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IN THE SUPREME COURT OF THE UNITED STATES

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KUNTRELL JACKSON, :

Petitioner : No. 10-9647

v. :

RAY HOBBS, DIRECTOR, ARKANSAS :

DEPARTMENT OF CORRECTIONS :

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Washington, D.C.

Tuesday, March 20, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:25 a.m.

APPEARANCES:

BRYAN A. STEVENSON, ESQ., Montgomery, Alabama; on behalf of Petitioner.

KENT G. HOLT, ESQ., Assistant Attorney General, Little Rock, Arkansas; on behalf of Respondent.

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P R O C E E D I N G S

(11:25 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-9647, Jackson v. Hobbs.

Welcome back.

(Laughter.)

ORAL ARGUMENT OF BRYAN A. STEVENSON

ON BEHALF OF THE PETITIONER

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

JUSTICE SCALIA: You haven't changed your mind in the interim?

(Laughter.)

MR. STEVENSON: No, Justice Scalia, I haven't. I do want to emphasize -- yes.

JUSTICE SOTOMAYOR: Could you start -- I know that Enmund and Tison has to do with death eligibility with respect to adults, but it does draw a line between death eligibility with respect to intentionality or not, or recklessness.

Assuming for the sake of argument that some of us might be interested in whether a line should be created for juveniles who intended or didn't intend death, with respect to their eligibility for life without parole, whether it's mandatory or voluntary, how

1 would we write that? Would -- would we just import all
2 the Enmund and Tison jurisprudence? Or would we say
3 something different with respect to juveniles?

4 MR. STEVENSON: Well, I -- I think you --
5 you could do that. In fact, in Graham, the Court makes
6 these statements that they're trying to exempt and
7 shield juveniles who did not kill, quote, "or did not
8 intend to kill." And that language could be a basis for
9 organizing the Court's thinking on this issue.

10 And, obviously, in this case where there
11 wasn't a requirement of the specific intent to kill that
12 was required in the Alabama case, that -- that might
13 dictate a certain different outcome. I think the
14 challenge with that is that juvenile status, juvenile
15 intent, is a much more complicated issue, and that for
16 many of the same reasons that are problematic with how
17 kids function at the first stage of these trials, it
18 would be hard --

19 JUSTICE SOTOMAYOR: That has to do with your
20 general rule, which -- which we shouldn't impose it at
21 all.

22 MR. STEVENSON: That -- that's right.
23 But --

24 JUSTICE SOTOMAYOR: But if we go even to
25 your second step rule --

1 MR. STEVENSON: I think --

2 JUSTICE SOTOMAYOR: -- assuming we
3 bifurcate --

4 MR. STEVENSON: Yes, I hear --

5 JUSTICE SOTOMAYOR: -- then -- then we still
6 have the question of when do we permit a mandatory
7 imposition?

8 MR. STEVENSON: I think there is no
9 question, Justice Sotomayor, there would be more
10 justification for those crimes where there is an intent
11 to kill, because this Court in its jurisprudence had
12 recognized that kind of hierarchy which you've outlined
13 and is exhibited in Enmund and then in the Court's other
14 cases.

15 Now, it's true that in -- in Arkansas under
16 this provision an adult would still be subject to the
17 death penalty, because they used this "recklessness"
18 language so that even a focus on "intent to kill" that
19 we addressed in Enmund might not categorically protect
20 these other juveniles, which I think the Court can
21 rightly acknowledge have diminished culpability.

22 It's also worth noting that in many of these
23 States where there are children being sentenced to life
24 without parole, there is no confusion about this. They
25 are being convicted of homicide offenses for which there

1 is no intent to kill. No dispute. Those jurisdictions,
2 those provisions would likely be addressed by the Enmund
3 analysis.

4 JUSTICE SOTOMAYOR: Well, in fact, Jackson
5 was convicted with a nonintent, just a felony --

6 MR. STEVENSON: Well, it would -- you're
7 absolutely right that it's felony murder, but it's a
8 little different. In Arkansas, if you cooperate or give
9 aid to someone who commits a crime, even if it's not
10 intentional, if it's a reckless indifference to life,
11 you can be found guilty of what is capital felony
12 murder. And the Arkansas court has interpreted that to
13 mean for an adult you'd be subject to the death penalty.
14 And here Kuntrell Jackson was subject to life without
15 parole.

16 The State argues that there was support for
17 that and even some kind of intent, because there was a
18 dispute about the words -- just quickly, you know, these
19 three --

20 JUSTICE SOTOMAYOR: It doesn't matter.

21 MR. STEVENSON: Yes.

22 JUSTICE SOTOMAYOR: The jury didn't have
23 to -- all the jury found was that he didn't meet his
24 affirmative burden of proving.

