUSTICE KAGAN: Okay. So if I can --  
2 again, I guess what you're saying is if there's  
3 a process rule, and that process is necessary to  
4 prevent a serious potential for bad substantive  
5 outcomes, then that's enough under Teague, is  
6 that correct?

7 MS. NOBILE: Well, what Montgomery  
8 says is that there is a grave risk, not a  
9 "likelihood" or "possibility." You can see that  
10 on page 736.

11 And so I think if you look at the  
12 class language in Montgomery -- I'm not  
13 disagreeing with Your Honor that that language  
14 is in there, of course -- but you can look at  
15 it, for example, as a numerator/denominator kind  
16 of a -- kind of a -- a setup, the denominator  
17 being all juveniles convicted of homicide and  
18 the numerator being a class of defendants for  
19 which a life-without-parole sentence, based on  
20 all the circumstances, will be disproportionate.

21 JUSTICE KAGAN: Thank you.

22 MS. NOBILE: My point is that you  
23 cannot --

24 CHIEF JUSTICE ROBERTS: Justice  
25 Gorsuch.

1                   JUSTICE GORSUCH: Counsel, I'd like to  
2 pick up Justice Kagan's question. And, well,  
3 let me -- before I do, let me just ask one quick  
4 question. Because Mr. Jones is on direct appeal  
5 from resentencing, do you think he needs the  
6 right he seeks to be retroactively applicable  
7 under Teague, or is that just neither here nor  
8 there?

9                   MS. NOBILE: No, Your Honor. The  
10 State has never actually argued that he was on  
11 -- that -- that he was -- he was on collateral  
12 review.

13                   JUSTICE GORSUCH: Okay, okay. So  
14 we're on direct review, and we're just trying to  
15 figure out what to do with it.

16                   Let -- let -- let's say we -- we think  
17 that Miller was a decision about processes and  
18 that Montgomery did what Justice Kagan described  
19 and created a class of persons or a substantive  
20 right for a class of persons.

21                   What do -- what do we do about that?  
22 If -- if -- if Montgomery misstated the rule  
23 from Miller, what do we -- how do we proceed?

24                   MS. NOBILE: I, of course, don't agree  
25 that Montgomery set a new rule, but here's where

1 I think you proceed. I think you look at the  
2 process that Miller itself prescribed because  
3 that process is going to effectuate a  
4 substantive rule.

5 I don't think Miller and Montgomery,  
6 read together, could be said that the  
7 substantive rule that came out of one doesn't  
8 match the procedure. I think the process in  
9 Miller, which is repeated at least twice in  
10 Montgomery, would give effect to any substantive  
11 rule, whether or not this Court looks at that  
12 substantive rule coming from Miller or  
13 Montgomery. And I think --

14 JUSTICE GORSUCH: Well, but that's --  
15 that's not normally how we think of rights. We  
16 think of some rights as process rights,  
17 regardless of what -- the substantive outcome.  
18 In a substantive right, you have a right to a  
19 substantively reasonable sentence -- sentence,  
20 for example, no matter what the process was that  
21 led to it. They're independent. They're  
22 complementary, to be sure, but one could be  
23 violated without the other.

24 So that -- that's normally how we  
25 think about it. And I guess you're asking us --

1 I think you're asking us basically to ignore  
2 substantive aspects of Montgomery and just --  
3 just acknowledge that it misread Miller. Am I  
4 wrong about that?

5 MS. NOBILE: I -- I actually think I'm  
6 trying to reconcile the two, and so what Justice  
7 Kagan was asking about about the class of  
8 offenders, I think my point that I may not have  
9 finished or explained accurately is that there  
10 is going to be a class of offenders for which a  
11 life-without-parole sentence will be grossly  
12 disproportionate.

13 The point is that you can't define  
14 that class categorically. And I don't think  
15 Montgomery ever says you can. And I think that  
16 that would just fall out of step with  
17 individualized sentencing to begin with.

18 So I'm not disagreeing that there's  
19 going to be a class. I'm disagreeing that  
20 there's going to be a class that you can  
21 determine categorically. Instead, it's going to  
22 be a case-by-case basis on whether or not the  
23 mitigating circumstances and all the surrounding  
24 circumstances diminish the penological  
25 justification for punishment.

