

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

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2
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P R O C E E D I N G S

(11:01 a.m.)

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

ORAL ARGUMENT OF BRYAN STEVENSON
ON BEHALF OF THE PETITIONER

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

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

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

JUSTICE GINSBURG: Mr. Stevenson, there is a serious question before we get to the particulars of this case. Justice Kennedy suggested it in the last argument. This -- the time ran out for post-conviction relief in 1993, and this petition is brought in 2007. There is a two-year statute of limitations. Florida said there is a procedural bar; we don't get to the merits of this case.

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

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

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

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

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

22 JUSTICE SOTOMAYOR: But isn't that what the
23 Court said here? It said, first of all, Roper doesn't
24 command the results you are seeking; and, second, it
25 didn't make its application retroactive. So wasn't it

1 really consistent with 39(a), the Florida court?

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

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

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

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

22 JUSTICE SCALIA: But Roper was decided under
23 a regime, which I -- I think still exists, that death is
24 different. How could it possibly be thought to apply to
25 this case, which is not a death case?

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

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

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

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

19 JUSTICE GINSBURG: Let me -- let me -- but
20 this judge said: Yes, there is a Federal question in
21 this case: Does Roper render unconstitutional life
22 without parole for juveniles? He answers that question
23 no. And then he said: There is no other Federal
24 question in the case; I do not reach the question that
25 you are raising, that is, life without parole being

1 cruel and unusual. All -- the only Federal question
2 that, under our rules, I reach is does Roper cover this
3 case? No. Anything else is procedurally barred.

4 What was wrong with that --

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

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

17 MR. STEVENSON: Yes. The rule would still
18 allow us to challenge the sentence under the no-time
19 restriction as it relates to --

20 JUSTICE SCALIA: No, no. The only Federal
21 question in the case -- or at least the preliminary
22 Federal question, the threshold Federal question, is
23 simply whether the State court was right about what
24 Roper did. And if we agree with the State court about
25 what Roper did, then the State's bar automatically

1 applies and that's the end of the case.

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

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

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

16 The court found that Roper was not available
17 to Mr. Sullivan when this case was on appeal, prior to
18 1993. Based on that determination, the court then
19 engaged in an analysis. And, again, what triggered
20 this -- and I just want to make this really clear, that
21 death row prisoners after Roper in Florida got a better
22 sentence than Joe Sullivan.

23 They got life with parole eligibility after
24 25 years. The argument was that that established a
25 reasonable basis for Joe Sullivan --

1 JUSTICE GINSBURG: I thought -- I thought
2 Simmons got life without parole. I thought that
3 Simmons' sentence was life without parole.

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

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

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

20 MR. STEVENSON: My argument is that if Roper
21 applied -- if Roper is relevant -- because what the
22 State courts of Florida have said is that when you are
23 looking at this question there are three things. One,
24 is it a rule from the Florida Supreme Court or United
25 States Supreme Court?

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

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

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

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

23 The question that the State is raising is
24 does this Court have jurisdiction to review the Federal
25 question that was presented below, when the trial court

1 itself engaged in an analysis of Roper. This Court
2 doesn't lose its jurisdiction to deal with a Federal
3 question when the State court analyzed that question to
4 reach its --

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

14 Then -- then, automatically, the -- the
15 procedural bar of Florida applies.

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

21 JUSTICE GINSBURG: Then that would
22 completely overtake the specific provision. I mean, if
23 you say the catch-all illegal sentence, open to
24 challenge at any time, then there is nothing left to
25 this specific provision that says two-year statute of

1 limitations, unless three things.

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

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

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

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

18 MR. STEVENSON: That's correct.

19 JUSTICE KENNEDY: But the right is whether
20 or not -- it had -- what was your phrase? "A
21 significant bearing"?

22 MR. STEVENSON: That's right. That comes
23 from Summers v. State, which is cited in our brief,
24 Justice Kennedy, where the court has made it clear,
25 because they have to sometimes engage in these questions

1 about what's retroactive, how does it apply?

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

11 JUSTICE SCALIA: Did -- did you raise below
12 your assertion that the exception -- that there is an
13 exception for challenging -- for vacating sentences,
14 that there is -- that that is an exception to the normal
15 rule of two-years limitation? Did you make that
16 argument below?

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

24 That was the way the case was presented,
25 Justice Scalia, because at no point did the State ever

1 argue an affirmative defense of procedural default. And
2 that's how the case gets here. It gets here in the
3 posture of a very rare sentence.

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

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

19 MR. STEVENSON: Mr. Chief Justice, you may
20 get that case and this Court will have to evaluate that.
21 But I think here what we haven't resolved, which I think
22 we have to resolve, is the question of whether life
23 without parole is unconstitutional, whether that's
24 excessive. And I think there is a great deal of
25 evidence to support that this Court should make that

1 finding, in part because of its lack of consensus.

2 There are only nine kids in the entire
3 country that have been sentenced to life without parole
4 for any crime.

5 CHIEF JUSTICE ROBERTS: No, but -- I mean,
6 you look at the Federal Government allows this sentence,
7 right? 38 States allow this sentence. I just don't
8 understand how you can say there is a consensus --

9 MR. STEVENSON: Yes.

10 CHIEF JUSTICE ROBERTS: -- that this type of
11 sentence is unconstitutional.

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

16 JUSTICE SCALIA: All you have established is
17 that there is a consensus that that sentence should be
18 rare, not a consensus that that sentence should not be
19 available, because most States make it available.

20 MR. STEVENSON: I -- I think, Your Honor,
21 that -- that the judgment that they have made it
22 available in some conscious way can't really be
23 defended, because no one who has set the minimum age for
24 imposing a sentence of life without parole has set it as
25 young as -- as 13. When States have taken up this

1 question, they have never said that a child of 13 should
2 be subject to life without parole. What they said is --

3 CHIEF JUSTICE ROBERTS: So it would be -- it
4 would be reasonable under your approach to have
5 different results in these two cases, a difference in
6 terms of consensus or when sentencing is allowed would
7 result in a different result in your case than in
8 Mr. Graham's case?

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

16 But if you accept that Florida has adopted
17 life without parole for a child of 13, you also have to
18 accept that they have adopted it for a child of 6 or 5,
19 because --

20 CHIEF JUSTICE ROBERTS: It seems to me, once
21 -- excuse me.

22 MR. STEVENSON: Sorry.

23 CHIEF JUSTICE ROBERTS: It seems to me that
24 one way to take that into effect is through our normal
25 proportionality review and in a case by case. Your --

1 your client -- his crime is horrendously violent. At
2 the same time he is much younger than in the typical
3 case. And it seems to me that requiring under the
4 Eighth Amendment consideration of his age, as I said
5 earlier, I guess, avoids all these line-drawing problems
6 which seem -- the arbitrariness of the line-drawing
7 seems inconsistent with the notion of the Eighth
8 Amendment.

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

16 CHIEF JUSTICE ROBERTS: I thought -- I would
17 have thought your argument that this is so rare suggests
18 that maybe that analysis, to the extent it is permitted
19 under State law, has worked well for children.

20 MR. STEVENSON: Well, but -- but I -- I
21 think in many ways it -- it hasn't. I mean, Joe
22 Sullivan never had his case reviewed, never had his
23 sentence reviewed. The lawyer filed an Anders brief on
24 direct appeal. He's been in prison for 20 years, and
25 wouldn't be in this Court but for this Court's decision

1 in Roper that created some new categorical exemptions.

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

10 But we didn't, because we recognize that
11 there are distinctions between kids and adults that have
12 to be respected by our Constitution, that have to be
13 reflected in our constitutional norms. I think --

14 CHIEF JUSTICE ROBERTS: That's because death
15 is different, is what we said; and it is because death
16 is reserved, as this Court said in Roper, for the worst
17 of the worst. And we know that life without parole is
18 not reserved for the worst of the worst.

19 MR. STEVENSON: But I think it is, Your
20 Honor, for -- for -- for the kinds of crimes that we are
21 talking -- for non-homicides, life without parole is
22 reserved for the worst of the worst. That's what this
23 Court effectively created with its decision in Kennedy.

24 And in that context, the same difference
25 that can be made between kids and adults in the death

1 penalty context we believe needs to be made here. To
2 equate the crime of a 13-year-old with a 25 or
3 30-year-old, particularly one like Joe Sullivan --

4 JUSTICE SCALIA: There are a lot of
5 murderers who get life without parole. Not every
6 murderer gets -- gets executed. So how can you say that
7 these are worst of the worst? Murderers are the worst
8 of the worst and they get life without parole.

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

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

17 MR. STEVENSON: That's one way of
18 characterizing it. I think, though, whatever we say
19 about children and adults, we know that there are
20 distinctions, and those distinctions that were
21 articulated in Roper are applicable here.

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

24 MR. STEVENSON: I would like you to adopt
25 any rule that bans life without parole for any child

1 under the age of 14. And I think that would supported
2 by the judgment -- that ruling wouldn't actually
3 invalidate a single State law.

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

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

14 JUSTICE GINSBURG: Why not Thompson, where
15 the line was 16?

16 MR. STEVENSON: Well, I mean, the difficulty
17 of course, is that -- and Thompson was a plurality
18 opinion. We don't -- you could draw the line anywhere.
19 And we briefed our case recognizing that this Court has
20 discretion. There could be distinctions that could be
21 made between younger kids and older kids, but we
22 certainly support a judgment that all children should be
23 shielded from this age difference.

24 The reason why we make that distinction is
25 because there are legal distinctions. There are States

1 that have set the minimum age for trying kids or
2 imposing these sentences of life without parole at 16 or
3 17. We do recognize long traditions on the age of 14.

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

11 JUSTICE GINSBURG: What -- what about
12 homicide, a 13-year-old?

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

22 JUSTICE GINSBURG: But you are
23 differentiating your position based on young age from
24 Graham's counsel who said for murder, even in the case
25 of a youthful offender, life without parole is an

1 appropriate -- is an available sentence?

