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P R O C E E D I N G S

(10:01 a.m.)

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

Mr. Gowdy.

ORAL ARGUMENT OF BRYAN S. GOWDY

ON BEHALF OF THE PETITIONER

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

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

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

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

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

3 CHIEF JUSTICE ROBERTS: 38 States allow this
4 sentence, though, don't they?

5 MR. GOWDY: 30 --

6 CHIEF JUSTICE ROBERTS: 38, 39. I know you
7 have a little dispute, but the vast majority of States
8 allow the imposition of this sentence.

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

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

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

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

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

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

3 MR. GOWDY: No, Your Honor.

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

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

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

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

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

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

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

13 JUSTICE SCALIA: So --

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

20 MR. GOWDY: Your Honor, our position is that
21 it should be left up to the States to decide. We think
22 that the -- the Colorado provision would probably be
23 constitutional. We will have to see what different
24 States do, I mean, but -- but, yes, even that long
25 amount of time would give at least some hope to the

1 adolescent offender.

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

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

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

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

25 MR. GOWDY: Your Honor, first, I am -- I am

1 not conceding that with 50. The question was asked
2 about 40. But I understand --

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

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

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

19 JUSTICE GINSBURG: Is it --

20 JUSTICE KENNEDY: I am interested in -- in
21 two different things and you can address them during the
22 course of your argument. One is the assumption of the
23 argument seems to be that there are in place parole --
24 throughout all the States -- parole systems which are
25 effective, which are operating, and that they have the

1 capacity to make accurate judgments about
2 rehabilitation. What can I read -- what -- what studies
3 do you have to -- that -- that comment on that?

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

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

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

16 But, yes, to answer short, we -- we believe
17 that -- that the parole systems in place can be
18 effective to do this, and in all seven States where
19 there are currently non-homicide juvenile offenders they
20 all have functioning parole systems.

21 Even Florida has it. Even though it -- it
22 abolished parole in 1983, Florida still has 6,000
23 parole-eligible inmates and last year they heard over --
24 they made over 1,700 parole determinations. So the --
25 the administrative burden to the State of adding --

1 JUSTICE ALITO: But Florida has abolished
2 parole, has it not, going forward?

3 MR. GOWDY: Going forward, it has abolished
4 parole --

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

8 MR. GOWDY: And Florida can choose to make
9 that sentence and instead impose a sentence, as its
10 prosecutor recommended here, a 30-year determinate
11 sentence, if Florida doesn't want to reinstitute parole.
12 We are not saying it has to do parole. That is just one
13 of several constitutional options.

14 JUSTICE KENNEDY: What -- what would you do
15 if there were a crime spree and there were different
16 jurisdictions? One jurisdiction imposes for 35 years,
17 the next jurisdiction for another 35 years, to be served
18 consecutively.

19 MR. GOWDY: Well, Your -- Your Honor, I -- I
20 think the -- that you would get into the question about
21 whether that sentence is the equivalent of life without
22 parole, and there could be an argument made that if
23 you -- obviously, if you sentence someone to 150,
24 200 years, there is no conceivable hope of ever release,
25 150 years without parole.

1 JUSTICE KENNEDY: So the second jurisdiction
2 has the obligation, but not the first? Is that the way
3 it works?

4 MR. GOWDY: I would think that the -- if you
5 have the -- I would think that the -- that the judge
6 making that sentence would have to take that into
7 consideration, that this sentence is going to -- based
8 on all adolescent conduct -- it has to be all adolescent
9 conduct, not if some of the conduct is post-juvenile.
10 But, yes, I would think that the -- that the second
11 sentencing judge would need to take that into
12 consideration.

13 JUSTICE SCALIA: So he -- he could sentence
14 up to one year before the life expectancy of the -- of
15 the person in prison? That -- that would be okay?

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

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

20 MR. GOWDY: I think --

21 JUSTICE SCALIA: -- consecutive?

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

23 JUSTICE SCALIA: There obviously does. What
24 do you propose? I propose, you know, one year before
25 his life expectancy.