1 JUSTICE GORSUCH: Thank you, counsel.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Justice

4 Kavanaugh.

5 JUSTICE KAVANAUGH: Good morning,

6 Ms. Nobile. Mr. Shapiro said we shouldn't

7 analogize this situation to Lockett in the death

8 penalty context but, rather, to Atkins and Ford

9 and consider this, in essence, an eligibility

10 requirement with a finding of some kind, not

11 just a process that considers youth as a factor.

12 And that raises, of course, the

13 tension that Justice Kagan was identifying in

14 Montgomery. And I think what she was getting at

15 is that the key paragraph in Montgomery that

16 says no finding of fact is required is, some

17 would say, in tension with the conclusion that

18 Miller was a substantive rule. Okay?

19 And so, if that's true -- and you've

20 made an attempt to reconcile it, and I think you

21 make a -- a good point on that. But suppose

22 that's true, and we either have to follow the

23 paragraph in Montgomery or follow the

24 implication of the Teague conclusion and really

25 say that paragraph is wrong in Montgomery or

1 back away from it, which Justice Gorsuch was  
2 getting at, a long lead-up to a bottom-line  
3 question: Why shouldn't we just require a  
4 finding of fact that the defendant is  
5 permanently incorrigible?

6 MS. NOBILE: I think that that is  
7 fairly elusory. I mean, a finding of fact that  
8 the defendant is incorrigible ignores much of  
9 Miller. It's also not an objective fact.

10 It's going to be some type of judgment  
11 that a sentencer is going to have to make, and  
12 to get to that judgment, you're going to need an  
13 evaluative process and you're going to need to  
14 evaluate mitigating circumstances, which this  
15 Court has always said is a normative type of a  
16 value call. And so I think this is more like  
17 the Woodson line of cases, and I think we know  
18 that because Miller says that.

19 And I think, if you really look at  
20 Petitioner's reply brief on pages 12 -- or pages  
21 11 and 12, I think it underscores the absence of  
22 any constitutional mooring for the rule that the  
23 Petitioner advances, because he doesn't really  
24 tell us is this a legal rule or a factual rule.  
25 Which side would have the burden of proof? Does

1 a judge or jury have to make the finding? If it  
2 -- if it is a specific finding, does a jury have  
3 to make it? And at that point, are we in the  
4 Apprendi arena?

5 So I think that that just suggests  
6 that we don't really know what the nature of the  
7 rule is, which suggests that it's probably not a  
8 constitutional rule. And we typically don't  
9 think about the Eighth Amendment as requiring  
10 specific findings. I think that's been  
11 completely rejected by this Court in the cases  
12 that Miller cited, including Johnson versus  
13 Texas.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Barrett.

17 JUSTICE BARRETT: Ms. Nobile, do you  
18 agree that a defendant can bring an as-applied  
19 Eighth Amendment challenge to a sentence, a  
20 juvenile sentence of life without parole?

21 MS. NOBILE: Yes, Your Honor, that  
22 there would be a gross disproportionality  
23 challenge. I think what I see Miller adding to  
24 gross disproportionality is the consideration of  
25 youth.



1 JUSTICE BARRETT: And what would the  
2 standard be? Not permanent incorrigibility, I  
3 take it?

4 MS. NOBILE: I don't --

5 JUSTICE BARRETT: Is it a more broad  
6 question of was this grossly disproportionate?

7 MS. NOBILE: Yes, I think so, Your  
8 Honor. And I think looking at it that way  
9 dovetail -- dovetails quite nicely into why  
10 Miller is a substantive rule and why Miller --  
11 and why Montgomery said Miller was a substantive  
12 rule, because you're trying to -- in  
13 Montgomery's own words on page 734, you're  
14 trying to determine that a life without parole  
15 is a proportionate sentence.

16 JUSTICE BARRETT: But how do you  
17 determine that if you're not looking at the  
18 question of whether this is transient immaturity  
19 or a reflection of permanent incorrigibility?  
20 How is the --

21 MS. NOBILE: I think --

22 JUSTICE BARRETT: -- appellate court  
23 supposed to -- what standard is it supposed to  
24 apply?

25 MS. NOBILE: I think that you --

1 Miller considers an all-things type of an  
2 analysis and weighing mitigating circumstances.  
3 That's something trial courts do using the tools  
4 and the rules that trial courts normally do.

5 I think the way we define a crime, as  
6 to whether or not a crime reflects transient  
7 immaturity, is a crime sufficiently mitigated by  
8 the distinctive characteristics of youth so that  
9 all the circumstances surrounding the crime  
10 would make a life without parole grossly  
11 disproportionate.