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

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

22 MR. STEVENSON: I guess we make these
23 categorical distinctions in lots of contexts, not just
24 in the death penalty context. We appended to our brief
25 hundreds of laws that draw lines that say if you are 14

1 you can't drive, you can't enter into a contract.

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

8 MR. STEVENSON: Well, it is this Court's
9 history. That is, in Thompson you drew a line between
10 15 and those who were younger. In -- in -- in Roper you
11 have drawn the line at 18 and 17. In other contexts, we
12 wrestle with this all the time. In Atkins, you had to
13 draw a line of defining mental retardation in some
14 sphere.

15 What we are ultimately arguing is that there
16 are people who are vulnerable, that there are people who
17 need protection, and children are some of those people.
18 Their diminished capacity, their diminished culpability,
19 their inability to be responsible, their vulnerability
20 to negative peer pressures, and their capacity to change
21 and reform is what we think generates this question, and
22 we think it's an honest question.

23 JUSTICE SCALIA: It depends on how horrible
24 the crime is that they've committed, doesn't it? But
25 you say it doesn't, it doesn't depend upon how horrible

1 it is and how much retribution society demands.

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

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

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

21 With regard to Joe Sullivan, we don't have
22 to speculate. We know what the sentence will be. If he
23 is returned and resentenced, he will be sentenced up to
24 40 years, or actually the points that were applied to
25 him would recommend a sentence between 27 years and

1 40 years. And we don't contend that that would be
2 violative of the Constitution, because there is --

3 JUSTICE SOTOMAYOR: Could you go back
4 through the statistics for me? For children under 14,
5 how many are in prison for life without parole for
6 homicide and non-homicide cases?

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

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

25 JUSTICE BREYER: Can you do what you have

1 just done with the category non-homicide cases?

2 MR. STEVENSON: Yes.

3 JUSTICE BREYER: Life without parole?

4 MR. STEVENSON: Yes.

5 JUSTICE BREYER: Under the age of 18 when
6 committed.

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

8 JUSTICE BREYER: 111. Of those 111, how
9 many are in Florida?

10 MR. STEVENSON: 77.

11 JUSTICE BREYER: 77. And of the remaining,
12 how many States are they in?

13 MR. STEVENSON: Six.

14 JUSTICE BREYER: Six.

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

19 JUSTICE SCALIA: This is not homicide. Six
20 --

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

22 Yes, sir. And so it is this absence of a categorical
23 rule that has created some of these results. There are
24 some arbitrary features about this population that we've
25 raised in our brief that are concerning. They are

1 disproportionately kids of color --

2 JUSTICE ALITO: What is your response to the
3 State's argument that these statistics are not
4 peer-reviewed? And these are statistics, am I right,
5 that you generated yourself?

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

15 JUSTICE SOTOMAYOR: There is a certain
16 number of States that didn't respond at all.

17 MR. STEVENSON: There are very few. In one
18 study, there were only two States. In the report that
19 we generated, we got the information from all states.

20 I see my white light is on. I would like to
21 reserve my time for rebuttal.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr.
23 Stevenson.

24 Mr. Makar.

25 ORAL ARGUMENT OF SCOTT D. MAKAR

1 ON BEHALF OF THE RESPONDENT

2 MR. MAKAR: May it please the Court:

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

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

12 MR. MAKAR: Justice Breyer, we have no data
13 on --

14 JUSTICE BREYER: Not in your own system?
15 You don't know how many people in Florida --

16 MR. MAKAR: I'm sorry, let me -- in Florida,
17 it was the non-homicide --

18 JUSTICE BREYER: Non-homicide, life without
19 parole, under the age of 18 when committed.

20 MR. MAKAR: 150.

21 JUSTICE BREYER: And they say 77?

22 MR. MAKAR: They say 77. That's correct.
23 The reason being is that the study they're relying upon,
24 which was generated this summer while this case was
25 pending --

1 JUSTICE BREYER: What? Sorry.

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

3 JUSTICE SCALIA: You are speaking too fast.

4 I can't understand you.

5 MR. MAKAR: I apologize.

6 JUSTICE GINSBURG: Maybe if you raise the --

7 raise the lectern a bit -- no, the other way.

8 MR. MAKAR: The reason why is that the
9 Annino study upon which they relied, which was generated
10 just this past summer, doesn't count a non-homicide
11 offense that happens to also be bundled with a homicide
12 offense.

13 So for example, someone went down the
14 street, committed an armed burglary as Graham did, but
15 then they went across --

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

18 JUSTICE SCALIA: Wait. I -- I don't
19 understand what he's saying. Can I understand this
20 first? He's there for the homicide offense or for the
21 non-homicide offense?

22 MR. MAKAR: This is an individual that they
23 don't count.

24 JUSTICE SCALIA: Yes.

25 MR. MAKAR: And this is a person who

1 committed, for example, an armed burglary.

2 JUSTICE SCALIA: Right.

3 MR. MAKAR: And then put in jail, sentenced
4 to life without parole.

5 JUSTICE SCALIA: For the burglary, not for
6 the --

7 MR. MAKAR: Right, non-homicide. But they
8 happened, as the course of the crime spree, to commit a
9 homicide offense down the road at a different location.
10 They don't count that sentence for the non-homicide
11 offense in their data. They undercount the data
12 dramatically.

13 And in addition, the States -- this is not
14 an easy issue. The States have primary offenses and
15 secondary offenses.

16 JUSTICE BREYER: So -- so in your example,
17 Mr. Smith was sentenced to life without parole for a
18 robbery. Then you said Mr. Smith also killed someone.
19 Now, was he convicted of killing someone?

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

21 JUSTICE BREYER: Yes. Okay. And so did the
22 judge have in front of him the conviction for the
23 killing of the person as well as for the burglary or
24 whatever?

25 MR. MAKAR: Yes, sir.

1 JUSTICE BREYER: Yes. Okay. So I think I
2 can count that as a homicide offense. I understand your
3 point.

4 Now let's suppose that we take those out of
5 it. In other words, for argument's purpose, concede
6 that where there is also a homicide offense, it counts
7 as homicide, not in the set I am asking you about.

8 I am asking you about the set of those
9 non-homicide offenses, life without parole, and they
10 were under the age of 18 when they committed it. How
11 many in Florida?

12 MR. MAKAR: By our number, it's 150. They
13 say it's 77.

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

17 MR. MAKAR: Well, okay. If you are asking
18 me to accept their number, if they use that definition,
19 that is correct. It would be 77 individuals. It would
20 be life without parole. That's correct. And --

21 CHIEF JUSTICE ROBERTS: Which of these cases
22 is worse? 16-year-old committing the crimes that Graham
23 committed; 13-year-old committing the crimes that
24 Sullivan committed?

25 MR. MAKAR: Well, worse in which sense? I

1 mean, under the Eighth Amendment, which would be --

2 CHIEF JUSTICE ROBERTS: My point is, if you
3 had to consider youth as one of the factors that we
4 consider under proportionality analysis, how do you come
5 out?

6 MR. MAKAR: Well, I think certainly in this
7 case we are at the far extreme. We are off the charts.
8 This is one of those unfathomable --

9 CHIEF JUSTICE ROBERTS: Off the charts on
10 age or off the charts on violence?

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

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

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

19 MR. MAKAR: Two different -- the woman --
20 there was two counts of -- of sexual battery in the --
21 he committed the offense in two different ways upon this
22 woman, and --

23 JUSTICE SOTOMAYOR: So your adversary
24 provided statistics to show that other people who have
25 committed rapes have gotten much smaller terms of

1 imprisonment, the average being, I think we were told,
2 10 years.

3 So explain to me why someone who commits a
4 rape is getting 10 years and this 13-year-old is the
5 most heinous crime for a 13-year-old that justifies life
6 without parole?

7 MR. MAKAR: Well, when we look at the data
8 for sexual battery, there is a distribution, and there
9 is all kinds of factors underlying each of those
10 sentences, and we have hundreds of sexual battery
11 sentences in Florida. Each one is unique and each one
12 is presented to the trial judge to make the
13 determination about the sentence.

14 And there are very harsh sentences,
15 certainly, for some offenses and not for others. But to
16 take the notion that one could average them together and
17 walk into Court and say, I'm way above the average, I
18 should somehow get an Eighth Amendment remedy, we
19 believe is just the wrong methodology.

20 JUSTICE BREYER: What is the right --

21 CHIEF JUSTICE ROBERTS: My --

22 JUSTICE BREYER: Go ahead.

23 CHIEF JUSTICE ROBERTS: Go ahead.

24 JUSTICE BREYER: I mean, I think if you want
25 to address it, that the basic argument here is we want a

1 that category roughly corresponds with an age of
2 maturity.

3 So you get into arguments when you get to
4 10, no; 11, no; 17, yeah, maybe; 16, yeah, maybe. But
5 as long as we are around three years old, five, seven,
6 nine, 12, and they want to say certainly 14, we are in
7 that area of ambiguity. And not just we, people all
8 over America, some thinking one way, some thinking
9 another. And that's enough to cut the connection with
10 morality, a strong enough connection that could justify
11 taking the person's entire life away.

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

16 MR. MAKAR: Sure. Well, I think what you
17 are getting to, Justice Breyer, is that --- two things.
18 One is the distribution as a function of age. We know
19 that at younger ages the crime occurrence, the
20 incidence, goes down. And that goes to the second
21 point, which is that this is a good thing. It's -- it's
22 a lawful sentence that can be imposed, but it's rare.
23 And we are -- we should be proud of that. That it
24 doesn't occur with a -- with a great regularity. It's
25 an unfortunate thing when it happens, and we have these

1 gross acts of depravity that would justify it even for
2 someone who is very young.

