

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: JOE HARRIS SULLIVAN, Petitioner, v. FLORIDA
CASE NO: No. 08-7621
PLACE: Washington, D.C.
DATE: Monday, November 9, 2009
PAGES: 1-51

ALDERSON REPORTING COMPANY
1155 CONNECTICUT AVE., NW
WASHINGTON, D.C. 20036
(202) 289-2260

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

2 (11:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 08-7621, Sullivan v. Florida.

5 Mr. Stevenson.

6 ORAL ARGUMENT OF BRYAN STEVENSON

7 ON BEHALF OF THE PETITIONER

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

10 Joe Sullivan was 13 years of age when he was
11 arrested with two older boys, one 15 and one 17, charged
12 with sexual assault, ultimately convicted, and sentenced
13 to life without parole.

14 Joe is one of only two children this age who
15 have ever been sentenced to life without parole for a
16 non-homicide, and no child has received this sentence
17 for non-homicide in the last 18 years.

18 JUSTICE GINSBURG: Mr. Stevenson, there's a
19 serious question before we get to the particulars of
20 this case. Justice Kennedy suggested it in the last
21 argument. This -- the time ran out for postconviction
22 relief in 1993, and this petition is brought in 2007.
23 There's a 2-year statute of limitations. Florida
24 said there's a procedural bar; we don't get to the
25 merits of this case.

1 MR. STEVENSON: Yes, there are two
2 responses. I mean, first of all, with regard to
3 challenges to sentences, Florida law, under Rule 3.850,
4 makes it very clear that a challenge to a sentence can
5 be brought at any time. What the trial court --

6 JUSTICE GINSBURG: They said there's a
7 question whether that means an illegal sentence, like
8 the judge gave more than the maximum punishment. Do you
9 have any indication in Florida law that correcting a
10 sentence any time overtakes the limitation on
11 postconviction relief?

12 MR. STEVENSON: Yes, we cite in our brief
13 Summers v. State, which is an example of someone
14 challenging their sentence after this Court's decision
15 in Apprendi long after the time would have run.

16 JUSTICE SOTOMAYOR: Except the court there
17 applied 39(a) and said: Yes, it's a change in law, but
18 it hasn't been made retroactive.

19 MR. STEVENSON: That -- that's correct. But
20 the propriety of that determination is exactly what can
21 be -- is engaged in by the State courts, and that's
22 what we simply sought here.

23 JUSTICE SOTOMAYOR: But isn't that what the
24 court said here? It said, first of all, Roper doesn't
25 command the results you are seeking; and, second, it

1 didn't make its application retroactive. So wasn't it
2 really consistent with 39(a), the Florida court?

3 MR. STEVENSON: No, Justice Sotomayor. The
4 only thing the judge said here was that I don't
5 think the reasoning of Roper can be applied to someone
6 serving life in prison without parole.

7 JUSTICE SOTOMAYOR: No, that's an unfair
8 characterization. What the judge said was Roper didn't
9 say that it applied to life without parole. That's a
10 very -- vastly different thing than saying that the
11 reasoning shouldn't be applied. It said that we are not
12 choosing to, but that's not what Roper said.

13 MR. STEVENSON: But our argument -- and I
14 accept that. Our argument was we recognized that Roper
15 dealt with the death penalty as opposed to life without
16 parole, but our argument was that the reasoning of Roper
17 is similarly applicable to someone sentenced to life
18 imprisonment without parole.

19 The trial judge could not evaluate the
20 procedural question without analyzing Roper, and that's
21 what the trial court did. The trial court conceded that
22 if Roper applies, Joe Sullivan is entitled to review.

23 JUSTICE SCALIA: But Roper was decided under
24 a regime, which I -- I think still exists, that death is
25 different. How could it possibly be thought to apply to

1 this case, which is not a death case?

2 MR. STEVENSON: Well, because -- because
3 what the Court said in Roper categorically for the first
4 time is that kids are different, and in this context we
5 were arguing --

6 JUSTICE SCALIA: It said kids are different
7 for purposes of the death penalty, which is different.

8 MR. STEVENSON: Well, I think our argument
9 was that they are different for the purposes of
10 sentencing. And what triggered this -- and this is why
11 this is relevant to this procedural question -- was that
12 the State of Florida did apply Roper to juveniles who
13 had been sentenced to death after this Court's decision.

14 And the case we cited to the Florida appeals
15 court, Bonifay v. Florida -- it's on page 38 of our
16 joint appendix -- was a case where Florida implemented
17 that law, and the law under Florida was that death row
18 prisoners sentenced at the time of Joe Sullivan --

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

20 MR. STEVENSON: -- had their sentences
21 reduced to life in prison with parole.

22 JUSTICE GINSBURG: But this judge said:
23 Yes, there's a Federal question in this case: Does
24 Roper render unconstitutional life without parole for
25 juveniles? He answered that question: no. And then he

1 said: There is no other Federal question in the case; I
2 do not reach the question that you are raising, that is,
3 life without parole being cruel and unusual. All -- the
4 only Federal question that, under our rules, I reach is,
5 does Roper cover this case? No. Anything else is
6 procedurally barred.

7 What was wrong with that?

8 MR. STEVENSON: Well, because under your
9 precedent, if the question -- if the judgment of
10 procedural default is dependent on an analysis, an
11 assessment of Federal law, in any context, then it is
12 not an independent and adequate State ground, and that's
13 the basis on which we --

14 JUSTICE KENNEDY: Well, suppose arguendo we
15 assume that the judge is right, that Roper did not
16 establish a rule that applies in this case. Then what
17 position are you in with reference to the procedural
18 bar? Do you have any other arguments that overcome the
19 procedural bar?

20 MR. STEVENSON: Yes, that is the rule would
21 still allow us to challenge the sentence under the no-
22 time restriction as it relates to the sentence --

23 JUSTICE SCALIA: No, no. The only Federal
24 question in the case now -- or at least the preliminary
25 Federal question, the threshold Federal question, is

1 simply whether the State court was right about what
2 Roper did. And if we agree with the State court about
3 what Roper did, then the State's bar automatically
4 applies and that's the end of the case.

5 MR. STEVENSON: Well, yes, but if you agree
6 with the State court about Roper did, then we don't --
7 we are not entitled to relief under -- under either
8 theory, under a merits theory or a default theory, but
9 the point is --

10 JUSTICE SCALIA: Oh, I don't -- I don't know
11 about that. We -- is the argument here that, unless
12 Roper mandates this result, you don't urge that the
13 Constitution requires it? I don't think so.

14 MR. STEVENSON: No. Our argument simply is
15 that the question that the trial judge dealt with here
16 was, in part, dependent on an assessment of the Federal
17 Constitution, whether the Eighth Amendment does
18 constrain a sentence like this. We relied on Roper.