12 I mean, can you explain this crime by  
13 a particular quality of youth? It's always  
14 anchored to the crime. And I think that makes  
15 sense because, in going forward with these  
16 Miller cases, you're not going to have any  
17 evidence of post-sentencing rehabilitation.

18 JUSTICE BARRETT: Won't you often be  
19 able to say that? And -- and I guess what I'm  
20 wondering is then isn't it -- aren't we back to  
21 whether it's procedural, that youth matters and  
22 we see that the trial court considered youth?

23 MS. NOBILE: I do think that that is  
24 the procedure, but I think the substantive  
25 component of what Miller and Montgomery were

1 concerned about is that not applying Miller  
2 retroactively would create too great of a risk  
3 that many juveniles sentenced to mandatory life  
4 without parole prior to Miller were serving  
5 unconstitutionally disproportionate punishment,  
6 with Montgomery reiterating that the protection  
7 against disproportionate punishment is the  
8 central substantive guarantee of the Eighth  
9 Amendment.

10 JUSTICE BARRETT: Thank you, counsel.

11 CHIEF JUSTICE ROBERTS: Counsel, would  
12 you like to take a minute to wrap up?

13 MS. NOBILE: Thank you, Chief Justice.

14 Miller and Montgomery recognized that  
15 life-without-parole sentences for juveniles  
16 convicted of homicide are not necessarily  
17 unconstitutionally disproportionate, but they  
18 can be.

19 To reduce the risk of a  
20 disproportionate sentence and give effect to  
21 Miller's substantive right, the Eighth Amendment  
22 requires sentencers to give individualized  
23 consideration to the mitigating circumstances of  
24 youth and all that accompanies it before  
25 imposing a life-without-parole sentence.

1           The Eighth Amendment does not further  
2       impose specific procedures or require sentencers  
3       to follow a particular verbal formula. The  
4       sentencing court here had the benefit of Miller  
5       and took care to consider the implications of  
6       age, age-related characteristics, and the nature  
7       of the particularly brutal murder of Bertice  
8       Jones.

9           On the whole, the sentencing court  
10       disagreed that youth and its attendant  
11       characteristics demean -- diminish the  
12       penological justification for a  
13       life-without-parole punishment. The appellate  
14       court affirmed that sentence, and the court  
15       should be affirmed here.

16           CHIEF JUSTICE ROBERTS: Thank you,  
17       counsel.

18           Mr. Liu.

19           ORAL ARGUMENT OF FREDERICK LIU

20           FOR THE UNITED STATES, AS AMICUS CURIAE,  
21           SUPPORTING THE RESPONDENT

22           MR. LIU: Mr. Chief Justice, and may  
23       it please the Court:

24           This Court in Montgomery answered the  
25       question presented here when it made clear that

1 Miller does not require trial courts to make an  
2 affirmative finding of permanent  
3 incorrigibility.

4 This Court should reaffirm that  
5 conclusion for two reasons.

6 First, whether a crime reflects  
7 transient immaturity isn't an inquiry separate  
8 from the inquiry Miller prescribes.

9 Under Miller, the court must consider  
10 whether the distinctive attributes of youth have  
11 diminished the penological justifications for  
12 life without parole.

13 When, as in this case, the court  
14 determines that they have not, that is a  
15 determination that the crime does not reflect  
16 transient immaturity, and no further finding is  
17 required.

18 Second, even if transient immaturity  
19 required a separate finding, the court made such  
20 a finding here when it found Petitioner's  
21 transient immaturity argument unpersuasive.

22 For either of those reasons, the  
23 judgment below should be affirmed.

24 CHIEF JUSTICE ROBERTS: Counsel, I'd  
25 like to ask you the question that I understood

1 Justice Kagan to be asking your -- your friend  
2 from the State.

3 I understand your submission to be  
4 that the requirement here is purely procedural.  
5 In other words, I'm looking at page 15 of your  
6 brief: The sentencers have the ability to take  
7 into account youth and attendant characteristics  
8 and, if they do that, then that's enough.

9 Is that a fair reading?

10 MR. LIU: It -- it's a fair reading of  
11 our brief that we think the inquiry Miller  
12 prescribes is enough to implement Miller's  
13 substantive rule. But I think this Court need  
14 not go so far as to say part of the language in  
15 Montgomery announcing the substantive rule was  
16 right or wrong.