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

11 Justice Ginsburg, you hit the nail on the
12 head. To interpret the rules the way they are
13 interpreting our rules in Florida would swallow the
14 3.850(B)(2) exception that says --

15 JUSTICE GINSBURG: Can you tell -- tell us
16 something about that catchall that says an illegal
17 sentence can be reopened at any time, an illegal
18 sentence? What -- Mr. Stevenson said that is not
19 limited to just -- the maximum is 15 years and the
20 defendant got 20.

21 MR. MAKAR: Well, that's incorrect. The two
22 rules he is citing to at this point -- one raised in the
23 reply brief -- deal with motions to correct the sentence
24 that exceeds the limits provided by law -- that exceeds
25 the limits provided by law. And the Florida courts have

1 held that this is -- in these situations it is the law
2 in effect at the time of the sentencing. In other
3 words, if -- and -- and then there is the exception
4 under 3.850(B)(2) that says --

5 JUSTICE KENNEDY: That wouldn't apply to the
6 Eighth Amendment?

7 MR. MAKAR: No, because 3.850(B)(2) -- I
8 think if, for example, at the time of sentencing --

9 JUSTICE KENNEDY: We are talking about the
10 first sentence of (B), I take it?

11 MR. MAKAR: Right. That's the one they are
12 relying upon: A motion to vacate a sentence that
13 exceeds the time limits provided by law may be filed at
14 any time. That has been interpreted in Florida courts
15 not to allow a new constitutional right that has been
16 applied. Retroactively it can be raised. It is applied
17 to say: At the time of your sentencing, on the face of
18 it was there an error that was made?

19 Okay. And -- and to interpret it their way
20 would swallow the exception. Florida is entitled, like
21 every other State, to create a limited exception under
22 its post-conviction rules to say: We are only going to
23 consider new fundamental constitutional rights that are
24 applied retroactively.

25 I think, simply put, the Florida trial court

1 couldn't answer the question they want this Court to now
2 answer. It was beyond the trial court's jurisdiction.
3 The court below couldn't create a new right, extend one,
4 or make it retroactive. The trial court did what we
5 would expect the trial court to do here, which is to
6 take a quick look. What are you asking me to do? Do
7 you want me to apply Roper in a context that it doesn't
8 state? I can't do that. The rule 3.850(B)(2) says I
9 can't do that. And a judge said it on the record here,
10 Joint Appendix 56, 57, and 58. The claim does not fit
11 into the limited category of claims allowed to be
12 brought after the expiration of the two-year period.

13 JUSTICE GINSBURG: Now, what -- during the
14 -- during the time, the post-conviction period, would he
15 -- he has an appointed lawyer at trial. Then we know
16 that he has a lawyer in 2007. In between, was counsel
17 available to Sullivan?

18 MR. MAKAR: Not as a matter of right, and he
19 did file, I believe, a habeas --

20 JUSTICE GINSBURG: No, I mean -- I mean he
21 does -- he had representation in 2007. He didn't for
22 his first post-conviction motion. I'm not asking as a
23 matter of right, but did he, in fact, have counsel
24 during this stage, this --

25 MR. MAKAR: Not -- not that I am aware of,

1 Justice Ginsburg. I mean he did file a pro se, State
2 post-conviction challenging the -- the failure to have a
3 semen sample taken and the failure to examine one of his
4 -- his co-defendants at trial. And that was a pro se
5 pleading, and I have looked at it, and it -- it is
6 actually not bad. It was one, I guess, that was
7 probably done while -- along the -- in the --

8 JUSTICE KENNEDY: What age was he at that
9 point?

10 MR. MAKAR: He would have been
11 approximately, I think, 16, somewhere in his late teens,
12 I believe, or a few years after, '89, or '90. It is
13 about four -- he was about 17, I think, or thereabouts.

14 JUSTICE BREYER: Do you want to comment on
15 the district court, the -- the -- what -- what the --
16 your opponent says is that this Florida rule is a rule
17 as the district court applied it that said the
18 following: You have to file a challenge within two
19 years. There are three exceptions to that. One and
20 three clearly don't apply. And as to two, Roper isn't
21 clear enough to make it apply.

22 Their response to that is there is no
23 Florida law that says you have to challenge a sentence
24 within two years. That Florida courts -- and then they
25 have, like, 14 cases listed here. And the Supreme Court

1 of Florida has said that when you are trying to correct
2 an illegal sentence, that whole part of the statute does
3 not apply. Okay? What's the response to that?

4 MR. MAKAR: That's not what those cases
5 stand for.

6 JUSTICE BREYER: Okay. So what I should do
7 is go look up and see what those cases hold, and -- and
8 you said to the lower court or the court of appeals --
9 you said their argument is wrong. The two-year statute
10 does apply. The two-year statute does apply. There are
11 three exceptions, and you do not fit within section (B)
12 because. Where did you say that?

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

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

18 MR. MAKAR: Didn't deny -- I am sorry.

19 JUSTICE BREYER: So the State -- he says
20 that whole section doesn't apply. There is no two-year
21 statute. And you say Florida did not reply in a brief
22 to that argument?

23 MR. MAKAR: No, because I think it was so
24 obvious from the trial judge's order that he was relying
25 on the procedural bar of 3.850(B)(2). The trial court

1 had no -- the trial court couldn't do anything. The
2 trial court couldn't do anything.

3 JUSTICE BREYER: All right.

4 MR. MAKAR: I think -- I think Roper -- he
5 said it just doesn't apply here. It's barred. I -- I
6 can't do anything more with it. So -- and I think the
7 fact that he took a quick look at the Roper decision and
8 made that determination under Florida law -- this Court
9 said in footnote 10 of Harris versus Reed that the trial
10 court shouldn't be fearful of looking at the Federal
11 issue for -- for fear of having it come up as being a --
12 establishing Federal jurisdiction. And then in Tyler
13 versus Cane this Court had a retroactivity issue
14 presented to it as well.

15 JUSTICE BREYER: In any case, there is a
16 circularity point here, I guess. If we were to say in
17 our opinion -- if we were to say that Roper does hold
18 that there is a fundamental constitutional right which
19 we extend to this case and it applies here, and it
20 applies to the -- retroactively to those whose --
21 certainly those who are raising the issue, then we would
22 send it back and Florida now would not bar it under this
23 statute, because it would fall squarely within the
24 exception; is that right?

25 MR. MAKAR: That's exactly right, Justice

1 Breyer. If in the Graham case you have a categorical
2 rule that says 18 and under, then prospectively that
3 line is established, and Sullivan could file a
4 post-conviction motion under 3.850(B)(2) and pursue it.

5 JUSTICE GINSBURG: You did say in -- in your
6 brief that if Graham should prevail in his petition,
7 that Sullivan would get the benefit of that decision.
8 How, if we -- if we say just say there was an adequate
9 independent State ground and we have no authority to do
10 any more, how would -- how would Sullivan get the
11 benefit of the --

12 MR. MAKAR: Well, he could file -- the next
13 day he could file a --

14 JUSTICE GINSBURG: A new -- a new
15 post-conviction motion?

16 MR. MAKAR: Absolutely. Absolutely. And
17 that the Florida court would have jurisdiction to move
18 this exception to consider, given that it would
19 establish a fundamental constitutional right that is
20 retroactively applicable to his situation.

21 CHIEF JUSTICE ROBERTS: So would -- would
22 the standards applied in that situation be any different
23 than the standards that would apply if you prevailed on
24 his reading of the procedural bar?

25 MR. MAKAR: I'm --

1 CHIEF JUSTICE ROBERTS: I'm just trying to
2 see if this jurisdictional issue makes any difference.
3 If you are saying -- it sounds to me like you're saying,
4 well, if he wins, he wins, and, if he loses, he loses.
5 I don't think he cares if it's under the procedural bar
6 or some other basis.

7 MR. MAKAR: Well, I think that -- but his
8 winning would be hinging upon Graham, rather than
9 winning in this forum today, on a new claim, that the
10 trial court had no jurisdiction to consider in the first
11 instance.

12 JUSTICE SCALIA: If I understand you
13 correctly, you are saying he could lose here on the
14 procedural bar, and then win later in the State courts.
15 Is that right?

16 MR. MAKAR: But that's premised upon this
17 Court establishing a new fundamental right in Graham, a
18 categorical rule, that would apply to him in his case,
19 retroactive application. That's -- that's possible, and
20 we -- we acknowledge that.

21 JUSTICE SOTOMAYOR: What do the Florida
22 courts do with that series of cases in your footnote, in
23 the yellow brief, where it did apply Apprendi after.
24 Did it rule that it wasn't retroactive? What did it do
25 in those cases to consider the Apprendi challenges?

1 MR. MAKAR: Well, my -- my recollection is
2 that the retroactivity was there, so that they would
3 apply it, but, frankly, I cannot, as I stand here, I
4 can't tell you all -- what all --

5 JUSTICE SOTOMAYOR: If you are wrong and
6 they did do exactly what your adversary said and
7 considered the issue of the legality of the sentence
8 under Apprendi, does that dissonate your argument here?
9 Is our -- does that make your adversary's argument
10 correct?

11 MR. MAKAR: Well, I don't think that a court
12 here or there that may deviate from the rule would
13 establish the precedent. I think they cited, in
14 their -- in their brief, the -- the decision of
15 Carter v. State of the Florida Supreme Court, which I
16 think has a pretty good recitation of how the rule
17 operates.

18 And it may be that there is a fifth district
19 case they rely upon, where the -- the language is a
20 little squishy, but those are -- those are anomalies,
21 and they are not the rule in Florida.

22 JUSTICE GINSBURG: Well, if it's not
23 consistently applied, then it's not an adequate ground.
24 If the -- if the citations are correct and Florida
25 sometimes treats it as legitimate and sometimes doesn't,

1 then it's not a consistently applied -- not an adequate
2 State ground.

3 MR. MAKAR: Well, there is no question that
4 3.850(b)(2) is consistently and regularly applied.
5 These other rules, I would submit, are consistently and
6 regularly applied.