19 The court found that Roper was not available
20 to Mr. Sullivan when his case was on appeal, prior to
21 1993. Based on that determination, the court then
22 engaged in an analysis. And, again, what triggered
23 this -- and I just want to make this really clear, that
24 death row prisoners after Roper in Florida got a better
25 sentence than Joe Sullivan.

1 They got life with parole eligibility after
2 25 years. The argument was that that established a
3 reasonable basis for Joe Sullivan --

4 JUSTICE GINSBURG: I thought -- I thought
5 Simmons got life without parole. I thought that
6 Simmons's sentence was life without parole.

7 MR. STEVENSON: Simmons did, Your Honor, in
8 Missouri. But in Florida, at the point at which these
9 sentences were being imposed, there was no life without
10 parole for capital murder. People convicted of capital
11 murder could -- could only be sentenced to life in
12 prison, with parole eligibility after 25 years.

13 And so the question was generated by this
14 Court's decision in Roper, how is it constitutional
15 under the Eighth Amendment for the death sentence
16 prisoner to get life with parole after 25 years, and Joe
17 Sullivan at 13, convicted of a non-homicide --

18 JUSTICE ALITO: Your argument is that
19 because the -- the State judge had to decide whether
20 Roper dictated or required the result that you were
21 asking for, that -- that it's not an independent State
22 ground. That's the argument?

23 MR. STEVENSON: My argument is that if Roper
24 applied -- if Roper is relevant -- because what the
25 State courts of Florida have said is that when you are

1 looking at this question there are three things. One,
2 is it a rule from the Florida Supreme Court or United
3 States Supreme Court?

4 Two, is it a rule of constitutional -- of a
5 constitutional nature? Which, obviously, this would be.
6 Three, is it a rule of fundamental significance? That's
7 all. We don't have to establish that --

8 JUSTICE ALITO: No, but I'm -- I'm
9 interested in how we decide whether it's independent.
10 If you had cited -- if you said Marbury v. Madison
11 dictates this result, well, the judge would have to
12 decide what Marbury v. Madison required. That's a
13 Federal -- that can be characterized as a Federal
14 question. That would make the -- that would make it --
15 the State law ground not an independent ground?

16 MR. STEVENSON: No, Your Honor. I mean, we
17 could say that -- that some rule that has to do with
18 antitrust applies, but the judge wouldn't have to
19 consider that, wouldn't have to evaluate that; it
20 wouldn't be determinative. Here, the judge could not
21 reject our claim without an analysis of Roper.

22 The judge engaged in that, and let -- let
23 me just point out, this is not a case of procedural
24 default, State court ruling, we are now in Federal
25 habeas. This is a question about jurisdiction.

1 The question that the State is raising is:
2 Does this Court have jurisdiction to review the Federal
3 question that was presented below, when the trial court
4 itself engaged in an analysis of Roper? This Court
5 doesn't lose its jurisdiction to deal with a Federal
6 question when the State court analyzed that question to
7 reach its --

8 JUSTICE SCALIA: Well, that's true, but once
9 we analyze the question, if we decide, as the trial
10 court decided, that in fact Roper does not demand the
11 result in this case and, therefore, there is no
12 exception to the procedural bar of Florida, which makes
13 an exception where the fundamental constitutional right
14 asserted was not established within the period provided
15 for, once we decide that in fact Roper didn't establish
16 it, you're out of court, it seems to me.

17 Then -- then, automatically, the -- the
18 procedural bar of Florida applies.

19 MR. STEVENSON: No, Justice Scalia. The
20 other provision of 3.850 would still allow us to
21 challenge this sentence because it is a challenge to a
22 sentence, and Florida says that there is no time
23 limitation on the challenge of a sentence.

24 JUSTICE GINSBURG: Then that would
25 completely overtake the specific provision. I mean, if

1 you say the catchall illegal sentence, open to
2 challenge at any time, then there's nothing left to
3 the specific provision that says 2-year statute of
4 limitations, unless three things.

5 MR. STEVENSON: That's correct, Justice
6 Ginsburg. Florida applies the provision, the construct
7 that, with regard to challenges to sentences, at least,
8 there is no time limitation.

9 We contend that the more relevant challenge
10 is generated by this Court's decision in Roper. But,
11 even without that, we are entitled to merits review, and
12 no one has argued against that.

13 I mean, it's worth stating here that there
14 was no responsive pleading filed by the State in the
15 trial court. There was no responsive pleading. No one
16 asserted an affirmative defense arguing that these
17 procedural defaults be --

18 JUSTICE KENNEDY: And you say the -- under
19 Florida law, the question is not whether the right was,
20 to use the phrase, "clearly established"?

21 MR. STEVENSON: That's correct.

22 JUSTICE KENNEDY: But the right is whether
23 or not -- it had -- what was your phrase? "A
24 significant bearing"?

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

1 from Summers v. State, which is cited in our brief,
2 Justice Kennedy, where the court has made it clear,
3 because they have to sometimes engage in these questions
4 about what's retroactive, how does it apply?

5 They have done that with regard to Appendi.
6 They have done that with regard to some of this Court's
7 other decisions in a vast array of areas. Eighth
8 Amendment questions come up all the time before the
9 Florida Supreme Court under that analysis. And with
10 that in context, I don't think there is any real
11 question that this Court has jurisdiction, and that's
12 the issue here: Do you have jurisdiction to review the
13 Federal question that was considered below?

14 JUSTICE SOTOMAYOR: Can I --

15 JUSTICE SCALIA: Did -- did you raise below
16 your assertion that the exception -- that there is an
17 exception for challenging -- for vacating sentences,
18 that there is -- that that is an exception to the normal
19 rule of 2 years' limitation? Did you make that
20 argument below?

21 MR. STEVENSON: No, because at no point did
22 the State make any argument that we were barred or
23 precluded in any way. On appeal, we did reference the
24 provision in the -- in Bonifay v. State, which was a
25 case that talked about how these provisions can be

1 challenged, how these sentences can be challenged at any
2 time.

3 That was the way the case was presented,
4 Justice Scalia, because at no point did the State ever
5 argue an affirmative defense of procedural default. And
6 that's how the case gets here. It gets here in the
7 posture of a very rare sentence.

8 And I do want to respond to the notion that
9 we are uncertain about what will happen. There's no
10 uncertainty about what will happen to Joe Sullivan if
11 this Court rules in his favor. Florida law clearly
12 states what the next sentencing option is. He could
13 only be sentenced to 40 years in prison with good time
14 and credits available. That's what Florida law says.
15 Under 775.082, anyone not sentenced to life in prison
16 can only receive a maximum sentence of 40 years. And
17 that --

18 CHIEF JUSTICE ROBERTS: Why won't the next
19 case we get be an argument that for a juvenile,
20 particularly one as young as -- as your client, 40 years
21 is too long; 40 years doesn't recognize his capacity for
22 moral development within a reasonable period?