1 MR. GOWDY: Your -- Your Honor, I think that
2 would be coming so close to the -- the constitutional
3 line, it would be -- it would be difficult to see that
4 as constitutional, but -- but --

5 JUSTICE SCALIA: Oh, one year before life is
6 also unconstitutional?

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

8 JUSTICE SCALIA: Two years before life?

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

17 CHIEF JUSTICE ROBERTS: We have -- you are
18 arguing for a categorical rule.

19 MR. GOWDY: Yes.

20 CHIEF JUSTICE ROBERTS: Your friend on the
21 other side is arguing for a categorical rule, always
22 permissible. But we have a precedent that suggests in
23 -- in an individual case, you assess the proportionality
24 of the sentence to the crime.

25 Now, we know from Roper that death is

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

9 But if it's -- and I know you would argue
10 that these are the facts here -- if it's a less grievous
11 crime and there is, for example, a younger defendant
12 involved, then in that case maybe it is
13 disproportionate.

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

17 MR. GOWDY: Well, two things. First, Your
18 Honor, Roper states, and the science -- States that base
19 it on the science, that at that age we cannot make a
20 determination about whether or not the adolescent will
21 or will not reform. Even an expert psychologist,
22 psychiatrist cannot do it --

23 CHIEF JUSTICE ROBERTS: Oh, I understand.
24 But I don't think they'll say that we can't make that
25 determination at 17 years 51 months, but we can make

1 that determination at 18 years, 1 month.

2 MR. GOWDY: Anywhere you draw the line, Your
3 Honor, you're going to come up with an example where you
4 are one day before or one day after, and the Court in
5 Roper struggled with where to draw the line between
6 maturity and immaturity and it concluded, rightly so, to
7 draw the line at 18 based on both the science and the
8 legislative determinations.

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

16 MR. GOWDY: I think it's because adolescents
17 are different. Adolescents are different in that we
18 can't tell at this age whether they are going to reform
19 or not. And all we are proposing is that an adolescent
20 not necessarily be released, but that he be given a
21 later opportunity. And it boils -- it just comes down
22 to adolescents are different, Your Honor, and the
23 determination can't be made at age 17 even for the most
24 heinous crimes that are committed.

25 JUSTICE GINSBURG: Is there any difference

1 in the terms of incarceration making this harsher than
2 otherwise? I think you suggested in -- in your brief
3 that educational and vocational training is not given to
4 people who are in for life without parole because they
5 will never be out on the street so they don't need to be
6 transitioned back.

7 MR. GOWDY: If I understand your question,
8 would it be different if those type of programs are made
9 available to --

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

12 MR. GOWDY: Yes.

13 JUSTICE GINSBURG: Is that true?

14 MR. GOWDY: Yes, that is generally true.
15 And the -- and the very web site that the State of
16 Florida cites makes a point of saying that the programs
17 are for the purpose of reentry into society. And so
18 those that are obviously the opposite of what life
19 without parole is. You are never going to reenter
20 society, and it's generally true that those programs are
21 not available to offenders who get life without parole.
22 And that's what makes the sentence so particularly
23 cruel, to give up on a kid at that point in his life.

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

1 MR. GOWDY: Well, Your Honor, I think it
2 varies obviously by facility to facility. But the
3 sentence means you are going to stay in your cell and
4 die there. You are going to stay in your cell for 60 or
5 70 years, whenever you reach your natural death, and die
6 there.

7 You know, they -- they do have some limited
8 freedoms, as the State of Florida has pointed out, the
9 same types of freedoms that people on death row have.
10 But ultimately both sentences mean that you are going to
11 die in a State-controlled institution. And they are
12 very hopeless --

13 JUSTICE SCALIA: I don't think -- the same
14 kind of freedoms that people on death row have?

15 MR. GOWDY: Well, the State makes the point
16 in their brief, Your Honor, that you have the right to
17 exercise your religion, you have the right to petition
18 the courts.

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

22 MR. GOWDY: Your Honor, I -- obviously
23 everything varies facility by facility.

24 JUSTICE SCALIA: Well, I doubt whether this
25 varies. I don't know of any principle where if you are

1 in for life you are in solitary.

2 MR. GOWDY: I am not -- I am not -- you are
3 correct. I'm not suggesting they are in solitary
4 confinement. But they are locked up for the rest of
5 their life and they're not allowed to rejoin civil
6 society even if, as some of the former juvenile
7 offenders who filed a brief in this case, can
8 demonstrate that they have become model citizens.