17 We are -- we are willing to accept  
18 that language that draws a distinction between  
19 the two types of crimes we've been talking  
20 about. And our position is that, even if you  
21 accept that language, the Miller -- that the  
22 inquiry Miller prescribes is the inquiry to draw  
23 those distinctions.

24 CHIEF JUSTICE ROBERTS: Well, but how  
25 does that -- under Teague, how then is this rule

1 properly considered retroactive?

2 MR. LIU: Well, if we -- even if we  
3 take Montgomery at its word that the substantive  
4 rule in Miller is a distinction between crimes  
5 reflecting transient immaturity and crimes  
6 reflecting permanent incorrigibility, the next  
7 question is: Well, what is a crime reflecting  
8 transient immaturity?

9 And we think the Court should just  
10 stick to what it said at the top of page 734 of  
11 Montgomery. It's -- there, I think it makes  
12 pretty clear that a crime reflects transient  
13 immaturity where the penological justifications  
14 for life without parole have collapsed in light  
15 of the distinctive attributes of youth.

16 And once you have that understanding  
17 of what a crime reflecting transient immaturity  
18 is in mind, then it lines up exactly with the  
19 inquiry Miller prescribes, because Miller on  
20 page 472 tells courts to ask: How do the  
21 distinctive attributes of youth diminish the  
22 penological justifications for a  
23 life-without-parole sentence?

24 So a court that conducts --

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas.

3 JUSTICE THOMAS: I have no questions,  
4 Chief Justice.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Breyer. Justice Breyer?

7 JUSTICE BREYER: No, I have no  
8 questions. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE ALITO: Suppose a judge says  
11 this after a sentencing hearing: I -- I don't  
12 think this minor who committed this crime a  
13 month short of his 18th birthday is transiently  
14 immature. I think this person is highly  
15 intelligent and very mature. But I can't say  
16 that after 25 years in prison he can't be  
17 rehabilitated, if he's released after 25 years,  
18 he will commit other crimes.

19 What is the judge to do in that  
20 situation?

21 MR. LIU: We think that is a  
22 legitimate thing for a judge to say. What the  
23 judge is essentially saying is that the  
24 penological justifications for life without  
25 parole have not collapsed in one of the



1 distinctive attributes of youth.

2           The court is identifying an  
3 uncertainty about the future, but I think  
4 everyone agrees, including Petitioner, that the  
5 burden can be placed on the defendant to show  
6 that a lower sentence is possible.

7           So that uncertainty itself can be  
8 dispositive in saying that the -- that the  
9 process is wrong.

10           JUSTICE ALITO: Well, I don't quite  
11 understand the question. Suppose that the  
12 defense brings in a dozen highly qualified  
13 psychologists who say, we think that just about  
14 anybody who commits a crime short of 18 can,  
15 after a period of time in a good correctional  
16 facility, be rehabilitated so that the person  
17 will not create a risk for society after the  
18 person is released?

19           MR. LIU: In -- in that case, it's --  
20 it's still within the judge's power to conclude  
21 that a life-without-parole sentence is  
22 appropriate if he thinks there's still  
23 penological justification to support such a  
24 sentence.

25           So the court could reason, for

1 example, that while there's a possibility of  
2 some rehabilitation, it's not going to be enough  
3 to show true rehabilitation, given how brutal  
4 and depraved the crime itself was.

5 JUSTICE ALITO: I mean, Montgomery and  
6 Miller use a lot of language possibly quite  
7 loosely. They lose -- they use certain terms  
8 interchangeably -- corruption, redemption,  
9 incorrigibility -- and then contrasted that with  
10 transient immaturity. I -- I'm not quite sure  
11 how they all fit together.

12 MR. LIU: Well, I agree, Justice  
13 Alito, that those are not self-defining terms.  
14 I think it would help the analysis if the Court  
15 were to make clear that the phrase "crime  
16 reflecting transient immaturity" means a crime  
17 where the penological justification for a  
18 life-without-parole sentence has collapsed in  
19 one of the distinctive attributes of youth, and  
20 a "crime reflecting permanent incorrigibility"  
21 is a crime where those penological  
22 justifications have not collapsed.