23 MR. STEVENSON: Mr. Chief Justice, you may
24 get that case and this Court will have to evaluate that.
25 But I think here what we haven't resolved, which I think

1 we have to resolve, is the question of whether life
2 without parole is unconstitutional, whether that's
3 excessive. And I think there's a great deal of
4 evidence to support that this Court should make that
5 finding, in part because of its lack of consensus.

6 There are only nine kids in the entire
7 country that have been sentenced to life without parole
8 for any crime.

9 CHIEF JUSTICE ROBERTS: No, but -- I mean,
10 you look at the Federal Government allows this sentence,
11 right? Thirty-eight States allow this sentence. I just
12 don't understand how you can say there is a consensus --

13 MR. STEVENSON: Yes.

14 CHIEF JUSTICE ROBERTS: -- that this type of
15 sentence is unconstitutional.

16 MR. STEVENSON: I think with regard to very
17 young kids, I -- I don't think we can say that the
18 States have adopted or considered or approached this
19 kind of sentence, in part because --

20 JUSTICE SCALIA: All you have established is
21 that there is a consensus that that sentence should be
22 rare, not a consensus that that sentence should not be
23 available, because most States make it available.

24 MR. STEVENSON: I -- I think, Your Honor,
25 that -- that the judgment that they have made it

1 available in some conscious way can't really be
2 defended, because no one who has set the minimum age for
3 imposing a sentence of life without parole has set it as
4 young as -- as 13. When States have taken up this
5 question, they have never said that a child of 13 should
6 be subject to life without parole. What they said is --

7 CHIEF JUSTICE ROBERTS: So it would be -- it
8 would be reasonable under your approach to have
9 a different result in these two cases? A difference in
10 terms of consensus or when sentencing is allowed would
11 result in a different result in your case than in
12 Mr. Graham's case?

13 MR. STEVENSON: It would be conceivable. It
14 wouldn't be desirable. I'll concede that. But, yes,
15 it's conceivable only in the sense that we know that
16 States like Florida that have created no minimum age for
17 trying children as adults, but have created life without
18 parole for these adult sentencers have created this
19 world where these things are possible.

20 But if you accept that Florida has adopted
21 life without parole for a child of 13, you also have to
22 accept that they have adopted it for a child of 6 or 5,
23 because --

24 CHIEF JUSTICE ROBERTS: It seems to me, once
25 -- excuse me.

1 MR. STEVENSON: Sorry.

2 CHIEF JUSTICE ROBERTS: It seems to me that
3 one way to take that into effect is through our normal
4 proportionality review and in a case by case. Your --
5 your client -- his crime is horrendously violent. At
6 the same time, he is much younger than in the typical
7 case. And it seems to me that requiring under the
8 Eighth Amendment consideration of his age, as I said
9 earlier, I guess, avoids all these line-drawing problems
10 which seem -- the arbitrariness of the line-drawing
11 seems inconsistent with the notion of the Eighth
12 Amendment.

13 MR. STEVENSON: I understand your point,
14 Mr. Chief Justice, but I don't think that's the way the
15 Court should proceed, for two reasons: One -- one is
16 that that kind of case by case analysis hasn't worked
17 well for children. It is in part because these kids are
18 so vulnerable, are so at risk in this system, that
19 they end up --

20 CHIEF JUSTICE ROBERTS: Well, I thought -- I
21 would have thought your argument that this is so rare
22 suggests that maybe that analysis, to the extent it's
23 permitted under State law, has worked well for children.

24 MR. STEVENSON: Well, but -- but I -- I
25 think in many ways it -- it hasn't. I mean, Joe

1 Sullivan never had his case reviewed, never had his
2 sentence reviewed. The lawyer filed an Anders brief on
3 direct appeal. He's been in prison for 20 years and
4 wouldn't be in this Court but for this Court's decision
5 in Roper that created some new categorical exemptions.

6 And I think the problem with the
7 individualized review, as Justice Kennedy wrote actually
8 in Roper, is that in this context, age can actually be
9 an aggravating factor. I mean, the Court could have
10 said in the death penalty context, let's deal with this
11 on a case-by-case basis. We actually have a
12 proportionality review that's enshrined in our capital
13 jurisprudence. States have to do that.

14 But we didn't, because we recognize that
15 there are distinctions between kids and adults that have
16 to be respected by our Constitution, that have to be
17 reflected in our constitutional norms. And I think --

18 CHIEF JUSTICE ROBERTS: Well, that's because
19 death is different, is what we said, and because death
20 is reserved, as this Court said in Roper, for the worst
21 of the worst. And we know that life without parole is
22 not reserved for the worst of the worst.

23 MR. STEVENSON: But I think it is, Your
24 Honor, for -- for -- for the kinds of crimes that we are
25 talking -- for non-homicides, life without parole is

1 reserved for the worst of the worst. That's what this
2 Court effectively created with its decision in Kennedy.

3 And in that context, the same difference
4 that can be made between kids and adults in the death
5 penalty context, we believe, needs to be made here. To
6 equate the crime of a 13-year-old with a 25- or a
7 30-year-old, particularly one like Joe Sullivan --

8 JUSTICE SCALIA: There are a lot of
9 murderers who get life without parole. Not every
10 murderer gets -- gets executed. So how can you say that
11 these are worst of the worst? Murderers are the worst
12 of the worst, and they get life without parole.

13 MR. STEVENSON: Yes, they do,
14 Justice Scalia. But my point is that, with regard to
15 non-homicides, life without parole occupies the same
16 kind of end-of-the-line status that the death penalty
17 does with homicide. And to fail to make a distinction
18 between --

19 JUSTICE SCALIA: Call them the "worse of the
20 worse" maybe, but they are not the worst of the worst.

21 MR. STEVENSON: Well, that's one way of
22 characterizing it. I think, though, whatever we say
23 about children and adults, we know that there are
24 distinctions, and those distinctions that were
25 articulated in Roper are applicable here.

1 JUSTICE ALITO: What is the categorical rule
2 that you would like us to adopt?

3 MR. STEVENSON: I would like you to adopt
4 a rule that bans life without parole for any child
5 under the age of 14. And I think that would be
6 supported by the judgment -- that ruling wouldn't
7 actually invalidate a single State law.

8 JUSTICE GINSBURG: But that would leave out
9 Graham, then? Your rule, you say under the age of 14,
10 so you are distinguishing your case from Graham's? You
11 are not saying all juveniles, just -- you are setting
12 the line at 14?

13 MR. STEVENSON: Well, I support -- my client
14 is 13, and there are differences between kids who are 14
15 and younger and kids who are older. But I support a
16 line that actual draws the line at 18. I think that
17 that distinction can and should be made.