9 JUSTICE ALITO: Why isn't the most sensible
10 way to deal with the problem that you are suggesting the
11 one that the Chief Justice suggested, to permit as-
12 applied proportionality challenges that take into
13 account the particular circumstances of the juvenile in
14 question, rather than this per se rule that you are
15 advocating, which would deprive the State of Florida
16 from reaching the judgment that there are some
17 juveniles, some individuals who are short of their
18 eighteenth birthday, who cannot -- who deserve
19 imprisonment in -- life imprisonment without parole?

20 Some of the actual cases that -- in which
21 this sentence has been imposed in Florida involve
22 factual situations that are so horrible that I couldn't
23 have imagined them if I hadn't actually seen them.
24 Raping an 8-year-old girl and burying her alive; are you
25 familiar with that case.

1 MR. GOWDY: I am not familiar with that
2 particular case.

3 JUSTICE ALITO: Raping a woman in front of
4 her 12-year-old son and then forcing the son to engage
5 in sexual conduct with the mother; are you familiar with
6 that case?

7 MR. GOWDY: Yes, Your Honor, I am familiar
8 with that case.

9 Your Honor, the reason, first of all, the
10 Court has said and said so clearly in Kennedy that
11 murder is different. In the Kennedy decision you also
12 said: Horrible facts, someone who raped their
13 stepdaughter. But yet this Court drew a line and
14 exempted from capital punishment adult defendants who
15 commit horrible crimes.

16 But to get to the core of your question as
17 to why not do it on a case by case basis, because you
18 can only make the determination about the adolescent
19 later in life. And we would agree that there should be
20 a case by case determination as to whether or not that
21 offender should spend his whole life in prison, but we
22 say it needs to happen later, once he has matured, once
23 he's reached past adulthood.

24 JUSTICE SCALIA: You assume -- doesn't your
25 argument assume that the only purpose of punishment is

1 deterrence in the sense of protecting society from this
2 person in the future, so that, you know, once that's no
3 longer a problem we should let this person out. But
4 that isn't the only purpose of punishment that we've
5 acknowledged. One of the purposes is retribution,
6 punishment for just perfectly horrible actions. And I
7 don't know why that value of retribution diminishes to
8 the point of zero when it's a person who's, you know,
9 17 years, 9 months old.

10 MR. GOWDY: We are not suggesting that it
11 goes to the point of zero, and we concede the State has
12 a right to -- to exact retribution from the juvenile
13 offender. And in this case 30 years would have been a
14 lot of retribution for Terrance Graham.

15 JUSTICE SCALIA: Most States don't think so,
16 or many States don't think so.

17 MR. GOWDY: Well, Your Honor, but we -- a
18 juvenile, not only does he have an inherent capacity to
19 grow; he is less culpable. And so to exact the most --
20 for a non-homicide crime whether you are an adult or
21 juvenile, this is the most severe punishment you can
22 receive, and to exact that most severe punishment for a
23 less culpable offender that the court has recognized is
24 a less culpable offender doesn't -- is too much
25 retribution. We are not saying the State can't exercise

1 retribution, but that life without parole is -- is too
2 much.

3 JUSTICE STEVENS: Mr. Gowdy, can I ask this
4 question?

5 MR. GOWDY: Yes, Justice.

6 JUSTICE STEVENS: If your client in this
7 case had been processed in the juvenile system instead
8 of the adult system, what would the maximum penalty he
9 could have received been?

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

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

14 MR. GOWDY: No, no, Your Honor. We concede
15 that the State of Florida may continue to prosecute
16 juveniles in adult court and that makes sense in order
17 to get a term of years that is longer than you can get
18 in juvenile court. In this case, if the judge had gone
19 along with the prosecutor's recommendation it would have
20 meant a 30-year sentence for my client, which would have
21 been far longer than he could have gotten in the
22 juvenile court.

23 CHIEF JUSTICE ROBERTS: The logic in Roper
24 was very straightforward. It says "Death is reserved
25 for the worst of the worst." I think that was the

1 quote. We know that juveniles are not the worst of the
2 worst, for the reasons you have articulated, that they
3 are not fully developed, don't have moral sense to the
4 same extent as an adult. But life without parole is not
5 reserved for the worst of the worst, and so it seems to
6 me that the logic of our precedent suggests that you
7 can't necessarily rely on the juvenile status to exempt
8 them from a penalty that is not reserved for the worst
9 of the worst, but perhaps it makes sense to consider in
10 a particular instance whether the penalty is
11 disproportionate, given the juvenile's characteristics
12 that you suggest.