7 The one -- the two fifth district opinions
8 they cite, and I have looked at them and the language
9 there, it's ambiguous, it's not exactly clear, but I
10 don't think that the lower court, the lower appellate
11 court's rulings would override the Florida Supreme Court
12 who controls the rules. They set the rules in Florida.
13 They have rule-making authority, that, somehow, that
14 would throw out the adequacy of the -- of the State law
15 ground.

16 In conclusion, if there are no other
17 questions, we ask that the Court dismiss this on
18 jurisdictional grounds. Alternatively, we ask, as to
19 this case and the others, that -- that the questions
20 presented should be addressed and answered, which is
21 whether there is a categorical ban and -- do not -- a
22 categorical ban does not exist. Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Makar.

25 Mr. Stevenson, you have four minutes

1 remaining.

2 REBUTTAL ARGUMENT OF BRYAN STEVENSON

3 ON BEHALF OF THE PETITIONER

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

6 Justice Sotomayor, the case is
7 Hughes v. State. It is cited -- it is an application of
8 Apprendi, where the defendant does not prevail, but,
9 nonetheless, is entitled to that review, and I don't
10 think there is any question in this case that, if a
11 death row prisoner, who was a juvenile, was still on
12 death row in Florida, had not sought the relief and
13 obtained the relief that he is entitled to under Roper,
14 he would be barred from such relief because he did not
15 file within the two years.

16 JUSTICE SOTOMAYOR: You are missing point.
17 What Florida says and what your adversary is saying
18 is -- you are absolutely right, if you win under Graham,
19 you can go under 39.a -- if you win under Graham, and
20 Graham makes its rule retroactive, that fits right into
21 (b)(2) directly, and so those cases, you have no
22 problems with.

23 What he is saying, however, is you can't go
24 in to Florida and ask them to announce the
25 constitutional rule under a case where it hasn't been

1 already held.

2 MR. STEVENSON: Well, I -- and that's what I
3 disagree with, Your Honor. That's exactly what the
4 Court is doing in Hughes. That's exactly what the Court
5 is doing in these other cases. Otherwise, a lot of this
6 Court's rules don't have clear and direct categorical
7 lines.

8 You have to apply them. You have to apply
9 them in context. And it would mean that people whose
10 sentences are now illegal under the law, only when
11 applied, would be so banned, and that's what I don't
12 think the Florida legislature or the Florida --

13 JUSTICE ALITO: And you address this in
14 Footnote 35 of your reply brief, and it would have been
15 a little bit helpful if you had raised it initially, so
16 the State would have had an opportunity to reply, but
17 you introduced the citation there with, for example, and
18 then you cite some cases. Are there others?

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

25 JUSTICE ALITO: There are -- there are other

1 cases in which the lower Florida courts have used --
2 have said that this particular subsection is appropriate
3 for raising a constitutional challenge.

4 MR. STEVENSON: That's correct. There are
5 other situations where they have made Eighth Amendment
6 claims and analyses, and, sometimes, the Petitioners
7 lose. Sometimes, they prevail. They have done it in
8 other contexts. And so I do think that it is quite
9 clear, from the way Florida applies these cases, that
10 this Court has jurisdiction.

11 JUSTICE GINSBURG: I thought, in your cert
12 petition, which I don't have with me, you raised the
13 question of the adequate State ground in the second
14 question.

15 MR. STEVENSON: We did -- well, what we
16 raised was that, without this Court intervening, that
17 people like Joe Sullivan would likely never get review.
18 Our point was that, without an intervention from this
19 Court, people like Joe Sullivan -- there hasn't been a
20 sentence like --

21 JUSTICE GINSBURG: But there was a question
22 that you raised, and then your opening brief doesn't
23 discuss it at all. Your reply brief responds to the
24 State and then brings up something in a footnote that
25 the State doesn't have a chance to answer.

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

3 MR. STEVENSON: Yes. Justice Ginsburg, we
4 read that second question to be should this Court take
5 an interest in a case? Should this Court be barred?
6 Should this Court intervene where a child of 13 has been
7 sentenced to life without parole, and there may never be
8 another example. He can't go to Federal habeas corpus
9 because he is time-barred from that. So this Court's
10 opportunity to review the case is critical. That's what
11 we thought we were raising in the second question.

12 Frankly, we thought that the jurisdictional
13 question was a question that was pretty clear -- plain
14 on its face because the trial court's disposition of the
15 this case was completely dependent on its interpretation
16 of Roper, and I think that's what gives this Court
17 jurisdiction.

18 You have said, repeatedly, in
19 Ohio v. Reiner, in Ake v. Oklahoma, when the analysis of
20 a State procedural rule does depend on an assessment of
21 the Federal law, you have jurisdiction.

22 And I think that jurisdiction should be
23 exercised in this case to declare that this sentence is
24 unconstitutional. It is unquestionably unusual to
25 have -- no child of 13 in this country sentenced to life

1 without parole in 44 States makes it clear that this is
2 an unusual sentence.

3 But we also contend to say to any child of
4 13 that you are only fit to die in prison is cruel. It
5 can't be reconciled with what we know about the nature
6 of children, about the character of children. It cannot
7 be reconciled with our standards of decency, and we
8 believe that the Constitution obligates us to enforce
9 those standards and reverse this judgment.

10 My time is up. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Stevenson; Mr. Makar.

13 The case is submitted.

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

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A		APPEARAN...		
above-entitled 1:11 50:15	aggravating 18:5	1:14	argue 14:1	15:22 22:1 38:17
absence 24:13 26:18,22	agree 7:24 8:2	appellate 45:10	argued 12:9	average 33:1,16 33:17
absolute 22:5	ahead 33:22,23	appended 22:24	arguendo 7:11	avoids 17:5
absolutely 42:16 42:16 46:18	Ake 49:19	appendix 6:15 38:10	arguing 6:4 12:13 21:9 23:15	aware 38:25
accept 5:13 16:16,18 31:18	Alito 9:15 10:5 19:22 27:2 47:13,20,25	applicable 5:16 19:21 42:20	argument 1:12 2:2,7 3:4,6,21 5:12,13,15 6:7 8:8,11,24 9:15 9:19,20 13:16 13:18 14:15 17:17 27:3,25 33:25 35:13 40:9,22 44:8,9 46:2	a.m 1:13 3:2 50:14
accepted 34:6	allow 7:18 11:17 15:7 37:15	application 4:25 22:8 43:19 46:7	arguments 7:15 35:3 47:22	B
acknowledge 43:20	allowed 16:6 38:11	applied 4:16 5:4 5:8,10 9:21 10:15 24:24 37:16,16,24 39:17 42:22 44:23 45:1,4,6 47:11	argument's 31:5	b 37:10 40:11 46:21
acts 32:13 36:1	allows 15:6	applies 5:21 7:13 8:1 11:15 12:3 41:19,20 48:9	armed 29:14 30:1	back 25:3 34:4 41:22
actual 20:12	Alternatively 45:18	apply 5:24 6:11 13:1 37:5 38:7 39:20,21 40:3 40:10,10,20 41:5 42:23 43:18,23 44:3 47:8,8	array 13:4	bad 39:6
addition 30:13	ambiguity 35:7	appointed 38:15	arrest 24:18	ban 22:6 24:14 45:21,22
address 33:25 47:13	ambiguous 45:9	Appendi 4:14 13:2 43:23,25 44:8 46:8	arrested 3:11	banned 47:11
addressed 36:9 45:20	Amendment 8:14 9:12 13:5 17:4,8 22:17 22:18 23:5,5 32:1 33:18 37:6 48:5	approach 16:4 49:2	articulated 19:21	bans 19:25 24:15
adequacy 45:14	America 35:8	approached 15:14	asked 31:16	bar 3:24 7:15,16 7:25 11:9,15 40:25 41:22 42:24 43:5,14
adequate 7:9 42:8 44:23 45:1 48:13	analyses 48:6	appropriate 22:1 48:2	asking 9:18 31:7 31:8,17 36:5 38:6,22	barred 7:3 13:18 41:5 46:14 49:5
adopt 19:23,24	analysis 7:7 8:19 10:18 11:1 13:6 17:12,18 32:4 49:19	arbitrariness 17:6	assault 3:12	based 8:18 21:14,23
adopted 15:14 16:16,18	analyze 11:6	arbitrary 23:6 26:24	asserted 11:11 12:13	basic 33:25 34:5
adult 16:14 22:11 24:8	analyzed 11:3	area 35:7	assertion 13:12	basis 7:10 8:25 18:7 22:16 43:6
adults 16:13 18:11,25 19:19	analyzing 5:19	areas 13:4	assessment 7:8 8:13 49:20	battery 32:20 33:8,10
adversary 32:23 44:6 46:17	Anders 17:23		assign 34:25	bearing 12:21
adversary's 44:9	Annino 29:9		assume 7:12	behalf 1:15,18 2:4,6,9 3:7 28:1 46:3
affirmative 12:13 14:1	announce 46:24		Atkins 23:12 25:19,23	beings 34:24
age 3:10,14 15:23 16:12 17:4 18:4 20:1 20:5,23 21:1,3 21:23 22:4 25:10 26:5 28:11,19 31:10 32:10 34:16 35:1,18 39:8	anomalies 44:20		authority 42:9 45:13	believe 19:1 33:19 38:19 39:12 40:13 50:8
ages 35:19	answer 38:1,2 48:25		automatically 7:25 11:14	benefit 42:7,11
	answered 45:20		available 8:16 14:10 15:19,19	better 8:21
	answers 6:22			beyond 38:2
	antitrust 10:15			
	apologize 29:5			
	appeal 8:17 13:19 17:24 40:14 47:23			
	appeals 6:13 40:8			