18 JUSTICE GINSBURG: Why not Thompson, where
19 the line was 16?

20 MR. STEVENSON: Well, I mean, the difficulty
21 of course, is that -- and Thompson was a plurality
22 opinion. We don't -- you could draw the line anywhere.
23 And we briefed our case recognizing that this Court has
24 discretion. There could be distinctions that could be
25 made between younger kids and older kids, but we

1 certainly support a judgment that all children should be
2 shielded from this age difference.

3 The reason why we make that distinction is
4 because that there are legal distinctions. There are
5 States that have set the minimum age for trying kids or
6 imposing these sentences of life without parole at 16 or
7 17. We do recognize long traditions on the age of 14.

8 In the Court's opinion in *Stanford v.*
9 *Kentucky* authored by Justice Scalia -- you referenced
10 this earlier -- at common law we recognize that there
11 was a rebuttable presumption that children 14 and
12 younger could not be tried for felonies, that they were
13 incapable. And so, we are just arguing that these
14 distinctions can be made.

15 JUSTICE GINSBURG: What -- what about a
16 homicide, a 13-year-old?

17 MR. STEVENSON: It's our position that,
18 based on the incidence of these sentences, that even
19 between non-homicide and homicide, no child of 13
20 should be sentenced to life imprisonment without parole.
21 That is, only -- in 44 States, no child for any kind of
22 crime has received that kind of sentence. And this
23 notion that we -- we have to think about who children
24 are in the context of this -- for the crime of rape, the
25 median sentence in this country is 10 years.

1 JUSTICE GINSBURG: But you -- you are
2 differentiating your position based on young age from
3 Graham's counsel, who said for murder, even in the case
4 of a youthful offender, life without parole is an
5 appropriate -- is an available sentence?

6 MR. STEVENSON: That's -- that's right, Your
7 Honor. That -- that is, we think that the data, that is
8 the consensus, would support both from an age
9 perspective and from a consensus perspective an absolute
10 ban on life without parole for any child of 13. It --
11 it has been rejected by virtually every State in terms
12 of its application. It has been rejected by many States
13 in terms of its even concept. I mean, there are a lot
14 of States in this country where you can't get any kind
15 of adult sentence for a crime at 13. We don't --

16 CHIEF JUSTICE ROBERTS: So your line is 13,
17 and for obvious reasons. Another line is going to be 16
18 for obvious reasons. When the 15-year-old comes in, he
19 is going to say 15, the 17-year-old -- and that it seems
20 to me is why drawing the line on the basis of the Eighth
21 Amendment -- there's certainly nothing in the Eighth
22 Amendment that suggests there is a difference between 16
23 and 17. Everybody with a different client is going to
24 have a different line, which suggests to me that it
25 ought to be considered in each individual case.

1 MR. STEVENSON: I guess we make these
2 categorical distinctions in lots of contexts, not just
3 in the death penalty context. We appended to our brief
4 hundreds of laws that draw lines, that say if you are 14
5 you can't drive, you can't enter into a contract.

6 CHIEF JUSTICE ROBERTS: Well, but that's
7 because that's a policy judgment by the legislature.
8 Here we are talking about the dictates of the Eighth
9 Amendment. And the idea that the Eighth Amendment draws
10 those kinds of arbitrary distinctions is one that I
11 don't understand.

12 MR. STEVENSON: Well, it is this Court's
13 history. That is, in Thompson you drew a line between
14 15 and those who are younger. In -- in -- in Roper you
15 have drawn the line at 18 and 17. In other contexts, we
16 wrestle with this all the time. In Atkins, you had to
17 draw a line of defining mental retardation in some
18 sphere.

19 What we are ultimately arguing is that there
20 are people who are vulnerable, that there are people who
21 need protection, and children are some of those people.
22 Their diminished capacity, their diminished culpability,
23 their inability to be responsible, their vulnerability
24 to negative peer pressures, and their capacity to change
25 and reform is what we think generates this question, and

1 we think it's an honest question.

2 JUSTICE SCALIA: It depends on how horrible
3 the crime is that they've committed, doesn't it? But
4 you say it doesn't. It doesn't depend upon how horrible
5 it is and how much retribution society demands.

6 MR. STEVENSON: I think for -- for a child
7 of 13 with regard to a sentence of life imprisonment
8 without parole, that is correct, Justice Scalia.

9 I think in our construct, where we don't
10 always impose these sentences even for those horrible
11 offenders, to not recognize the difference between a
12 child and an adult is cruel and unusual. To say to the
13 13-year-old in this case that you get life without
14 parole, but to the 17-year-old you get 4 years and
15 you are released in 6 months, or to the 15-year-old
16 you get juvenile treatment, speaks to the kind of
17 difficulty we have with the absence of a categorical
18 ban.

19 We make these bans all the time. And I
20 think that the States are capable of implementing them.
21 We cite *Gerstein v. Pugh* as an example where this Court
22 found time between arrest and presentation to be
23 violative of constitutional norms, and the States were
24 empowered to implement that.

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

1 to speculate. We know what the sentence will be. If he
2 is returned and resentenced, he will be sentenced up to
3 40 years, or actually the points that were applied to
4 him would recommend a sentence between 27 years and
5 40 years. And we don't contend that that would be
6 violative of the Constitution, because there is --

7 JUSTICE SOTOMAYOR: Could you go back
8 through the statistics for me? For children under 14,
9 how many are in prison for life without parole for
10 homicide and non-homicide cases?

11 MR. STEVENSON: There are 73 children 14 and
12 younger who have been imprisoned for life without
13 parole. They can be found in only 18 States. For the
14 age of 13 and younger, there are only nine kids, and
15 that's including both kids convicted of homicide and
16 non-homicide.

17 For non-homicide, there are only two. They
18 are both in Florida, and Joe Sullivan is one of them.
19 So the universe of children under 14 and younger is
20 very, very small, smaller than what this Court was
21 dealing with in Roper in terms of the number of death
22 sentences, smaller than what this Court was likely
23 dealing with in Atkins. It's what this Court has looked
24 at generally to find consensus. And here, where only 18
25 States have imposed these sentences, a judgment that

1 this is rejected, this is outside the norms, would be
2 consistent with this Court's precedents in Roper and
3 Atkins and Coker and Kennedy and the other cases.