23 That would have the benefit of lining  
24 up the language in Montgomery with the inquiry  
25 Miller prescribes, but it would also have the

1 benefit of allowing sentencing courts to conduct  
2 this inquiry the way they usually do, which is  
3 to consider the penological justification in  
4 light of a certain category of mitigating  
5 evidence and to ask whether that mitigating  
6 evidence is sufficiently compelling in a  
7 particular case.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Justice Sotomayor.

11 JUSTICE SOTOMAYOR: Counsel, you and  
12 your co-counsel basically want to say that  
13 Miller and Montgomery mean only: Does youth  
14 mitigate the horribleness of this crime?

15 But that's not what Miller and  
16 Montgomery say. And, in fact, what Miller and  
17 Montgomery said repeatedly was it would be the  
18 rarest juvenile that should receive life without  
19 parole.

20 So how does your narrow  
21 proportionality approach, yours and your  
22 colleague, get to the nub of that?

23 MR. LIU: Well, I think it just might  
24 be the case that when -- when a sentencing court  
25 asks whether the penological justifications for

1 life without parole have collapsed in light of  
2 the distinctive attributes of youth, that, in  
3 most cases, the answer will be yes.

4 And so I don't think there's any --

5 JUSTICE SOTOMAYOR: I'm sorry. In  
6 most cases, you're saying judges will find that  
7 these juveniles shouldn't be sentenced to life  
8 with -- without parole, or are you saying --

9 MR. LIU: Right. I --

10 JUSTICE SOTOMAYOR: -- that in most  
11 cases, they should?

12 MR. LIU: I'm saying that in most  
13 cases, they shouldn't because the penological  
14 justifications for such a sentence will be  
15 diminished, will collapse, in light of the  
16 distinctive attributes of youth.

17 It's not a question about the test.  
18 The test is: Do those penological  
19 justifications collapse? It may be that the  
20 result in applying the test to cases out there  
21 in the world, that the test is satisfied; that  
22 is, the test didn't collapse --

23 JUSTICE SOTOMAYOR: So -- but how does  
24 -- how does the proportionality test test that?  
25 That's what I'm trying to get to. It's very

1 rarely applied. In -- in Harmelin versus  
2 Michigan, we said possessing 672 grams of  
3 cocaine justified a life without parole.

4 MR. LIU: Right. What -- what -- the  
5 test I'm laying out about what a -- what a crime  
6 reflecting transient immaturity is is a test  
7 that the sentencer applies in the first  
8 instance. It's not a narrow proportionality.  
9 It's not a gross proportionality. It just is,  
10 as a sentencer would ask in any case, whether  
11 certain mitigating evidence is sufficient to  
12 warrant a lower sentence.

13 Now the question that was before this  
14 Court in the cases you mentioned was an  
15 appellate standard, and that appellate standard  
16 is more deferential to the sentencer, and so  
17 there is a level of grossness, a narrowness to  
18 the application of that test.

19 JUSTICE SOTOMAYOR: Thank you,  
20 counsel.

21 CHIEF JUSTICE ROBERTS: Justice Kagan.

22 JUSTICE KAGAN: Mr. Liu, I'd like to  
23 go back to a question that Justice Sotomayor  
24 asked Ms. Nobile and get your view on it.

25 Let's say that I'm a sentencer and I

1 go through a hearing, and at the end of the  
2 hearing, I say: I've considered this  
3 defendant's youth and the attendant  
4 characteristics of youth. I've done all that  
5 consideration. He's given me a lot of argument.  
6 I've listened to it all. To be honest, I don't  
7 think that he -- his crime reflects irreparable  
8 corruption. You know, he is not one of the  
9 incorrigibles that Montgomery and Miller talk  
10 about. I think, in fact, that it's possible  
11 that he could be rehabilitated. But I also  
12 don't think that his youth is sufficiently  
13 mitigating for this horrible crime that he  
14 committed. So I'm sentencing him to life  
15 without parole. I think that that would be a  
16 good punishment and a proportionate punishment.

17 Is that okay on your -- on your  
18 theory?

19 MR. LIU: No, Justice Kagan, it's not  
20 okay. We think a resentencing there would be  
21 appropriate, but it's not because the court  
22 failed to make any specific finding. It's  
23 because the court, in that hypothetical, has  
24 made contradictory statements, essentially  
25 saying both that the crime reflects transient

1 immaturity and that it does not.

2 And I think it's a pretty  
3 well-accepted form of procedural error that when  
4 a court says contradictory things, we send it  
5 back for the court to clear things up.