<p>bit 29:7 47:15 Bonifay 6:14 13:20 boys 3:11 Breyer 25:25 26:3,5,8,11,14 28:8,12,14,18 28:21 29:1,16 30:16,21 31:1 31:14 33:20,22 33:24 34:20 35:17 39:14 40:6,16,19 41:3,15 42:1 brief 4:11 12:23 17:23 22:24 26:25 36:23 40:14,21 42:6 43:23 44:14 47:14 48:22,23 briefed 20:19 bright 34:1,1 brings 48:24 brought 3:22 4:4 38:12 BRYAN 1:15 2:3,8 3:6 46:2 bundled 29:11 burglary 29:14 30:1,5,23</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 Call 19:15 Cane 41:13 capable 24:16 capacity 14:17 23:18,20 capital 9:7,7 18:8 cares 43:5 Carter 44:15 case 3:4,20,25 5:25,25 6:13 6:15,21,24 7:3 7:13,21 8:1,17 10:20 11:8</p>	<p>13:20,24 14:2 14:15,20 16:7 16:8,25,25 17:3,12,12,22 18:7,7 20:6,19 21:24 22:21 24:9 28:24 32:7 41:15,19 42:1 43:18 44:19 45:19 46:6,10,25 49:5,10,15,23 50:13,14 cases 16:5 25:6 25:24 26:1 31:21 34:22 39:25 40:4,7 43:22,25 46:21 47:5,18 48:1,9 catchall 36:16 catch-all 11:23 categorical 18:1 19:22 22:23 24:13 26:22 42:1 43:18 45:21,22 47:6 categorically 6:2 category 26:1 28:10 34:25 35:1 38:11 cert 48:11 certain 27:15 certainly 20:22 22:17 32:6 33:15 34:15 35:6 41:21 challenge 4:4 7:18 11:18,18 11:20,24 12:6 39:18,23 48:3 challenged 13:22,22 challenges 4:2 12:4 43:25 challenging 4:13 13:13 39:2</p>	<p>chance 48:25 change 4:16 23:20 character 50:6 characterizati... 5:7 characterized 10:10 characterizing 19:18 charged 3:11 charts 32:7,9,10 Chief 3:3,8 14:14,19 15:5 15:10 16:3,20 16:23 17:10,16 18:14 22:12 23:2 27:22 31:21 32:2,9 33:21,23 34:16 42:21 43:1 45:23 46:4 50:11 child 3:16 16:1 16:17,18 19:25 21:17 22:6 24:2,8 49:6,25 50:3 children 3:14 16:13 17:13,19 19:19 20:22 21:7,15,19 23:17 25:4,7 25:15 26:15 50:6,6 choosing 5:11 circularity 41:16 citation 47:17 citations 44:24 cite 4:11 24:17 45:8 47:18 cited 6:13 10:7 12:23 44:13 46:7 citing 36:22 claim 10:18</p>	<p>38:10 43:9 claims 38:11 48:6 clause 34:3 clear 4:3 8:20 12:24 34:21 39:21 45:9 47:6 48:9 49:13 50:1 clearly 12:17 14:7 39:20 client 14:16 17:1 20:9 22:19 Coker 25:24 color 27:1 come 13:5 27:6 32:4 41:11 comes 12:22 22:14 command 4:24 comment 39:14 commit 30:8 34:18 commits 33:3 committed 23:24 26:6 28:11,19 29:14 30:1 31:10,23 31:24 32:21,25 committing 31:22,23 common 21:6 completely 11:22 49:15 concede 16:10 31:5 conceded 5:20 conceivable 16:9,11 concept 22:9 concerning 26:25 conclusion 45:16 confusion 34:7 connection 34:5 35:9,10</p>	<p>conscious 15:22 consensus 15:1 15:8,17,18 16:6 22:4,5 25:20 consider 10:16 32:3,4 37:23 42:18 43:10,25 consideration 17:4 considered 13:10 15:14 22:21 44:7 consistent 5:1 25:22 consistently 44:23 45:1,4,5 Constitution 8:10,14 18:12 25:2 50:8 constitutional 9:11 10:1,2 11:10 18:13 24:19 37:15,23 41:18 42:19 46:25 48:3 constrain 8:15 construct 12:3 24:5 contend 12:6 25:1 50:3 contest 27:9 context 6:3 7:8 13:7 18:4,6,24 19:1 21:20 22:24 28:4 38:7 47:9 contexts 22:23 23:11 48:8 contextualize 47:20 contract 23:1 control 27:10,11 controls 45:12 convicted 3:12 9:7,14 25:11 30:19</p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

conviction 30:22	47:4,24 48:10	18:6 36:23	33:13 41:8	distinguishing
corpus 49:8	48:16,19 49:4	dealing 25:16,18	determinative	20:6
correct 4:18	49:5,6,16	dealt 5:14 8:12	10:17	distribution
12:2,18 24:4	courts 4:20 9:22	death 5:14,23,25	development	33:8 35:18
28:22 31:19,20	36:25 37:14	6:6,12,16 8:21	14:18	district 39:15,17
36:23 40:1	39:24 43:14,22	9:12 18:6,14	deviate 44:12	40:15 44:18
44:10,24 48:4	47:22 48:1	18:15,25 19:12	dictated 9:17	45:7
correcting 4:9	court's 4:13	22:24 25:17	dictates 10:8	doing 47:4,5
Corrections	6:12 9:11 12:7	28:4 46:11,12	23:4	dramatically
27:7,11	13:3 17:25	decency 50:7	die 50:4	30:12
correctly 43:13	21:4 23:8	decide 9:16 10:6	difference 16:5	draw 20:18
corresponds	25:23 38:2	10:8 11:6,12	18:24 20:23	22:25 23:13
35:1	45:11 47:6	decided 5:22	22:18 24:7	drawing 22:16
counsel 21:24	49:9,14	11:7	31:15 43:2	drawn 23:11
38:16,23	cover 7:2	decision 4:13	differences	draws 20:12
count 29:10,16	co-defendants	6:12 9:11 12:7	20:10	23:5
29:23 30:10	39:4	17:25 18:23	different 5:9,24	drew 23:9
31:2	create 37:21	41:7 42:7	6:3,5,6,8 16:5	drift 35:14
country 15:3	38:3	44:14	16:7 18:15	drive 23:1
21:21 22:10	created 16:12,13	decisions 13:4	22:19,20 30:9	D.C 1:8
49:25	16:14 18:1,23	declare 49:23	32:19,21 34:23	
counts 31:6	26:23	default 7:7 8:5	42:22	E
32:14,20	credits 14:10	10:21 14:1	differentiating	E 2:1 3:1,1
course 20:17	crime 15:4 17:1	defaults 12:14	21:23	earlier 17:5 21:6
30:8 34:21	19:2 21:18,20	defendant 36:20	difficulty 20:16	easy 30:14
court 1:1,12 3:9	22:11 23:24	46:8	24:13	effect 16:24 37:2
4:5,15,23 5:1	30:8 33:5	defended 15:23	diminished	effectively 18:23
5:20,20 6:2,14	35:19	defense 12:13	23:18,18	Eighth 8:14 9:12
7:23,24 8:3,16	crimes 18:20	14:1	direct 17:24	13:4 17:4,7
8:18 9:24,25	31:22,23 34:19	defining 23:13	47:6	22:16,17 23:4
10:21,24,25	criminal 34:5	definition 31:18	directions 34:23	23:5 32:1
11:1,3,7,13	critical 49:10	demand 11:7	directly 46:21	33:18 37:6
12:12,24 13:6	cruel 7:1 24:8	demands 24:1	disagree 47:3	48:5
13:8 14:7,20	34:4,9 50:4	deny 40:17,18	discretion 20:20	either 8:4
14:25 17:11,25	culpability	Department	discuss 48:23	eligibility 8:23
18:5,16,23	23:18	27:7	dismiss 45:17	9:9
20:19 24:17	cut 35:9	Departments	disposition	empowered
25:16,18,19		27:10	49:14	24:20
28:2 33:17	D	depend 23:25	disproportion...	end-of-the-line
36:3,4,9 37:25	D 1:17 2:5 3:1	49:20	27:1	19:12
38:1,3,4,5	27:25	dependent 7:7	dissonate 44:8	enforce 50:8
39:15,17,25	data 22:3 27:9	8:13 49:15	distinction	engage 12:25
40:8,8,25 41:1	27:11,14 28:3	depends 23:23	19:13 20:13,24	engaged 4:20
41:2,8,10,13	28:3,4,5,7,12	depravity 36:1	distinctions	8:19 10:19
42:17 43:10,17	30:11,11 33:7	desirable 16:10	18:11 19:20,20	11:1
44:11,15 45:10	day 42:13	determination	20:20,25 21:10	enshrined 18:8
45:11,17 47:4	deal 11:2 14:24	4:19 8:18	22:23 23:6	enter 23:1