25 MR. STEVENSON: That's correct. That's

1 exactly right.

2 JUSTICE SOTOMAYOR: And he didn't counsel --
3 they didn't make a finding --

4 MR. STEVENSON: That's exactly right.

5 JUSTICE SOTOMAYOR: -- as to what words were
6 used and what the intent was.

7 MR. STEVENSON: That -- that's exactly
8 right. And the dissenters of the Arkansas Supreme Court
9 relied on that in making the determination that they did
10 not conclude that intent had been established here in a
11 way that would support the judgment that -- that we
12 seek.

13 But that goes back to one of the earlier
14 questions that was posed about what happens at the guilt
15 phase. Is it -- Justice Kennedy, it is true that in
16 Alabama and in most jurisdictions, you would not be
17 permitted to tell the jury what the sentencing outcome
18 would be. And in many of these cases there -- there
19 isn't a lesser included. That's going to be up to
20 the -- to the prosecution in -- in some of these crimes.
21 And there are a range of offenses for which that would
22 not help a jury kind of deal with the -- the kind of --
23 the choice that --

24 JUSTICE ALITO: Is that what -- is that true
25 under the law of Arkansas? In most jurisdictions, I

1 would think if -- if someone's charged with the highest
2 degree of homicide, the defense can request an
3 instruction on -- you don't have to have a separate
4 charge on a lesser included offense; the defense can
5 request an instruction on lesser included offenses if it
6 could be supported by the evidence.

7 MR. STEVENSON: It -- it would really
8 depend, Justice Alito, on the facts. For example, one
9 of our provisions in Alabama makes the -- the crime sort
10 of a -- a homicide a capital crime if the victim is
11 under the age of 14. You're not entitled to some
12 diminished culpability, some other kind of homicide
13 charge unless there's something else going on that would
14 support that. Our laws and this Court's law say there
15 has to be evidence in support of that lesser included
16 instruction before the court is constitutionally
17 obligated to provide it. And so, for that reason, it's
18 not a given that that would happen.

19 And I think the challenge with the mandatory
20 scheme that we've been talking about in both of these
21 cases is that it does put the sentencer in a very
22 difficult situation, where there is no ability to
23 consider the age; there is no ability to consider the
24 factual diminished culpability that might exist in one
25 case or the other; no ability in either of these cases

1 to consider the fact that an older codefendant got a
2 lesser sentence. That there is something else going on
3 here that -- that goes beyond just the particulars of
4 this crime and this particular offender's culpability.

5 JUSTICE BREYER: Before we leave it,
6 could -- could -- what was the instruction the jury was
7 given? Was it you find him guilty if he was
8 deliberately indifferent, if he was recklessly -- what
9 are the words they used?

10 MR. STEVENSON: It's a reckless indifference
11 to life.

12 JUSTICE BREYER: If he was recklessly
13 indifferent to life.

14 MR. STEVENSON: And if he gave aid or
15 assistance to someone in that capacity, and the
16 question, Justice Breyer, turned on -- on this statement
17 made that the -- the codefendant who testified against
18 Kuntrell Jackson --

19 JUSTICE BREYER: Yes.

20 MR. STEVENSON: -- initially told the police
21 he -- that he came in and said we ain't playing, and
22 then he testified that he said, "I thought y'all were --
23 were playing."

24 JUSTICE SOTOMAYOR: I'm not sure reckless
25 indifference means that. Meaning if he knew they were

1 carrying guns, doesn't that make him liable for the
2 reckless indifference --

3 MR. STEVENSON: Well --

4 JUSTICE SOTOMAYOR: -- whether he thought
5 they would use them or not?

6 MR. STEVENSON: Yes, and that's what the
7 State argued here, is that the fact that he had
8 knowledge of this gun and that they went in there made
9 him guilty of reckless indifference even though it
10 didn't create the kind of intent to kill that -- that we
11 typically require for these kinds of showings.

12 That's again why there was the significance
13 around this language, that if you come in and you say
14 something declaratory that suggests that it's directed
15 at the victim, it might help kind of support that intent
16 finding if you don't --

17 JUSTICE BREYER: Reckless -- reckless
18 indifference to life suffices for the death penalty for
19 an adult.

20 MR. STEVENSON: Yes. What -- what the Court
21 does --

22 JUSTICE BREYER: If that's right, then
23 we'd -- you would have to argue on, if we took this
24 tack --

25 MR. STEVENSON: That --

1 JUSTICE BREYER: -- which I don't know that
2 we would --

3 MR. STEVENSON: That's --

4 JUSTICE BREYER: -- but that you cannot
5 sentence a juvenile to life without parole for murder
6 unless he, e.g., specifically intends the death or
7 something equivalent, but something stronger than
8 reckless indifference to life.