4 JUSTICE BREYER: Can you do what you have
5 just done with the category non-homicide cases?

6 MR. STEVENSON: Yes.

7 JUSTICE BREYER: Life without parole?

8 MR. STEVENSON: Yes.

9 JUSTICE BREYER: Under the age of 18 when
10 committed?

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

12 JUSTICE BREYER: One hundred and eleven. Of
13 those 111, how many are in Florida?

14 MR. STEVENSON: Seventy-seven.

15 JUSTICE BREYER: Seventy-seven. And of the
16 remaining, how many States are they in?

17 MR. STEVENSON: Six.

18 JUSTICE BREYER: Six.

19 MR. STEVENSON: And with regard to children
20 younger, we're also talking about just the universe of
21 six, 14 and younger, all in Florida. And so it is this
22 absence --

23 JUSTICE SCALIA: This is non-homicide. Six
24 --

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

1 Yes, sir. And so it is this absence of a categorical
2 rule that has created some of these results. There are
3 some other arbitrary features about this population that
4 we've raised in our brief that are concerning. They are
5 disproportionately kids of color --

6 JUSTICE ALITO: What is your response to the
7 State's argument that these statistics are not
8 peer-reviewed? And these are statistics, am I right,
9 that you generated yourself?

10 MR. STEVENSON: Well, these statistics come
11 from the States' Departments of Corrections, Your Honor.
12 I mean, we -- we gave the State -- the State doesn't
13 contest our data, at least in their pleading, and we
14 don't control these numbers. The Departments of
15 Corrections control these numbers, and where these data
16 are within their power of the State to present, we
17 don't think there's any real question about the
18 reliability of the data that we are relying on.

19 JUSTICE SOTOMAYOR: There's a certain
20 number of States that didn't respond at all.

21 MR. STEVENSON: There are very few. In one
22 study, there were only two States. In the report that
23 we generated, we got the information from all States.

24 I see my white light is on. I'd like to
25 reserve the rest of my time for rebuttal.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr.
2 Stevenson.

3 Mr. Makar.

4 ORAL ARGUMENT OF SCOTT D. MAKAR

5 ON BEHALF OF THE RESPONDENT

6 MR. MAKAR: May it please the Court:

7 As to the data, in our view, the data is
8 unreliable. The data -- unlike the death penalty
9 context, where there is a rich literature of data that's
10 been generated over years on mitigating factors and so
11 forth and there's full regard, the data here is suspect
12 --

13 JUSTICE BREYER: You say it's suspect. What
14 is your opinion, so far as you can do it, following
15 category: Non-homicide, life without parole, under the
16 age of 18 when committed?

17 MR. MAKAR: Justice Breyer, we have no data
18 on --

19 JUSTICE BREYER: Not in your own system?

20 MR. MAKAR: Oh, I'm sorry.

21 JUSTICE BREYER: You don't know how many
22 people in Florida --

23 MR. MAKAR: I'm sorry, let me -- in Florida,
24 it was the non-homicide. We --

25 JUSTICE BREYER: Non-homicide, life without

1 parole, under the age of 18 when committed.

2 MR. MAKAR: One hundred and fifty.

3 JUSTICE BREYER: And they say 77?

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

5 The reason being is that the study they're relying upon,
6 which was generated this summer while this case was
7 pending --

8 JUSTICE BREYER: What? Sorry.

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

10 JUSTICE SCALIA: You are speaking too fast.
11 I can't understand you.

12 MR. MAKAR: I apologize, Your Honor.

13 JUSTICE GINSBURG: Maybe if you raise the --
14 raise the lectern a bit -- no, the other way.

15 MR. MAKAR: The reason why is that the
16 Annino study upon which they rely, which was generated
17 just this past summer, doesn't count a non-homicide
18 offense that happens to also be bundled with a homicide
19 offense.

20 So, for example, if someone went down the
21 street, committed an armed burglary as Graham did, but
22 then they went across the --

23 JUSTICE BREYER: Okay. Let's -- let's count
24 it their way. Let's say that a -- non-homicide --

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

1 understand what he's saying. Can I understand this
2 first? He's there for the homicide offense or for the
3 non-homicide offense?

4 MR. MAKAR: This is an individual that they
5 don't count.

6 JUSTICE SCALIA: Yes.

7 MR. MAKAR: And this is a person who
8 committed, for example, an armed burglary.

9 JUSTICE SCALIA: Right.

10 MR. MAKAR: And then -- and put in jail and
11 sentenced to life without parole.

12 JUSTICE SCALIA: For the burglary, not for
13 the --

14 MR. MAKAR: Right, non-homicide. But they
15 happened, as the course of a crime spree, to commit a
16 homicide offense down the road at a different location.
17 They don't count that sentence for the non-homicide
18 offense in their data. They undercount the data
19 dramatically.

20 And in addition, the States -- this is not
21 an easy issue. The States have primary offenses and
22 secondary offenses.

23 JUSTICE BREYER: So -- so in your example,
24 Mr. Smith was sentenced to life without parole for a
25 robbery. Then you said Mr. Smith also killed someone.

1 Now, was he convicted of killing someone?

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

3 JUSTICE BREYER: Yes. Okay. And so did the
4 judge have in front of him the conviction for the
5 killing of the person as well as for the burglary or
6 whatever?

7 MR. MAKAR: Yes, sir.

8 JUSTICE BREYER: Yes. Okay. So I think I
9 could count that as a homicide offense. I understand
10 your point.

11 Now, let's suppose that we take those out of
12 it; in other words, for argument's purpose, concede
13 that where there is also a homicide offense, it counts
14 as homicide, not in the set I am asking you about.

15 I'm asking you about the set of those
16 non-homicide offenses, life without parole, and they
17 were under the age of 18 when committed. How
18 many in Florida?

19 MR. MAKAR: By our number, it's 150. They
20 say 77.

21 JUSTICE BREYER: Even though you gave --
22 said that the reason for the difference was a set of
23 instances that I just asked you to put to the side.

24 MR. MAKAR: Well, okay. If you are asking
25 me to accept their number, if they use that definition,

1 that is correct. It would be 77 individuals that would
2 be life without parole. That's correct. And --

3 CHIEF JUSTICE ROBERTS: Which of these cases
4 is worse? A 16-year-old committing the crimes that
5 Graham committed; a 13-year-old committing the crimes
6 that Sullivan committed?

7 MR. MAKAR: Well, worse in which sense? I
8 mean, under the Eighth Amendment, which would be --

9 CHIEF JUSTICE ROBERTS: My point is, if you
10 had to consider youth as one of the factors that we
11 consider under proportionality analysis, how do you come
12 out?

13 MR. MAKAR: Well, I think certainly in this
14 case we are at the far extreme. We're off the charts.
15 This is one of those unfathomable --

16 CHIEF JUSTICE ROBERTS: Off the charts on
17 age or off the charts on violence?

18 MR. MAKAR: Violence, I'm sorry. The
19 violence meaning that this is one of the most severe
20 violent acts that any human being could perpetuate upon
21 anyone else. It was done twice; there was two counts.
22 So in that regard --

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

24 JUSTICE SOTOMAYOR: What do you mean it was
25 done twice? I thought he raped only one person.

1 MR. MAKAR: Two different -- the woman --
2 there was two counts of -- of sexual battery in the --
3 he committed the offense in two different ways upon this
4 woman, and --

5 JUSTICE SOTOMAYOR: So your adversary
6 provided statistics to show that other people who have
7 committed rapes have gotten much smaller terms of
8 imprisonment, the average being, I think we were told,
9 10 years.