entire 15:2 34:10 35:11	expiration 38:12	five 35:5	34:23 35:12	34:21 39:6
entitled 5:21 8:4 12:8 37:20 46:9,13	explain 33:3	Fla 1:15,18	generally 25:19 34:6	41:16
equate 19:2	extend 38:3 41:19	Florida 1:6 3:4 3:23 4:2,9 5:1 6:11,13,14,15 6:16 8:21 9:5 9:22,24 11:9 11:15,19 12:3 12:16 13:6 14:7,10 16:12 16:16 25:14 26:9,17 28:15 28:16 31:11 33:11 36:9,13 36:25 37:14,20 37:25 39:16,23 39:24 40:1,21 41:8,22 42:17 43:21 44:15,21 44:24 45:11,12 46:12,17,24 47:12,12 48:1 48:9	generated 9:10 12:7 27:5,19 28:6,24 29:9	<hr/> H <hr/>
error 37:18	extent 17:18	front 30:22	generates 23:21	habeas 10:22 38:19 49:8
ESQ 1:15,17 2:3 2:5,8	extreme 32:7 34:11	forum 43:9	Gerstein 24:17	happen 14:5,6
establish 7:13 10:4 11:12 42:19 44:13	<hr/> F <hr/>	found 8:16 24:18 25:9	getting 33:4 35:17	happened 30:8
established 8:24 11:11 12:17 15:16 42:3	face 37:17 49:14	four 24:10 39:13 45:25	Ginsburg 3:18 4:6 6:19 9:1 11:21 12:3 20:4,14 21:11 21:22 29:6 32:16 36:11,15 38:13,20 39:1 42:5,14 44:22 48:11,21 49:3	happens 29:11 35:25
establishing 41:12 43:17	fact 11:7,12 38:23 41:7	frankly 44:3 49:12	given 42:18	Harris 1:3 41:9
evaluate 5:18 10:16 14:20	factor 18:5	forth 28:6 34:17	gives 49:16	harsh 33:14
Everybody 22:19	factors 28:6 32:3 33:9	for 28:6 34:17	go 25:3 33:22,23 34:4,22 40:7 46:19,23 49:8	head 36:12
evidence 14:25	fail 19:13	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	going 22:13,15 22:19 37:22	hear 3:3 35:15
exactly 4:19 41:25 44:6 45:9 47:3,4	failure 39:2,3	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	good 14:9 35:21 44:16	heinous 33:5 34:18
examine 39:3	fall 41:23	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	gotten 32:25	held 37:1 47:1
example 4:12 24:17 29:13 30:1,16 37:8 47:17 49:8	far 28:9 32:7	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	Government 15:6	helpful 47:15
exceeds 36:24 36:24 37:13	fast 29:3	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	Graham 20:5 29:14 31:22 42:1,6 43:8,17 46:18,19,20	hinging 43:8
exception 11:8 11:10 13:12,13 13:14 36:14 37:3,20,21 41:24 42:18	favor 14:7	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	Graham's 16:8 20:6 21:24	history 23:9
exceptions 39:19 40:11	fear 41:11	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	great 14:24 35:24	hit 36:11
excessive 14:24	fearful 41:10	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	gross 36:1	hold 40:7 41:17
excuse 16:21	features 26:24	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	ground 7:9 9:19 10:12,12 42:9 44:23 45:2,15 48:13	homicide 19:13 21:12,15 25:6 25:11 26:19 29:11,20 30:9 31:2,6,7
executed 19:6	Federal 6:20,23 7:1,8,20,22,22 8:13 10:9,10 10:21,24 11:2 13:10 15:6 41:10,12 49:8 49:21	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	grounds 45:18	Honor 9:4 10:13 15:20 18:20 22:3 27:7 47:3
exemptions 18:1	felonies 21:8	fundamental 10:3 11:10 37:23 41:18 42:19 43:17	guess 17:5 22:22	horrendously 17:1
exercised 49:23	fifth 44:18 45:7	fundamental 10:3 11:10 37:23 41:18 42:19 43:17		horrible 23:23 23:25 24:6
exist 45:22	file 38:19 39:1 39:18 42:3,12 42:13 46:15	fundamental 10:3 11:10 37:23 41:18 42:19 43:17		Hughes 46:7 47:4
exists 5:23	filed 12:11 17:23 37:13 40:14	fundamental 10:3 11:10 37:23 41:18 42:19 43:17		human 32:13 34:23
expect 38:5	find 25:20	fundamental 10:3 11:10 37:23 41:18 42:19 43:17		hundreds 22:25 33:10
	finding 15:1	fundamental 10:3 11:10 37:23 41:18 42:19 43:17		<hr/> I <hr/>
	first 4:1,23 6:2 29:20 37:10 38:22 40:15 43:10 47:24	fundamental 10:3 11:10 37:23 41:18 42:19 43:17		idea 23:5
	fit 38:10 40:11 50:4	fundamental 10:3 11:10 37:23 41:18 42:19 43:17		illegal 4:7 11:23 36:16,17 40:2 47:10
	fits 46:20	fundamental 10:3 11:10 37:23 41:18 42:19 43:17		

implement 24:20	36:13	Justice 3:3,8,18 3:20 4:6,15,22	juveniles 6:11 6:22 20:7	38:15,16
implemented 6:15	intervene 49:6	5:2,6,22 6:5,19		leave 20:4
implementing 24:16	intervening 48:16	7:11,20 8:7 9:1	K	lectern 29:7
impose 24:6	intervention 48:18	9:15 10:5 11:5	Kennedy 3:20	left 11:24
imposed 9:6 25:21 35:22	introduced 47:17	11:16,21 12:2	7:11 12:15,19	legal 20:25
imposing 15:24 21:2	invalidate 20:3	12:15,19,24	12:24 18:3,23	legality 44:7
imprisoned 25:8	issue 13:9 30:14	13:11,25 14:14	25:24 37:5,9	legislature 23:3 47:12
imprisonment 5:17 21:16 24:3 33:1	36:8 41:11,13	14:19 15:5,10	39:8	legitimate 44:25
inability 23:19	41:21 43:2	15:16 16:3,20	Kentucky 21:5	let's 18:6 29:16 29:16,17 31:4
incapable 21:9	44:7 47:24	16:23 17:10,16	kids 6:3,5 15:2	life 3:13,15 5:5,8 5:14,16 6:18
incidence 21:14 35:20	J	18:3,14 19:4	15:13 17:13	6:21,25 8:23
including 25:11	Jacksonville 1:15	19:10,15,22	18:11,25 20:10	9:2,3,6,8,13
inconsistent 17:7	jail 30:3 36:5	20:4,14 21:5	20:11,21,21	14:11,22 15:3
incorrect 36:21	Joe 1:3 3:10,14	21:11,22 22:12	21:1 25:10,11	15:24 16:2,13
independent 7:9 9:18 10:6,12 42:9	5:21 6:17 8:22	23:2,23 24:4	27:1	16:17 18:17,21
indication 4:9	8:25 9:13 14:6	25:3,25 26:3,5	killed 30:18	19:5,8,11,25
individual 22:21 29:22 34:10	17:21 19:3	26:8,11,14,19	killing 30:19,23	21:2,16,25
individualized 18:3	24:21 25:14	27:2,15,22	kind 15:15	22:6 24:3,9
individuals 31:19 34:25	48:17,19	28:8,12,14,18	17:12 19:12	25:5,8 26:3
information 27:19	joint 6:15 38:10	28:21 29:1,3,6	21:17,18 22:10	28:10,18 30:4
initially 47:15	judge 4:7 5:3,7	29:16,18,24	24:12 34:4	30:17 31:9,20
instance 43:11	5:18 6:20 7:12	30:2,5,16,21	kinds 18:20 23:6	33:5 34:11
interest 49:5	8:12 9:16 10:8	31:1,14,21	33:9 34:22	35:11 36:5
interested 10:6	10:15,17,19	32:2,9,16,17	know 8:7 16:11	49:7,25
interpret 36:12 37:19	30:22 33:12	32:23 33:20,21	18:17 19:19	light 27:20
interpretation 49:15	38:9	33:22,23,24	24:22 28:15	limitation 4:10 11:20 12:5 13:15
interpreted 37:14	judge's 40:24	34:16,20 35:17	35:18 38:15	limitations 3:23 12:1
interpreting	judgment 7:6	36:11,15 37:5	50:5	limited 36:19 37:21 38:11
	15:21 20:2,22	37:9 38:13,20	L	limits 36:24,25 37:13
	23:3 25:21	39:1,8,14 40:6	lack 15:1	line 20:8,12,12 20:15,18 22:12
	50:9	40:16,19 41:3	language 44:19	22:13,16,20
	jurisdiction 10:22,24 11:2	41:15,25 42:5	45:8	23:9,11,13
	13:8,9 38:2	42:14,21 43:1	late 39:11	34:1,1 42:3
	41:12 42:17	43:12,21 44:5	law 4:3,9,16	lines 22:25 47:7
	43:10 48:10	44:22 45:23	6:16,16 7:8	line-drawing 17:5,6
	49:17,21,22	46:5,6,16	10:11 12:16	listed 39:25
	jurisdictional 43:2 45:18	47:13,20,25	14:7,10 17:19	literature 28:5
	49:12	48:11,21 49:3	20:3 21:6 34:5	
	jurisprudence 18:8	50:11	36:24,25 37:1	
		justification 34:1	37:13 39:23	
		justifies 33:5	41:8 45:14	
		justify 35:10	47:10 49:21	
		36:1	lawful 35:22	
		juvenile 14:15	laws 22:25	
		24:12 46:11	lawyer 17:23	