9 MR. STEVENSON: That -- that's correct,
10 Justice Breyer. And, again, I think that this Court
11 knows its own precedents, but as you'll recall, Tison
12 followed Enmund, and in Tison v. Arizona is when the
13 Court allowed there to be this kind of room around this
14 intent standard in the way that you just described.

15 JUSTICE ALITO: So, you would draw the line
16 at -- at a specific intent to kill?

17 MR. STEVENSON: Again, my -- I would -- I
18 would categorically prohibit no matter what the intent
19 is. I think particularly for children at this age.
20 What I think this case highlights, what's meant by "I
21 thought you all were playing" versus "we ain't playing"
22 isn't a very good indicator of whether someone should be
23 subject to life without parole.

24 JUSTICE ALITO: What if it was a lot
25 clearer? What if they had said, okay, before we go in,

1 let's understand what's going on here; Shields has
2 got -- has got the sawed-off shotgun, and if we need to
3 use it, we'll use it; we'll do whatever it takes to --
4 to bring this off?

5 MR. STEVENSON: I -- I think the evidence --

6 JUSTICE ALITO: There might not be a
7 specific intent --

8 MR. STEVENSON: Yes.

9 JUSTICE ALITO: -- to kill there.

10 MR. STEVENSON: Yes. I think the evidence
11 that would support a finding of aggravated murder would
12 obviously be stronger, but even there -- and this is
13 what the Court points out in -- in Roper, the -- the
14 decisionmaking of children, that the thinking of
15 children is categorically different. They're not
16 thinking three steps ahead; they're not thinking about
17 consequences; they're not actually experienced enough
18 with the world to understand how they deal with their
19 frustrations in the same way that an adult is. And so,
20 their judgments about what they intend to do, their
21 declarations, mean something very, very different.

22 And one of the factors that we haven't
23 talked about, but I just want to emphasize, is it's not
24 just their inherent internal attributes; it's also the
25 external circumstances that they find themselves in.

1 Kuntrell Jackson was born in a household where there was
2 nothing but violence and guns and people shooting each
3 other. His grandmother shot his uncle. His mother shot
4 a neighbor. His brother shot someone. They were all
5 put to jail.

6 But, unlike an adult, these children don't
7 have the ability to escape. A child of 14 cannot leave
8 his criminogenic or violent environment. They have no
9 control over that. And --

10 JUSTICE KAGAN: Mr. -- I'm sorry; go ahead.

11 MR. STEVENSON: And just because of that, I
12 think it does reinforce why even their judgments, their
13 so-called intentional judgments, reflect a very
14 different kind of understanding of their character,
15 their potential for rehabilitation, than it would with
16 an adult.

17 JUSTICE KAGAN: One of the arguments that
18 the State makes is that when you look at all these
19 numbers, the number that is most different between this
20 pair of cases and Graham is the denominator. And I am
21 wondering whether you would address that. What kind of
22 denominator we should be using here and how it compares
23 to the denominators that we have used in past cases.

24 MR. STEVENSON: Yes. I think, first of all,
25 it is true that homicide offenses are less common than

1 non-homicidic offenses. In Graham, this Court looked at
2 a range of non-homicide crimes, and that was a huge
3 number, 300,000, that's largely because we were talking
4 about a multitude of offenses and here we are talking
5 about a single offense.

6 I think the fact that there have been 7,000
7 children arrested for homicide and non-negligent murder
8 -- manslaughter, over this 40-year time period and only
9 79 children have been sentenced to life without parole
10 is a significant fact that reinforces our claim that
11 this is a very rare sentence. That is 1 percent. And
12 the fact that it's over 40 years, that's also true for
13 the 79. We got to that --

14 JUSTICE ALITO: It's arrests to start out
15 with, it's not -- it's not convictions.

16 MR. STEVENSON: That's right.

17 JUSTICE ALITO: And it's not for the type of
18 offense for which one could be sentenced to life
19 imprisonment without parole, it's a broader category of
20 homicide offenses.

21 MR. STEVENSON: Well, you're absolutely
22 right, Justice Alito, on the first point, that these are
23 arrest data. Of course, that's what we used in Graham,
24 because again in this cohort, conviction data is simply
25 very difficult to get. But it's not true that only

1 children arrested for aggravated murder are subject to
2 life without parole. As I have mentioned, in the States
3 that create the largest population of these kids, all
4 kinds of homicide can subject you to life without
5 parole. So it is true --

6 JUSTICE ALITO: Is it true that in the
7 States that permit life without parole for a minor
8 homicide -- a minor murder, a person -- a minor
9 convicted of -- of murder, that that is permitted for
10 every non-negligent homicide?