10 So explain to me why someone who commits a
11 rape is getting 10 years and this 13-year-old -- it's
12 the most heinous crime for a 13-year-old that justifies
13 life without parole.

14 MR. MAKAR: Well, when we look at the data
15 for sexual battery, there's a distribution, and there's
16 all kinds of factors underlying each of those
17 sentences, and we have hundreds of sexual battery
18 sentences in Florida. Each one is unique, and each one
19 is presented to the trial judge who makes the
20 determination about the sentence.

21 And there are very harsh sentences,
22 certainly, for some offenses and not for others. But to
23 take the notion that one could average them together and
24 walk into court and say, I'm way above the average, I
25 should somehow get an Eighth Amendment remedy, we

1 believe is just the wrong methodology.

2 CHIEF JUSTICE ROBERTS: My --

3 JUSTICE BREYER: So, what is the right -- go
4 ahead.

5 CHIEF JUSTICE ROBERTS: Go ahead.

6 JUSTICE BREYER: I mean, I think if you want
7 to address it, that the basic argument here is we want a
8 bright line. And the justification for the bright line
9 is (a) it's pretty unusual to have this. So that is
10 one part of the clause. And in respect to it being
11 cruel, you go back to what is supposed to be some kind
12 of rough, basic connection between criminal law and
13 generally accepted principles of morality.

14 And the confusion and uncertainty about
15 the moral responsibility of a 13-year-old is such that
16 it is not -- it is a cruel thing to do to remove from
17 that individual his entire life. You say we're at the
18 extreme. Now that's roughly what's
19 perking around in my mind, and I would like you to reply
20 to that.

21 MR. MAKAR: Well, certainly -- and I've got,
22 Mr. Chief Justice, questions about how does age play a
23 role in proportionality and so forth. And I think here
24 that a 13-year-old can commit the most heinous of
25 crimes.

1 JUSTICE BREYER: That wasn't my point. I
2 guess I wasn't clear. My point was, of course, there
3 can be cases in any set which go in all kinds of
4 different directions. But, as a general matter, human
5 beings are uncertain about how much moral responsibility
6 to assign to individuals in a particular category, and
7 that category roughly corresponds with an age of
8 maturity.

9 So you get into arguments when you get to
10 10, no; 11, no; 17, yes maybe; 16, yes maybe. But
11 as long as we are around 3 years old, 5, 7,
12 9, 12, and they want to say certainly 14, we are in
13 that area of ambiguity. And not just we, people all
14 over America, some thinking one way, some thinking
15 another. And that's enough to cut the connection with
16 morality, a strong enough connection that could justify
17 taking the person's entire life away.

18 You see, I'm trying to make a general
19 argument, and maybe I haven't stated it perfectly. But
20 if you can get the drift of what I'm talking about, I
21 would like to hear your reply.

22 MR. MAKAR: Sure. Well, I think what you
23 are getting to, Justice Breyer, is that --- two things:
24 One is that the distribution as a function of age. We
25 know that at younger ages the crime occurrence, the

1 incidence, goes down. And that goes to the second
2 point, which is that this is a good thing. It's -- it's
3 a lawful sentence that can be imposed, but it's rare.
4 And we are -- we should be proud of that, that it
5 doesn't occur with a -- with a great regularity. It's
6 an unfortunate thing that it happens, that we have these
7 gross acts of depravity that would justify it even for
8 someone that's very young.

9 Sullivan is not here to tell the Court: I
10 should not be punished. He has told the Court: I can
11 be in jail for the rest of my life. All he is asking
12 for is this opportunity to get out, this parole
13 opportunity. That's what -- what we are talking about.
14 And this issue that he has presented obviously was not
15 one the Florida trial court could have addressed
16 whatsoever.

17 Justice Ginsburg, you hit the nail on the
18 head. To interpret the rules the way they are
19 interpreting our rules in Florida would swallow the
20 3.850(b)(2) exception that says --

21 JUSTICE GINSBURG: Can you tell -- tell us
22 something about that catchall that says an illegal
23 sentence can be reopened at any time, illegal
24 sentence? What -- Mr. Stevenson said that is not
25 limited to just -- the maximum is 15 years and the

1 defendant got 20.

2 MR. MAKAR: Well, that's incorrect. The two
3 rules he is citing to at this point -- one raised in the
4 reply brief -- deal with motions to correct a sentence
5 that exceeds limits provided by law -- that exceeds
6 the limits provided by law. And the Florida courts have
7 held that this is -- in these situations, it's the law
8 in effect at the time of the sentencing. In other
9 words, if -- and -- and then there's the exception
10 under 3.850(b)(2) that says --

11 JUSTICE KENNEDY: That wouldn't apply to the
12 Eighth Amendment?

13 MR. MAKAR: No, because 3.850(b)(2) -- well,
14 I think if, for example, at the time of sentencing --

15 JUSTICE KENNEDY: We're talking about the
16 first sentence of (B), I take it?

17 MR. MAKAR: Right. That's the one they're
18 relying upon: A motion to vacate a sentence that
19 exceeds the time limits provided by law may be filed at
20 any time. That has been interpreted in the Florida
21 courts not to allow a new constitutional right that has
22 been applied retroactively to be raised. It's applied
23 to say: At the time of your sentencing, on the face of
24 it, can -- was there an error that was made?

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

1 would swallow the exception. Florida is entitled, like
2 every other State, to create a limited exception under
3 its postconviction rules to say: We are only going to
4 consider new fundamental constitutional rights that are
5 applied retroactively.

6 I think, simply put, the Florida trial court
7 couldn't answer the question they want this Court to now
8 answer. It was beyond the trial court's jurisdiction.
9 The court below couldn't create a new right, extend one,
10 or make it retroactive. The trial court did what we
11 would expect the trial court to do here, is
12 take a quick look: What are you asking me to do? Do
13 you want me to apply Roper in a context that it doesn't
14 state? I can't do that. The rule 3.850(b)(2) says I
15 can't do that.

16 And the judge said it on the record here,
17 Joint Appendix 56, 57, and 58: The claim does not fit
18 into the limited category of claims allowed to be
19 brought after the expiration of the 2-year period.

20 JUSTICE GINSBURG: Now, what -- during the
21 -- during the time, the postconviction period, would he
22 -- he had an appointed lawyer at trial. Then we know
23 that he has a lawyer in 2007. In between, was counsel
24 available to Sullivan?