<p>little 44:20 47:15 location 30:9 long 4:14 14:17 21:3 35:5 look 15:6 33:7 38:6 40:7 41:7 looked 25:19 39:5 45:8 looking 9:23 41:10 lose 11:2 43:13 48:7 loses 43:4,4 lot 19:4 22:9 47:5 lots 22:23 lower 40:8 45:10 45:10 47:22 48:1</p> <hr/> <p style="text-align: center;">M</p> <p>Madison 10:7,9 Makar 1:17 2:5 27:24,25 28:2 28:12,16,20,22 29:2,5,8,22,25 30:3,7,20,25 31:12,17,25 32:6,11,19 33:7 34:15 35:16 36:21 37:7,11 38:18 38:25 39:10 40:4,13,18,23 41:4,25 42:12 42:16,25 43:7 43:16 44:1,11 45:3,24 50:12 mandates 8:9 Marbury 10:7,9 matter 1:11 34:23 38:18,23 50:15 maturity 35:2 maximum 4:8 14:12 36:19</p>	<p>mean 10:13 11:22 12:10 15:5 17:21 18:5 20:16 22:9 27:8 32:1 32:17 33:24 38:20,20 39:1 47:9 meaning 32:12 means 4:7 median 21:21 mental 23:13 merits 3:25 8:5 12:8 methodology 33:19 mind 34:13 minimum 15:23 16:12 21:1 minutes 45:25 missing 46:16 Missouri 9:5 mitigating 28:6 Monday 1:9 months 24:11 moral 14:18 34:8,24 morality 34:6 35:10 motion 37:12 38:22 42:4,15 motions 36:23 move 42:17 murder 9:7,8 21:24 murderer 19:6 murderers 19:5 19:7</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 nail 36:11 nature 10:2 50:5 need 23:17 needs 19:1 negative 23:20 never 16:1 17:22</p>	<p>17:22 48:17 49:7 new 18:1 37:15 37:23 38:3 42:14,14 43:9 43:17 nine 15:2 25:10 35:6 non-homicide 3:16,17 9:14 21:15 25:6,12 25:13 26:1,21 28:10,17,18 29:10,17,21 30:7,10 31:9 non-homicides 18:21 19:11 normal 13:14 16:24 norms 18:13 24:19 25:22 notion 14:4 17:7 21:19 33:16 November 1:9 no-time 7:18 number 25:17 27:11,16 31:12 31:18 numbers 27:10</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 obligates 50:8 obtained 46:13 obvious 22:13 22:14 40:24 obviously 10:2 36:8 occupies 19:11 occur 35:24 occurrence 35:19 offender 21:25 offenders 24:7 offense 29:11,12 29:20,21 30:9 30:11 31:2,6</p>	<p>32:21 offenses 30:14 30:15 31:9 33:15 Oh 8:7 Ohio 49:19 okay 29:16 30:21 31:1,17 37:19 40:3,6 Oklahoma 49:19 old 35:5 older 3:11 20:11 20:21 once 11:5,12 16:20 open 11:23 opening 48:22 operates 44:17 opinion 20:18 21:4 28:9 41:17 opinions 45:7 opponent 39:16 opportunity 36:6,7 47:16 49:10 opposed 5:14 opposition 40:14 option 14:8 oral 1:11 2:2 3:6 27:25 order 40:24 ought 22:21 outside 25:22 overcome 7:15 override 45:11 overtake 11:22 overtakes 4:10</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 page 2:2 6:14 parole 3:13,15 5:5,8,15,17 6:18,22,25</p>	<p>8:23 9:2,3,7,9 9:13 14:23 15:3,24 16:2 16:14,17 18:17 18:21 19:5,8 19:11,25 21:2 21:16,25 22:6 24:4,10 25:5,9 26:3 28:10,19 30:4,17 31:9 31:20 33:6 36:6 49:7 50:1 part 8:13 15:1 15:15 17:13 34:3 40:2 particular 34:25 48:2 particularly 14:16 19:3 particulars 3:19 PCA 40:15 peer 23:20 peer-reviewed 27:4 penalty 5:14 6:6 18:6 19:1,12 22:24 28:4 pending 28:25 people 9:7 23:16 23:16,17 28:15 32:24 35:7 47:9 48:17,19 perfectly 35:13 period 11:11 14:18 38:12,14 perking 34:13 permitted 17:18 perpetuate 32:13 person 29:25 30:23 32:18 person's 35:11 perspective 22:5 22:5 petition 3:22 42:6 48:12 Petitioner 1:4</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>1:16 2:4,9 3:7 46:3 Petitioners 48:6 phrase 12:17,20 plain 49:13 play 34:16 pleading 12:11 12:12 27:9 39:5 please 3:9 28:2 plurality 20:17 point 8:6 9:5 10:20 13:17,25 17:9 19:10 31:3 32:2 34:20,21 35:21 36:22 39:9 41:16 46:16 47:21 48:18 points 24:24 policy 23:3 population 26:24 position 7:14 21:13,23 possible 16:15 43:19 possibly 5:24 posture 14:3 post-conviction 3:21 4:10 37:22 38:14,22 39:2 42:4,15 power 27:12 precedent 7:6 25:23 44:13 precluded 13:19 preliminary 7:21 premised 43:16 present 27:12 presentation 24:18 presented 10:25 13:24 33:12 36:8 41:14 45:20</p>	<p>pressures 23:20 presumption 21:7 pretty 34:2 44:16 49:13 prevail 42:6 46:8 48:7 prevailed 42:23 primary 30:14 principles 34:6 prior 8:17 prison 5:5 6:18 9:9 14:9,11 17:24 25:5 50:4 prisoner 9:13 46:11 prisoners 6:17 8:21 pro 39:1,4 probably 39:7 problem 18:2 problems 17:5 46:22 procedural 3:24 5:19 6:10 7:7 7:14,16 10:20 11:9,15 12:14 14:1 40:25 42:24 43:5,14 49:20 procedurally 7:3 proceed 17:11 proportionality 16:25 18:7 32:4 34:17 propriety 4:19 prospectively 42:2 protection 23:17 proud 35:23 provided 11:11 32:24 36:24,25 37:13 provision 11:17 11:22,25 12:3</p>	<p>13:20 provisions 13:21 Pugh 24:17 punished 36:4 punishment 4:8 purpose 31:5 purposes 6:6,8 pursue 42:4 put 30:3 31:16 37:25</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question 3:19 4:6 5:19 6:10 6:20,22,24,24 7:1,6,21,22,22 8:12 9:10,23 10:10,22,23,25 11:3,3,6 12:16 13:8,10 14:22 16:1 23:21,22 27:13 38:1 45:3 46:10 48:13,14,21 49:2,4,11,13 49:13 questions 12:25 13:5 34:16 45:17,19 quick 38:6 41:7 quite 48:8</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raise 13:11 29:6 29:7 raised 26:25 36:22 37:16 47:15,24 48:12 48:16,22 49:2 raising 6:25 10:23 41:21 48:3 49:11 ran 3:21 rape 21:20 33:4 raped 32:18 rapes 32:25</p>	<p>rare 14:3 15:18 17:17 35:22 reach 6:24 7:2 11:4 read 49:4 reading 42:24 real 13:7 27:13 really 5:1 8:20 15:22 reason 20:24 28:23 29:2,8 31:15 reasonable 8:25 14:18 16:4 reasoning 5:4,10 5:15 reasons 17:11 22:13,14 rebuttable 21:7 rebuttal 2:7 27:21 46:2 receive 14:12 received 3:16 21:18 recitation 44:16 recognize 14:17 18:10 21:3 24:7 recognized 5:13 21:6 recognizing 20:19 recollection 44:1 recommend 24:25 reconciled 50:5 50:7 record 38:9 reduced 6:18 Reed 41:9 reference 7:14 13:19 referenced 21:5 reflected 18:13 reform 23:21 regard 4:2 12:4</p>	<p>13:2,3 15:12 19:10 24:3,21 26:15 28:7 32:15 regime 5:23 regularity 35:24 regularly 45:4,6 Reiner 49:19 reject 10:18 rejected 22:7,8 25:22 relates 7:19 released 24:11 relevant 6:10 9:21 12:6 reliability 27:14 relied 8:15 29:9 relief 3:22 4:10 8:4 46:12,13 46:14 rely 44:19 relying 27:14 28:23 37:12 40:24 remaining 26:11 46:1 remedy 33:18 remove 34:10 render 6:21 reopened 36:17 repeatedly 49:18 reply 34:13 35:15 36:23 40:21 47:14,16 48:23 report 27:18 representation 38:21 required 9:17 10:9 requires 8:10 requiring 17:3 resentenced 24:23 reserve 27:21 reserved 18:16</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>18:18,22 resolve 14:22 resolved 14:21 respect 34:3 respected 18:12 respond 14:4 27:16 Respondent 1:18 2:6 28:1 responds 48:23 response 27:2 39:22 40:3 responses 4:1 responsibility 34:8,24 responsible 23:19 responsive 12:11,12 rest 36:5 restriction 7:19 result 8:9 9:17 11:8 16:7,7 results 4:24 16:5 26:23 retardation 23:13 retribution 24:1 retroactive 4:17 4:25 13:1 38:4 43:19,24 46:20 retroactively 37:16,24 41:20 42:20 retroactivity 41:13 44:2 returned 24:23 reverse 50:9 review 5:21 10:24 12:8 13:9 16:25 18:3,8 46:9 48:17 49:10 reviewed 17:22 17:23 rich 28:5 right 7:12,23</p>	<p>11:10 12:16,19 12:22 15:7 22:2 27:4 30:2 30:7 33:20 37:11,15 38:3 38:18,23 41:3 41:18,24,25 42:19 43:15,17 46:18,20 rights 37:23 risk 17:14 road 30:9 robbery 30:18 ROBERTS 3:3 14:14 15:5,10 16:3,20,23 17:16 18:14 22:12 23:2 27:22 31:21 32:2,9 33:21 33:23 42:21 43:1 45:23 50:11 role 34:17 Roper 4:23 5:4 5:7,11,13,15 5:19,21,22 6:2 6:11,21 7:2,12 7:24,25 8:3,9 8:15,16,21 9:11,17,20,21 10:18 11:1,7 11:12 12:7 18:1,4,16 19:21 23:10 25:17,23 38:7 39:20 41:4,7 41:17 46:13 49:16 rough 34:5 roughly 34:12 35:1 row 6:16 8:21 46:11,12 rule 4:3 7:13,17 9:24 10:1,3,8 10:14 13:15</p>	<p>19:22,25 20:5 26:23 38:8 39:16,16 42:2 43:18,24 44:12 44:16,21 46:20 46:25 49:20 rules 7:2 14:7 36:12,13,22 37:22 45:5,12 45:12 47:6 rule-making 45:13 ruling 10:21 20:2 rulings 45:11 run 4:14</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 sample 39:3 saying 5:9 20:7 29:19 40:17 43:3,3,13 46:17,23 says 11:19,25 14:10 36:14,16 37:4 38:8 39:16,23 40:19 42:2 46:17 Scalia 5:22 6:5 7:20 8:7 11:5 11:16 13:11,25 15:16 19:4,10 19:15 21:5 23:23 24:4 26:19 29:3,18 29:24 30:2,5 43:12 SCOTT 1:17 2:5 27:25 se 39:1,4 second 4:24 35:20 48:13 49:4,11 secondary 30:15 section 40:11,20 see 27:20 34:11</p>	<p>35:12 40:7 43:2 seeking 4:24 semen 39:3 send 41:22 sense 16:11 31:25 sentence 3:16 4:4,7,9,13 7:18 8:15,22 9:3,12 11:18,19,20,23 14:3,12 15:6,7 15:11,15,17,18 15:24 17:23 21:18,21 22:1 22:11 24:3,22 24:25 30:10 33:13 35:22 36:17,18,23 37:10,12 39:23 40:2 44:7 48:20 49:23 50:2 sentenced 3:12 3:15 5:16 6:12 6:17 9:8 14:9 14:11 15:3 21:16 24:23 30:3,17 49:7 49:25 sentencers 16:14 sentences 4:2 6:18 9:6 12:4 13:13,22 21:2 21:14 24:6 25:17,21 33:10 33:11,14 47:10 sentencing 6:9 14:8 16:6 37:2 37:8,17 series 43:22 serious 3:19 serving 5:5 set 15:23,24 21:1 31:7,8,15 34:22 45:12</p>	<p>setting 20:7 seven 35:5 severe 32:12 sexual 3:12 32:20 33:8,10 shielded 20:23 show 32:24 side 31:16 significance 10:3 significant 12:21 similarly 5:16 Simmons 9:2,3 9:4 simply 4:21 7:23 8:11 37:25 single 20:3 sir 26:21,22 30:25 situation 42:20 42:22 situations 37:1 48:5 six 24:11 26:13 26:14,17,19 small 25:16 smaller 25:16,18 32:25 Smith 30:17,18 society 24:1 Solicitor 1:17 sorry 16:22 28:16 29:1,2 32:11,16 40:18 Sotomayor 4:15 4:22 5:2,6 25:3 27:15 32:17,23 43:21 44:5 46:6,16 sought 4:21 46:12 sound 49:1 sounds 43:3 speaking 29:3 speaks 24:12 specific 11:22,25</p>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>speculate 24:22 sphere 23:14 spree 30:8 squarely 41:23 squishy 44:20 stage 38:24 stand 40:5 44:3 standards 42:22 42:23 50:7,9 Stanford 21:4 state 4:12,20 6:11 7:9,23,24 8:3 9:16,18,22 10:11,21,23 11:3 12:11,23 13:18,20,25 17:19 20:3 22:7 27:8,8,12 37:21 38:8 39:1 40:14,16 40:19 42:9 43:14 44:15 45:2,14 46:7 47:16,21 48:13 48:24,25 49:20 stated 35:13 states 1:1,12 9:25 14:8 15:7 15:14,19,25 16:12 18:9 20:25 21:17 22:8,10 24:16 24:19 25:9,20 26:12 27:16,18 27:19 30:13,14 50:1 State's 7:25 27:3 27:7 stating 12:10 statistics 25:4 27:3,4,6 32:24 status 19:12 statute 3:23 11:25 40:2,9 40:10,21 41:23 Stevenson 1:15 2:3,8 3:5,6,8</p>	<p>3:18 4:1,11,18 5:2,12 6:1,7 7:5,17 8:2,11 9:4,20 10:13 11:16 12:2,18 12:22 13:17 14:19 15:9,12 15:20 16:9,22 17:9,20 18:19 19:9,17,24 20:9,16 21:13 22:2,22 23:8 24:2 25:7 26:2 26:4,7,10,13 26:15,21 27:6 27:17,23 36:18 45:25 46:2,4 47:2,19 48:4 48:15 49:3 50:12 street 29:14 strong 35:10 study 27:18 28:23 29:9 subject 16:2 submit 45:5 submitted 50:13 50:15 subsection 48:2 suggested 3:20 suggests 17:17 22:18,20 Sullivan 1:3 3:4 3:10 5:21 6:17 8:17,22,25 9:14 14:6 17:22 19:3 24:21 25:14 31:24 36:3 38:17 42:3,7 42:10 48:17,19 summer 28:24 29:10 Summers 4:12 12:23 support 14:25 20:9,11,22</p>	<p>22:4 supported 20:1 suppose 7:11 31:4 supposed 34:4 Supreme 1:1,12 9:24,25 13:6 39:25 44:15 45:11 Sure 35:16 suspect 28:7,8 swallow 36:13 37:20 system 17:14 28:14</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 16:24 31:4 33:16 37:10 38:6 49:4 taken 15:25 39:3 talked 13:21 talking 18:21 23:4 26:16 35:14 36:7 37:9 Tallahassee 1:17 teens 39:11 tell 36:3,15,15 44:4 ten 21:21 terms 16:6 22:7 22:9 25:17 32:25 Thank 27:22 45:22,23 46:4 50:10,11 theory 8:5,5,5 thereabouts 39:13 thing 5:3,9 34:10 35:21,25 things 9:23 12:1 16:15 35:17 think 5:4,23 6:7</p>	<p>8:10 13:7 14:21,21,24 15:12,13,20 17:10,21 18:2 18:13,19 19:18 20:1,12 21:19 22:3 23:21,22 24:2,5,16 27:13 31:1 32:6 33:1,24 34:17 35:16 37:8,25 39:11 39:13 40:23 41:4,4,6 43:5,7 44:11,13,16 45:10 46:10 47:12 48:8 49:16,22 thinking 35:8,8 Thompson 20:14,17 23:9 thought 5:24 9:1 9:1,2 17:16,17 32:18 48:11 49:11,12 three 9:23 10:3 12:1 35:5 39:19,20 40:11 threshold 7:22 throw 45:14 time 3:21 4:4,10 4:14 6:3,17 11:19,24 12:5 13:5,23 14:9 17:2 23:12 24:15,18 27:21 36:17 37:2,8 37:13,14,17 38:14 47:24 50:10 time-barred 49:9 today 43:9 told 33:1 36:4 traditions 21:3 treatment 24:12 treats 44:25</p>	<p>trial 4:5 5:18,20 5:20 8:12 10:25 11:6 12:12 33:12 36:9 37:25 38:2,4,5,15 39:4 40:24,25 41:1,2,9 43:10 47:23 49:14 tried 21:8 triggered 6:9 8:19 true 11:5 trying 16:13 21:1 35:12 40:1 43:1 twice 32:14,18 two 3:11,14 4:1 10:1 16:5 17:11 25:13 27:18 32:14,19 32:20,21 35:17 36:21 39:18,20 39:24 45:7 46:15 two-year 3:23 11:25 38:12 40:9,10,20 two-years 13:15 Tyler 41:12 type 15:10 typical 17:2</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 3:12 23:15 uncertain 14:5 34:24 uncertainty 14:6 34:8 unconstitutio... 6:21 14:23 15:11 49:24 undercount 30:11 underlying 33:9 understand 15:8</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