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

18 JUSTICE GINSBURG: Is there -- is there
19 disproportionality review generally in Florida and
20 particularly for juvenile offenders?

21 MR. GOWDY: There is no -- no. Under
22 Florida law, there is no basis to challenge a sentence
23 as being excessive or disproportionate as long as it's
24 at the statutory maximum.

25 CHIEF JUSTICE ROBERTS: Well, there wasn't

1 prior to our death penalty jurisprudence, either. And I
2 thought we reviewed proportionality as a matter of
3 Federal law in the Solem case.

4 MR. GOWDY: Right. I guess I understood
5 Justice Ginsburg's question as if under Florida law.

6 JUSTICE GINSBURG: Yes.

7 CHIEF JUSTICE ROBERTS: Right.

8 MR. GOWDY: Can you --

9 CHIEF JUSTICE ROBERTS: Well, so did I, but
10 we are talking about constitutionality under the Eighth
11 Amendment --

12 MR. GOWDY: Right.

13 CHIEF JUSTICE ROBERTS: -- Federal law.

14 MR. GOWDY: I guess the -- I know under
15 Federal -- under Federal sentencing law, statutory law,
16 there is a reasonableness review. And I was -- I guess
17 I was trying to draw a comparison with, and maybe I'm
18 not answering the question correctly, that we don't have
19 that in Florida.

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

23 MR. GOWDY: Well, there would -- it would
24 have to be strictly Federal law. It would have to be a
25 procedure on a -- if you do this case by case

1 suggestion, it would -- it would have to be strictly
2 based on Federal constitutional law. The --

3 JUSTICE SCALIA: Oh, sure, but you can make
4 that claim in Florida courts, can't you? Can't you
5 argue in Florida courts that this sentence is
6 disproportionate and violates the Eighth Amendment,
7 whereupon the Florida courts would have to decide?
8 Wouldn't they have to decide that question?

9 MR. GOWDY: You -- you can make that
10 argument. And we do -- we do -- I should point out to
11 the Court that we do have a fallback position in our
12 papers based on Mr. Graham's offense of armed burglary
13 and -- and the fact that in only two States could Mr.
14 Graham have gotten this sentence and that the only State
15 that has actually imposed it for a first-time armed
16 burglary is Florida.

17 JUSTICE GINSBURG: But there is a problem
18 with that argument in this case, because the sentencing
19 judge made it quite plain that he was treating Graham as
20 a recidivist, not as a first-time offender. He said --
21 Graham got a very light sentence, just 12 months in
22 detention and then three years' probation, and the judge
23 said: Now, you better toe the line or else you could be
24 put away for a long time.

25 And then he committed -- it really was --

1 the sentence was for the later activities, even though
2 they weren't proved beyond a reasonable doubt. I think
3 that Graham admitted to a couple of -- to more armed
4 robberies; isn't that so?

5 MR. GOWDY: He admitted to the police, and I
6 don't want to get too much into the facts, but -- but
7 even if Your Honor concedes that he was convicted of all
8 those crimes, which he was not convicted of, but the
9 judge, as you say, correctly relied upon for this
10 sentence, then we only have two States that we know of
11 that have imposed life without parole for a recidivist
12 robbery or burglary crime, and that's California and
13 Florida.

14 And we -- we've set forth that argument to
15 give the Court that option, but we believe our primary
16 argument, the categorical rule, is more logical because
17 of the fact that you can't do a case-by-case
18 determination of an adolescent at the -- based on his
19 juvenile offense. And maybe, in these horrible crimes
20 --

21 JUSTICE SOTOMAYOR: But you haven't answered
22 Justice Alito's point, which is: What's the difference
23 between a month before he's 18 and a month after? What
24 makes us more capable at the 18th birthday to -- to
25 affirm a judgment that someone can't be -- can't be

1 rehabilitated?

2 MR. GOWDY: There is not much difference,
3 Your Honor. But the line has to be drawn somewhere and
4 society, as this Court recognized in Roper, has
5 generally drawn that line at 18, as between the --

6 JUSTICE SCALIA: A line has to be drawn
7 somewhere only if we accept your approach that there has
8 to be a categorical exemption. A line does not have to
9 be drawn somewhere if you adopt the approach of case by
10 case decide whether this is proportional, given how old
11 the individual was, given the nature of the crimes and
12 all of the other factors. You don't have to draw a line
13 then, and that's the attraction of that approach.