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

1 did file, I believe, a habeas --

2 JUSTICE GINSBURG: No, I mean -- I mean, he
3 does -- he had representation in 2007. He didn't for
4 his first postconviction motion. I'm not asking as a
5 matter of right, but did he, in fact, have counsel
6 during this stage, this --

7 MR. MAKAR: Not -- not that I am aware of,
8 Justice Ginsburg. I mean, he did file a pro se State
9 postconviction challenging the -- the failure to have a
10 semen sample taken and the failure to examine one of his
11 -- his codefendants at trial. And that was a pro se
12 pleading. I have looked at it, and it -- it is
13 actually not bad. It was one, I guess, that was
14 probably done while -- along the -- in the --

15 JUSTICE KENNEDY: What age was he at that
16 point?

17 MR. MAKAR: He would have been
18 approximately, I think, 16, somewhere late teens,
19 I believe; it was a few years after, '89, or '90. It
20 was about 4, so he was about 17, I think, or
21 thereabouts.

22 JUSTICE BREYER: Do you want to comment on
23 the district court, the -- the -- what -- what the --
24 your opponent says is that this Florida rule is a rule
25 as the district court applied it that said the

1 following: You have to file a challenge within 2
2 years. There are three exceptions to that. One and
3 three clearly don't apply. And as to two, Roper isn't
4 clear enough to make it apply.

5 Their response to that is there is no
6 Florida law that says you have to challenge a sentence
7 within 2 years. That Florida courts -- and then they
8 have, like, 14 cases listed here. And the Supreme Court
9 of Florida has said that when you are trying to correct
10 an illegal sentence, that whole part of the statute does
11 not apply. Okay? What's the response to that?

12 MR. MAKAR: That's not what those cases
13 stand for.

14 JUSTICE BREYER: Okay. So what I should do
15 is go look up and see what those cases hold, and -- and
16 you said to the lower court or the court of appeals --
17 you said their argument is wrong. The 2-year statute
18 does apply. The 2-year statute does apply. There are
19 three exceptions, and you do not fit within section (B)
20 because. Where did you say that?

21 MR. MAKAR: I don't believe there was any
22 State brief filed in opposition to his appeal. That the
23 first district PCA --

24 JUSTICE BREYER: So the State didn't even
25 deny what he was saying?

1 MR. MAKAR: Didn't deny -- I'm sorry.

2 JUSTICE BREYER: So the State -- he says
3 that whole section doesn't apply. There is no 2-year
4 statute. And you say Florida did not reply in a brief
5 to that argument?

6 MR. MAKAR: No, because I think it was so
7 obvious from the trial judge's order that he was relying
8 on the procedural bar of 3.850(b)(2). The trial court
9 had no -- the trial court couldn't do anything. The
10 trial court couldn't say --

11 JUSTICE BREYER: All right.

12 MR. MAKAR: -- I think -- I think Roper
13 applies. And he said it just doesn't apply here. It's
14 barred. I -- I can't do anything more with it. So --
15 and I think the fact that he took a quick look at the
16 Roper decision and made that determination under Florida
17 law -- this Court said in footnote 10 in Harris v. Reed
18 that the trial court shouldn't be fearful of looking at
19 the Federal issue for -- for fear of having it come up
20 as being a -- establishing Federal jurisdiction. And
21 then in Tyler v. Cain, this Court had a retroactivity
22 issue presented to it as well.

23 JUSTICE BREYER: In any case, there is a
24 circularity point here, I guess. If we were to say in
25 our opinion -- if we were to say that Roper does hold

1 that there is a fundamental constitutional right which
2 we extend to this case and it applies here, and it
3 applies to the -- retroactively to those whose --
4 certainly those who are raising the issue, then we would
5 send it back and Florida now would not bar it under this
6 statute, because it would fall squarely within the
7 exception. Is that right?

8 MR. MAKAR: That's exactly right, Justice
9 Breyer. If in the Graham case you have a categorical
10 rule that says 18 and under, then prospectively that
11 line is established, and Sullivan could file a
12 postconviction motion under 3.850(b)(2) and pursue it.

13 JUSTICE GINSBURG: You did say in -- in your
14 brief that if Graham should prevail in his petition,
15 that Sullivan would get the benefit of that decision.
16 How, if we -- if we say -- just say there was an
17 adequate independent State ground and we have no
18 authority to do anything more, how would -- how would
19 Sullivan get the benefit of the --

20 MR. MAKAR: Well, he could file -- the next
21 day he could file a --

22 JUSTICE GINSBURG: A new -- a new
23 postconviction motion?

24 MR. MAKAR: Absolutely. Absolutely. And
25 that the Florida court would have jurisdiction under the

1 exception to consider, given that it would
2 establish a fundamental constitutional right that's
3 retroactive in application to his situation. So --

4 CHIEF JUSTICE ROBERTS: Would -- would
5 the standards applied in that situation be any different
6 than the standards that would apply if you prevailed on
7 his reading of the procedural bar?

8 MR. MAKAR: I'm --

9 CHIEF JUSTICE ROBERTS: I'm just trying to
10 see if this jurisdictional issue makes any difference.
11 If you are saying -- it sounds to me like you're saying,
12 well, if he wins, he wins, and, if he loses, he loses.
13 I don't think he cares whether it's under the procedural
14 bar or some other basis.

15 MR. MAKAR: Well, I think that -- but his
16 winning would be hinging upon Graham, rather than
17 winning in this forum today, on a new claim, that the
18 trial court had no jurisdiction to consider in the first
19 instance.

20 JUSTICE SCALIA: If I understand you
21 correctly, you are saying he could lose here on the
22 procedural bar, and then win later in the State courts.
23 Is that right?

24 MR. MAKAR: But that's premised upon this
25 Court establishing a new fundamental right in Graham, a

1 categorical rule, that would apply to him in his case,
2 retroactive application. That's -- that's possible, and
3 we -- we acknowledge that.

4 JUSTICE SOTOMAYOR: What did the Florida --
5 what do the Florida courts do with that series of cases
6 in your footnote, in the yellow brief, where it did
7 apply Apprendi after? Did it rule that it wasn't
8 retroactive? What did it do in those cases --

9 MR. MAKAR: Well, my --

10 JUSTICE SOTOMAYOR: -- to consider the
11 Apprendi challenges?

12 MR. MAKAR: My recollection is
13 that the retroactivity was there, so that they would
14 apply it, but, frankly, I cannot, as I stand here, I
15 can't tell you all -- what all the --

16 JUSTICE SOTOMAYOR: If you are wrong and
17 they did do exactly what your adversary said and
18 considered the issue of the legality of the sentence
19 under Apprendi, does that vitiate your argument here?
20 Is your -- does that make your adversary's argument
21 correct?