17:9 23:7 29:4 29:19,19 31:2 43:12 unfair 5:6 unfathomable 32:8 unfortunate 35:25 unique 33:11 United 1:1,12 9:24 universe 25:15 26:16 unquestionably 49:24 unreliable 28:4 unusual 7:1 24:8 34:2 49:24 50:2 urge 8:9 use 12:17 31:18	W	40:9 44:5 wrote 18:3	31:23 33:4,5 34:9,18 14 20:1,5,8,10 21:3,7 22:25 25:4,7,15 26:17 35:6 39:25 15 3:11 22:15 23:10 36:19 15-year-old 22:14 24:11 150 28:20 31:12 16 20:15 21:2 22:13,18 35:4 39:11 16-year-old 31:22 17 3:11 21:3 22:19 23:11 35:4 39:13 17-year-old 22:15 24:10 18 3:17 20:12 23:11 25:9,20 26:5 28:11,19 31:10 42:2 1993 3:22 8:18	38 6:14 15:7 39(a) 4:16 5:1 39.a 46:19
V	Wait 29:18 walk 33:17 want 8:20 14:4 33:24,25 35:6 38:1,7 39:14 47:20 Washington 1:8 wasn't 4:25 34:20,21 43:24 way 13:19,24 15:22 16:24 17:10 19:17 29:7,17 33:17 35:8 36:12 37:19 47:21 48:9 49:1 ways 17:21 32:21 went 29:13,15 we're 26:16 we've 26:24 whatsoever 36:10 white 27:20 win 43:14 46:18 46:19 winning 43:8,9 wins 43:4,4 woman 32:19,22 words 31:5 37:3 worked 17:12 17:19 world 16:15 worse 19:15,16 31:22,25 worst 18:16,17 18:18,18,22,22 19:7,7,7,8,16 19:16 worth 12:10 wouldn't 10:15 10:16,17 16:10 17:25 20:2 37:5 wrestle 23:12 wrong 7:4 33:19	X	x 1:2,7	4
		Y	yeah 35:4,4 years 3:10,17 8:24 9:9,13 14:9,12,16,17 17:24 21:21 24:10,24,25 25:1 28:6 33:2 33:4 35:5 36:19 39:12,19 39:24 46:15 yellow 43:23 young 14:16 15:13,25 21:23 36:2 younger 17:2 20:11,21 21:8 23:10 25:8,10 25:15 26:16,17 35:19 youth 32:3 youthful 21:25	40 14:9,12,16,17 24:24 25:1 44 21:17 50:1 46 2:9
		0	2	5
		1	2 46:21 20 17:24 36:20 2007 3:22 38:16 38:21 2009 1:9 25 8:24 9:9,13 19:2 27 2:6 24:25	5 16:18 56 38:10 57 38:10 58 38:10
		10 33:2,4 35:4 41:9 11 35:4 11:01 1:13 3:2 11:51 50:14 111 26:7,8,8 12 35:6 13 3:10 9:14 15:25 16:1,17 20:10 21:15 22:6,11,12 24:3 25:10 49:6,25 50:4 13-year-old 19:2 21:12 24:9	3	6 16:18
			3 2:4 3.850 4:3 11:17 3.850(b)(2) 36:14 37:4,7 38:8 40:25 42:4 45:4 30-year-old 19:3 35 47:14	6 16:18 7
			8	73 25:7 77 26:10,11 28:21,22 31:13 31:19 775.082 14:11
			89 39:12	8
			9	9
			9 1:9 90 39:12	