14 MR. GOWDY: Well, I -- I think that the --
15 -- based on -- I would just ask to conclude and then I
16 will sit down.

17 Based on the -- on what scientists have told
18 us, the categorical approach is the most logical
19 approach because we can't tell which adolescents are
20 going to change and which aren't.

21 CHIEF JUSTICE ROBERTS: Thank you, Mr.
22 Gowdy.

23 Mr. Makar.

24 ORAL ARGUMENT OF SCOTT D. MAKAR

25 ON BEHALF OF THE RESPONDENT

1 MR. MAKAR: Mr. Chief Justice, and may it
2 please the Court:

3 The categorical rule that Petitioner seeks
4 here would undermine what Florida and other States have
5 adopted in terms of juvenile justice. And in
6 particular, it would go against three major trends, that
7 being: Strong punishment for serious violent crimes by
8 juveniles; second trend, to transfer laws allowing
9 juveniles to be treated as adults; those laws have been
10 enacted in the last 15 --

11 JUSTICE GINSBURG: Could you please --

12 JUSTICE KENNEDY: I didn't -- I didn't hear
13 the second.

14 MR. GOWDY: I'm sorry.

15 The three trends are: The strong punishment
16 for juveniles that States have enacted over the last 15,
17 20 years; the various transfer and waiver laws that
18 States have enacted over the last 10, 15, 20 years
19 allowing juveniles to be transferred into adult court;
20 and then finally, what is really at issue is parole.
21 Parole has been eliminated in many States. 15 States
22 have totally eliminated it in the last 10, 15 years. So
23 what they are seeking is a categorical rule that goes
24 against the national consensus and the national trend.

25 The concession here was that Graham's

1 sentence could be even up to life as long as there is
2 the possibility of parole. We believe that is very
3 telling. In their brief, they point out that Graham
4 could have been sentenced to something just short of his
5 actuarial life. His actuarial life is around 64 years
6 old, which means just about a 46-year sentence.

7 And the standard that we suggest here is
8 that there cannot be any categorical rule, for the
9 reasons Justice Alito pointed out.

10 CHIEF JUSTICE ROBERTS: Well, but you are
11 arguing for a categorical rule of your own. You are
12 saying that under a -- under -- juveniles under the age
13 of 18, what, it's never -- it can be never determinative
14 that they are juvenile in setting the sentence as a
15 matter of Federal law?

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

20 First, look at the legislative structure.
21 Florida structure doesn't -- Florida structure is a very
22 balanced, thoughtful approach, in waiving children into
23 the adult court only when it's a violent crime and only
24 under certain -- when certain ages are in play. Look at
25 the age. It does play a role. The judicial discretion

1 plays a role. The trial judge --

2 JUSTICE STEVENS: May I ask: Is there a
3 minimum age when a juvenile can be transferred to -- to
4 adult procedures?

5 MR. MAKAR: It's a three-tiered system,
6 Justice Stevens.

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

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

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

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

21 CHIEF JUSTICE ROBERTS: But then the -- what
22 is your objection to an approach that when you are
23 dealing with life without parole, for the reasons that
24 your brother has articulated, you must as a matter of
25 Federal law consider the juvenile status of the

1 defendant before that sentence is imposed?

2 MR. MAKAR: Well --

3 CHIEF JUSTICE ROBERTS: In other words, not
4 a -- not a categorical rule that it automatically makes
5 a difference, but not a categorical rule that it can
6 never make a difference?

7 MR. MAKAR: Well, sure. And as I say,
8 there's the three factors I would ask the Court to look
9 at.

10 First, the structure that we have here in
11 Florida, which many States have, that deal with the age.
12 Age does matter. 99 out of 100 juvenile offenders in
13 our system do not go into adult court, and an even
14 smaller percentage of that ultimately get into the adult
15 sanctions.

16 The trial judges in Florida, unless --
17 unless it is a very violent crime, have some discretion
18 to sentence as to age. If you look at the transcript
19 here in the joint appendix, the trial judge here
20 struggled with this, struggled with age, and said:
21 Juvenile sanctions are inappropriate; youthful offenders
22 -- youthful offender sanctions are inappropriate; I'm
23 going to sentence you to -- to adult.