6 JUSTICE KAGAN: Well, I guess I don't  
7 understand that, Mr. Liu, because I -- I -- I  
8 took your argument to be one that said, you  
9 know, these are just labels, the incorrigible  
10 label versus the transient immaturity label.  
11 What's necessary is that a -- a judge take into  
12 account youth and consider it. And -- and I  
13 think Ms. Nobile talked about an "all things  
14 considered" way.

15 And this judge has done that. He's  
16 considered youth in an "all things considered"  
17 way. He's balanced it against a whole bunch of  
18 other factors. And he said that,  
19 notwithstanding the possibility of  
20 rehabilitation, an LWOP sentence is appropriate.

21 Is that not right?

22 MR. LIU: It's because the labels do  
23 refer to specific concepts in our view. And so,  
24 when a court uses the phrase "crime reflecting  
25 transient immaturity," we're translating in --

1 that into I think the penological justifications  
2 of youth are collapsed.

3 If the court then says in the next  
4 breath, well, actually, I think the penological  
5 justifications have not collapsed, that's just  
6 saying two contradictory things.

7 But what I'm not saying is that in  
8 every case, the court has to utter some magic  
9 words about transient immaturity. I'm saying,  
10 when the court uses that phrase but then says  
11 something that contradicts it, we should send it  
12 back to clear things up.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch.

16 JUSTICE GORSUCH: No questions. Thank  
17 you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh.

20 JUSTICE KAVANAUGH: Good morning,  
21 Mr. Liu. I want to follow up on my  
22 understanding of how this plays out in your  
23 view. If the process was good and perfect, my  
24 understanding is that you can't raise a  
25 different Eighth Amendment argument that the



1 individual sentence was still disproportionate.

2           The answer to that is the process is  
3 what leads to the proportionality, at least as  
4 an Eighth Amendment matter. And by analogy, in  
5 the death penalty context, the Gregg versus  
6 Georgia context, we have said proportionality is  
7 required, but it's achieved in two ways.

8           One, you rule out the death penalty or  
9 life without parole for a certain class of  
10 offenses or offenders. And, secondly, we  
11 require that the sentencer consider all the  
12 relevant mitigating and other relevant  
13 circumstances. That's the Lockett principle.

14           And, here, I just want to make sure of  
15 your answer. If the -- if the process considers  
16 all the relevant circumstances, is there a  
17 separate argument, as an Eighth Amendment  
18 matter, that someone could still make, well,  
19 they applied all the relevant factors, but I  
20 still think it's disproportionate?

21           MR. LIU: So we do, Justice Kavanaugh.  
22 I think the way to think about it is to compare  
23 this to the federal regime. As no doubt you're  
24 familiar, you can bring a procedural  
25 reasonableness claim under, say, Rita but then a

1 substantive reasonableness claim under Gall.

2           And what we're saying here -- this is  
3 a case about procedures. We're saying that  
4 there's nothing wrong with the procedures that  
5 were followed here. The court asked the right  
6 question and considered the right elements in  
7 answering that question. So there's no sort of  
8 procedural Eighth Amendment claim.

9           We do think there's still room for a  
10 defendant to bring an as-applied Eighth  
11 Amendment claim. This is the sort of claim that  
12 the Chief Justice entertained in his concurrence  
13 in *Graham versus Florida*. I don't think *Miller*  
14 or *Montgomery* forecloses the availability of  
15 that type of claim.

16           JUSTICE KAVANAUGH: Thank you.

17           CHIEF JUSTICE ROBERTS: Justice  
18 Barrett.

19           JUSTICE BARRETT: So, counsel, I guess  
20 I'm a little surprised to hear you say that you  
21 think that they can raise an as-applied  
22 substantive challenge to the proportionality,  
23 because, I mean, I guess this is part of the  
24 confusion about whether *Miller* and *Montgomery*  
25 are substantive or procedural.

1                   But let me ask you this: If all the  
2 procedures, as Justice Kavanaugh said, were  
3 applied perfectly, what is the standard of  
4 review? Is it, well, the standard is grossly  
5 proportional because the defendant is not  
6 permanently incorrigible?

7                   MR. LIU: If -- if there were a  
8 separate substantive Eighth Amendment claim  
9 brought, Justice Barrett, yes, the standard of  
10 review for an appellate court would be the  
11 narrow proportionality standard that the Chief  
12 Justice applied in his concurrence in *Graham*  
13 versus Florida.