22 MR. MAKAR: Well, I don't think that a court
23 here or there that may deviate from the rule would
24 establish the precedent. I think they -- they've cited,
25 in their -- in their brief, the -- the decision of

1 Carter v. State of the Florida Supreme Court, which I
2 think has a pretty good recitation of how the rule
3 operates.

4 And it may be that there's a Fifth District
5 case they rely upon, where the -- the language is a
6 little squishy, but those are -- those are anomalies,
7 and they are not the rule in Florida.

8 JUSTICE GINSBURG: Well, if it's not
9 consistently applied, then it's not an adequate ground.
10 If so -- if the citations are correct and Florida
11 sometimes treats it as rigid and sometimes doesn't,
12 then it's not a consistently applied -- not an adequate
13 State ground.

14 MR. MAKAR: Well, there is no question that
15 3.850(b)(2) is consistently and regularly applied.
16 These other rules, I would submit, are consistently and
17 regularly applied.

18 The one -- the two Fifth District opinions
19 they cite -- I have looked at them and the language
20 there, it's ambiguous, it's not exactly clear, but I
21 don't think that the lower court, the lower appellate
22 court's rulings would override the Florida Supreme Court
23 who controls the rules. They set the rules in Florida.
24 They have rulemaking authority. That, somehow, that
25 would throw out the adequacy of the -- of the State law

1 ground.

2 In conclusion, if there are no other
3 questions, we ask that the Court dismiss this on
4 jurisdictional grounds. Alternatively, we ask, as to
5 this case and the others, that -- that the questions
6 presented should be addressed and answered, which is
7 whether there's a categorical ban and -- that they do
8 not -- a categorical ban does not exist. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Makar.

11 Mr. Stevenson, you have 4 minutes
12 remaining.

13 REBUTTAL ARGUMENT OF BRYAN STEVENSON
14 ON BEHALF OF THE PETITIONER

15 MR. STEVENSON: Thank you, Mr. Chief
16 Justice.

17 Justice Sotomayor, the case is
18 Hughes v. State. It is cited. It is an application of
19 Apprendi, where the defendant does not prevail but,
20 nonetheless, is entitled to that review. And I don't
21 think there's any question in this case that, if a
22 death row prisoner who was a juvenile was still on
23 death row in Florida, had not sought the relief and
24 obtained the relief that he is entitled to under Roper,
25 he would be barred from such relief because he did not

1 file within the 2 years.

2 JUSTICE SOTOMAYOR: You are missing the
3 point. What Florida says and what your adversary is
4 saying is -- you're absolutely right, if you win under
5 Graham, you could go under 39.a -- if you win under
6 Graham, and Graham makes its rule retroactive, that fits
7 right into (b)(2) directly, and so those cases you have
8 no problems with.

9 What he is saying, however, is you can't go
10 in to Florida and ask them to announce the
11 constitutional rule under a case where it hasn't been
12 already held.

13 MR. STEVENSON: Well, I -- and that's what I
14 disagree with, Your Honor. That's exactly what the
15 court is doing in Hughes. That's exactly what the court
16 is doing in these other cases. Otherwise, a lot of this
17 Court's rules don't have clear and direct categorical
18 lines.

19 You have to apply them. You have to apply
20 them in context. And it would mean that people whose
21 sentences are now illegal under the law, only when
22 applied, would be so banned, and that's what I don't
23 think the Florida legislature or the Florida courts are
24 saying.

25 JUSTICE ALITO: And you address this in

1 footnote 35 of your reply brief, and it would have been
2 a little bit helpful if you had raised it initially, so
3 that the State would have had an opportunity to reply,
4 but you introduced the citation there with "for
5 example," and then you cite some cases. Are there
6 others?

7 MR. STEVENSON: Yes -- yes, there are,
8 Justice Alito, and -- and, again, I just want to
9 contextualize why this is the way it is. At no point
10 did the State make any of these arguments in the lower
11 courts. They did make it at trial. They did not make
12 it on appeal. This issue was raised for the first time
13 in this Court.

14 JUSTICE ALITO: There are -- there are other
15 cases in which the lower Florida courts have used --
16 have said that this particular subsection is appropriate
17 for raising a constitutional challenge.

18 MR. STEVENSON: That's correct. There are
19 other situations where they have made Eighth Amendment
20 claims and analyses, and sometimes the petitioners
21 lose; sometimes they prevail. They have done it in
22 other contexts. And so I do think that it's quite
23 clear, from the way Florida applies these cases, that
24 this Court has jurisdiction.

25 JUSTICE GINSBURG: I thought that in your

1 cert petition, which I don't have with me, you raised
2 the question of the adequate State ground in the second
3 question.

4 MR. STEVENSON: We did -- well, what we
5 raised was that, without this Court intervening, that
6 people like Joe Sullivan would likely never get review.
7 Our point was that, without an intervention from this
8 Court, people like Joe Sullivan -- there hasn't been a
9 sentence like --

10 JUSTICE GINSBURG: But there was a question
11 that you raised, and then your opening brief doesn't
12 discuss it at all. Your reply brief responds to the
13 State and then brings up something in a footnote that
14 the State doesn't have a chance to answer.

15 That doesn't seem, to me, a very sound way
16 to approach a question that you, yourself, raised.

17 MR. STEVENSON: Yes. Justice Ginsburg, we
18 read that second question to be should this Court take
19 an interest in a case? Should this Court be barred?
20 Should this Court intervene where a child of 13 has been
21 sentenced to life without parole, and there may never be
22 another example? He can't go to Federal habeas corpus
23 because he is time-barred from that. So this Court's
24 opportunity to review the case is critical. That's what
25 we thought we were raising in the second question.

1 Frankly, we thought that the jurisdictional
2 question was a question that was pretty clear -- plain
3 on its face because the trial court's disposition of the
4 this case was completely dependent on its interpretation
5 of Roper, and I think that's what gives this Court
6 jurisdiction.

7 You have said, repeatedly, in
8 Ohio v. Reiner, in Ake v. Oklahoma, when the analysis of
9 a State procedural rule does depend on an assessment of
10 the Federal law, you have jurisdiction.

11 And I think that jurisdiction should be
12 exercised in this case to declare that this sentence is
13 unconstitutional. It is unquestionably unusual to
14 have -- no child of 13 in this country sentenced to life
15 without parole in 44 States makes it clear that this is
16 an unusual sentence.

17 But we also contend to say to any child of
18 13 that you are only fit to die in prison is cruel. It
19 can't be reconciled with what we know about the nature
20 of children, about the character of children. It cannot
21 be reconciled with our standards of decency, and we
22 believe that the Constitution obligates us to enforce
23 those standards and reverse this judgment.

24 My time is up. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Stevenson, Mr. Makar.

2 The case is submitted.

3 (Whereupon, at 11:51 a.m., the case in the
4 above-entitled matter was submitted.)

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CERTIFICATION

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Raymond R. Heer *sub*

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