24 JUSTICE STEVENS: Could I interrupt with one
25 question? Isn't it correct that the age is relevant on

1 whether or not to transfer the person to the adult
2 system, but once he's in the adult system age is
3 entirely immaterial?

4 MR. MAKAR: That's not accurate, Justice
5 Stevens. Under the Statute 985.226, 227, and 225, we
6 have a system in which the grounds are set for when
7 juveniles can be either mandatorily or discretionarily
8 brought into the adult system.

9 And then under the Statute 985, the
10 punishment is graduated. In other words, for the lower
11 offenses the juvenile sanctions must be considered and
12 the youthful offender sanctions must be considered.
13 It's only in certain limited instances, like indictment,
14 where it's a life offense, where the juvenile has been
15 indicted for life, that the trial judge is forced to do
16 adult sanctions.

17 In this case, Graham was under the
18 discretionary direct -- direct file, meaning that the
19 prosecutor had discretion whether to bring the case or
20 not. He brought it into the adult system. Graham
21 accept being processed as an adult. He was put on
22 probation, and then --

23 JUSTICE STEVENS: I still don't understand.
24 Just to make sure I get the point correct: After the
25 decision has been made to have them prosecuted in the

1 adult system, at that -- after that decision has been
2 made, is the age of the defendant a relevant factor in
3 sentencing?

4 MR. MAKAR: The age -- they get a
5 pre-sentence report. The age is woven in --

6 JUSTICE STEVENS: I understand, but
7 statutorily?

8 MR. MAKAR: Well, the statute doesn't
9 specifically say the trial judge --

10 JUSTICE STEVENS: The answer is no. It's --
11 under the statutes, it's totally irrelevant after he has
12 been transferred to the adult stage; is that correct?

13 MR. MAKAR: Not exactly, because the range
14 of remedies the trial judge can impose is based upon
15 what method by which the juvenile was transferred or
16 waived into the adult court. In Graham's case, he was
17 allowed to have juvenile and youthful offender sanctions
18 considered because of his age. I mean, that's the way
19 --

20 JUSTICE SCALIA: You mean the trial judge
21 under Florida law does not have discretion to choose a
22 lower sentence because of the tender years of the
23 defendant?

24 MR. MAKAR: Well, absolutely, the trial
25 judge does. And you can see the trial judge here

1 grappling with that.

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

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

7 CHIEF JUSTICE ROBERTS: And -- and
8 there's -- well, I guess that answers my question. He
9 is not required to as a matter of Federal law. He can
10 say: I am not considering the fact that this is a
11 juvenile because I think his crime should be treated as
12 an adult crime.

13 MR. MAKAR: No, certainly not under any
14 Federal constitutional principle I am aware of.

15 CHIEF JUSTICE ROBERTS: Well, that's what we
16 are arguing about.

17 MR. MAKAR: Right, right. Well, certainly
18 here, I mean, what we would say, assuming there is no
19 categorical rule and the Court decides to go into the
20 proportionality balance here, we think that certainly
21 Graham's offense certainly is off the scales and would
22 be grossly -- probably be -- it would be --

23 JUSTICE GINSBURG: That's -- that's one of
24 the problems. The individual sentencing judge might
25 think that Graham is a very bad individual, but the

1 prosecutor had a different judgment of it. And Florida
2 doesn't have any kind of proportionality review, doesn't
3 have any review -- appellate review of the sentences.
4 This judge, I think, surprised everyone in the courtroom
5 with the -- with the sentence. Certainly it was far
6 beyond what the prosecutor recommended.

7 MR. MAKAR: Well, the prosecutor recommended
8 30 years, that's correct, and the judge here entered
9 life. As I say, that translates into -- essentially a
10 46-year actuarial life sentence. That was within the
11 trial judge's discretion, and particularly given the
12 seriousness of the offences that Graham committed. We
13 are talking about violence.

14 And violence does matter. This Court has
15 said -- and certainly in oral argument in Solem and
16 others, the -- violence versus non-violent acts plays a
17 major role in sentencing, and it should play a major
18 role as well when it comes to juveniles.