14                   JUSTICE BARRETT: So your objection  
15 here is really that it's making the State jump  
16 through too many hoops to put something actually  
17 formally on the record as a finding of fact?

18                   MR. LIU: That's correct.

19                   JUSTICE BARRETT: It's not to meet the  
20 standard.

21                   MR. LIU: It would be as if, in the  
22 federal system, we had judges requiring trial  
23 courts to say: Oh, I followed the parsimony  
24 principle; I really did consider whether this --  
25 this sentence was sufficient but not greater

1 than necessary.

2 Courts don't require that sort of  
3 uttering of magic words. And -- and that's our  
4 objection to Petitioner's submission here.

5 JUSTICE BARRETT: Okay. Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Liu, a  
7 minute to wrap up.

8 MR. LIU: Thank you, Mr. Chief  
9 Justice.

10 I think this case turns on what the  
11 label "crime reflecting transient immaturity"  
12 is -- reflects -- means. We think it means a  
13 crime where the penological justifications of  
14 youth have collapsed in light of youth.

15 And if we -- once we understand "crime  
16 reflecting transient immaturity" in that way,  
17 then there's no tension between Miller's  
18 substance and Miller's process, and there's no  
19 tension between page 70 -- 734 of Montgomery,  
20 which draws the distinction, and page 735, which  
21 says no finding is required.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Shapiro, three minutes for

1 rebuttal.

2 REBUTTAL ARGUMENT OF DAVID M. SHAPIRO  
3 ON BEHALF OF THE PETITIONER

4 MR. SHAPIRO: Thank you, Mr. Chief  
5 Justice.

6 I want to be very clear that we are  
7 not -- we are not asking for any sort of formal  
8 or affirmative or express or magic words type of  
9 finding requirement.

10 What we -- all we are asking for is  
11 that the judge needs to understand that children  
12 who are capable of rehabilitation cannot be  
13 sentenced to life without parole and to decide  
14 whether or not the defendant fits within the  
15 rule.

16 As the Chief Justice noted, we are not  
17 asking for much. All that we are asking for is  
18 for the rule of Miller and Montgomery, which is  
19 a rule stated in Miller, reiterated in  
20 Montgomery seven times as an integral part of  
21 its holding, that only permanently incorrigible  
22 juveniles can be sentenced to life without  
23 parole.

24 And all we're saying is that means  
25 that there needs to be a determination. It can

1 be an implicit one based on the usual  
2 presumption that the judge knows and applies the  
3 law correctly, a presumption that is overcome  
4 here, or -- or it can be something more  
5 explicit.

6 That is for the states to decide. My  
7 -- my friend from Mississippi said that a  
8 weakness of our position is that we haven't laid  
9 out all of the details. But that's -- but  
10 that's the point.

11 The details are for the states. That  
12 is up to them in their discretion. But what  
13 there must absolutely be is a determination,  
14 implicit or explicit, that the defendant is  
15 incapable of rehabilitation before he or she is  
16 sentenced to life without parole.

17 And I think what we've just heard from  
18 the other side is what a frontal attack on stare  
19 decisis and settled law is -- is being made by  
20 my -- my -- my friends. My friend from  
21 Mississippi agreed that even a corrigible  
22 juvenile could be sentenced to life without  
23 parole.

24 And my friend from the United States  
25 is dismissing the permanent incorrigibility rule

1 as just a label and not really providing a  
2 direct answer to whether permanently  
3 incorrigible juveniles can be sentenced to life  
4 without parole.

5           Montgomery provides that direct  
6 answer. Miller provides that direct answer in  
7 saying that trial courts need to distinguish  
8 between the two classes.

9           And -- and -- and I think my friend  
10 from Mississippi, her comments illustrate what a  
11 free-for-all it is without a standard. It comes  
12 down to considering factors and deciding whether  
13 a lesser sentence is appropriate, all things  
14 considered.

15           What we are saying is that there is a  
16 rule. This Court has laid down that rule in  
17 Miller and Montgomery. It is part of the  
18 edifice of stare decisis and the stability  
19 interests that it protects. And this Court does  
20 not lay down rules so that they cannot be  
21 applied. Mississippi courts need to decide  
22 whether Brett Jones is permanently incorrigible.

23           Thank you.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel. The case is submitted.

1                   (Whereupon, at 11:27 a.m., the case  
2 was submitted.)  
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