19 I don't read Roper to say that it takes off
20 the table lengthy sentences for violent crimes by
21 juveniles.

22 JUSTICE SOTOMAYOR: Counsel, do you think
23 that it categorically violates the Eighth Amendment for
24 a 10-year-old to be sentenced to life without parole?

25 MR. MAKAR: Well, the answer to that is it

1 certainly raises a concern about the age. Age does
2 matter. And as the age goes down, it does.

3 JUSTICE SOTOMAYOR: So once it matters, the
4 question for me is -- help me draw the line -- if 10 is
5 in my judgment too early, why isn't 14, 16 or 18?
6 Meaning why should a -- someone below the age of 14 be
7 sentenced to life without parole? That's the -- that's
8 the Sullivan case --

9 MR. MAKAR: Right.

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

14 MR. MAKAR: Sure. It matters -- I think it
15 does matter and it matters from a legislative
16 perspective, from a judicial perspective, and from an
17 Eighth Amendment perspective.

18 JUSTICE SCALIA: What about historical
19 perspective? I mean, you might appeal to the fact that
20 at common law, which was in effect when the cruel and
21 unusual punishments clause was adopted, 12 years was --
22 was viewed as the year when a -- when a person reaches
23 the age of reason. And -- and the death penalty could
24 not be inflicted on anyone --

25 MR. MAKAR: Well, certainly that historical

1 perspective had --

2 JUSTICE SCALIA: -- and all felonies were
3 the death penalty.

4 MR. MAKAR: And it has importance. To some
5 extent, the States have displaced the common law with
6 their juvenile justice systems. And we -- as I say, I
7 believe Florida is -- is very balanced.

8 Going back too your question, Justice
9 Sotomayor, I think that the way age plays a role is that
10 we -- in our system in Florida we have no one under the
11 age of 13. And that's sort of --

12 JUSTICE GINSBURG: You have no one? What
13 was your answer?

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

17 JUSTICE SOTOMAYOR: Is that because judges
18 haven't chosen to impose it or because your legal system
19 doesn't permit it?

20 MR. MAKAR: No, the legal system permits it.

21 JUSTICE SOTOMAYOR: How young could the
22 youngest person in Florida be to be prosecuted as an
23 adult and be eligible for life without parole?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. MAKAR: Well -- well --

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

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

22 MR. MAKAR: Well, of course --

23 CHIEF JUSTICE ROBERTS: It's already there.

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

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

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

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

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

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

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

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

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

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

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

1 JUSTICE GINSBURG: Yeah.

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

4 JUSTICE GINSBURG: Yes.

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

8 JUSTICE GINSBURG: Because he assisted the
9 prosecutor.

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

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

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

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

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

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

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

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

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

11 MR. MAKAR: True.

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

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

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

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

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

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

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

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

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

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

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

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

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

4 MR. MAKAR: Well --

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

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

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

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

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

1 urging that that difference will deter the teenager. So
2 you might think, oh, if I commit this violent crime,
3 then I will have life without parole.

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

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

13 MR. MAKAR: Well, I --

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

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

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

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

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

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

13 MR. MAKAR: Well, in terms of recidivism, I
14 think, No. 1, violence matters. I think there are
15 studies -- I can't quite put my finger on them -- that
16 says that the violent offenders tend to recidivate more
17 than the non-violent. And that as one ages -- I think
18 Judge Posin has written a book called "Aging and Old
19 Age" that talks about -- in one of its chapters about
20 how age matters, and that crime rates go down as -- as
21 the population ages. So I mean there are those sorts of
22 things out there that --

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

1 responsible for most violent crime?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 If there's no further questions --

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

15 Mr. Gowdy, you have 4 minutes remaining.

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

18 REBUTTAL ARGUMENT OF BRYAN S. GOWDY

19 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

1 there should be uniform rules across the board.

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

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

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

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

25 And the -- the parole official, just like

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

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

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

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

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

22 MR. GOWDY: It -- it decreases over time,
23 undoubtedly, and that -- that supports, I think, our
24 argument here, that the -- that Terrance Graham, at age
25 47, will not be the person he was at age 17.

1 I see my time is up. I will sit down.
2 CHIEF JUSTICE ROBERTS: Thank you, counsel.
3 The case is submitted.
4 (Whereupon, at 10:59 a.m., the case in the
5 above-entitled matter was submitted.)

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