11 MR. STEVENSON: In some States, yes.
12 That is to the extent that you get convicted of murder
13 some of these States, South Dakota and Pennsylvania come
14 to mind, whether it's first degree or second degree, you
15 are subject to life imprisonment without parole and it
16 is a mandatory sentence.

17 JUSTICE ALITO: Some States, but not in all
18 --

19 MR. STEVENSON: Not in all States, that's
20 true.

21 JUSTICE ALITO: So you have a very imprecise
22 denominator, you have arrests for a broader category of
23 offenses.

24 MR. STEVENSON: Yes. But I don't think --

25 JUSTICE ALITO: You don't know how much

1 smaller that number would be if we narrowed it down
2 appropriately, do we?

3 MR. STEVENSON: Well, we can't get beyond
4 what the data tell us. But I want to suggest it's no
5 less precise than what this Court had to deal with in
6 Graham. In Graham, we talked about 380,000 non-homicide
7 offenders. Half of that class were people convicted of
8 drug crimes, which no one has suggested would subject
9 you to life without parole. Another 60,000 were
10 convicted of assaults and kids get into fights all the
11 time. But we used the aggregate of all of those numbers
12 when we made that comparison.

13 So I'd actually argue that we are dealing
14 here with a category definition that is much more
15 precise than what we dealt with in Graham.

16 And, Justice Kagan, to return to your
17 question we do have some precedence that help us with
18 this. In Coker v. Georgia, this Court was trying to
19 make an assessment about the propriety of the death
20 penalty for the crime of rape. And what the Court noted
21 was that nine out of ten of the jury that made decisions
22 about life versus death chose life. And there we were
23 talking about a death rate, if you will, of 10 percent.
24 Here, with a larger universe, we are talking about a
25 rate of 1 percent.

1 JUSTICE BREYER: How do you -- think about
2 this, which is not your favorite position, but it's a
3 position you've taken. It's the same question I asked
4 before. If I say, well, doesn't there have to be some
5 line, 3 years old, you will say of course. 10 years
6 old, you will say of course. But nobody -- there is no
7 problem with sentencing 10-year-olds to life without
8 parole. 12 years old. Well, hum, now maybe your
9 opponents want to defend that. 13 years old, 14 years
10 old and of course I am walking right into the buzz saw,
11 well, leave it up to the legislature.

12 But suppose that there's something to be
13 said for not leaving it up to the legislature, at least
14 for the numbers that were in that range. But how would
15 you defend the cutoff for no life without parole at say
16 14, older than 14, rather than older than 15, rather
17 than older than 13. What kind of argument is there that
18 isn't totally random for picking that number as the age
19 below which you cannot impose life without parole even
20 for the most horrendous murder.

21 MR. STEVENSON: Yeah. I think two nonrandom
22 arguments can be made for the two ages. I will start
23 with the young age of 14.

24 When you consider the fact that 13
25 jurisdictions have thought about this, and have all but

1 one set the age above 14, I think we can then rely on
2 that to make a determination that if there is a minimum
3 age, it's above 14.

4 I think we can also, consistent with this
5 Court's precedents, look at the frequency of the
6 sentence for this population. Most States have never
7 sentenced a child to life without parole for a crime at
8 14. They've just never done it. 32 States, there are
9 no children 14 and younger serving life without parole.

10 And so, I think that allows this Court in a
11 very nonrandom way to defend that judgment. But I also
12 think a nonrandom argument can be made to draw the line
13 at 18. That is offenders under the age of 18. That's
14 exactly what this Court has done in Roper, it's what
15 this Court has done in Graham. What we have relied on
16 about juvenile status is applicable to that poll. I
17 concede that these other indicia are not quite as
18 compelling.

19 JUSTICE BREYER: 18, you use for a lot of
20 purposes, 18 -- you could say, okay, 18. The difficulty
21 with 18 is you are running into 2300, not 79.

22 MR. STEVENSON: That's right --

23 JUSTICE BREYER: And the difficulty is that
24 in Roper, it said, well, don't worry so much about not
25 having the death penalty, the other one, don't worry so

1 much about it because there's always life without
2 parole. And the fact that 18-year-olds or 17-year-olds
3 in many respects are quite mature or at least can be.
4 And so that makes 18 seem not quite right. But there's
5 a problem with each of them, so that's --

6 MR. STEVENSON: Yeah, but I guess just on
7 that point, Justice Breyer, I think you're right that
8 the indicia are more complicated. But I want to just
9 stress that they are less meaningful here. Because with
10 mandatory sentences, they don't tell you the same thing
11 they do in these other contexts.

12 But I also think it's true that we have
13 recognized that up until the age of 18, you are a
14 juvenile, your status is coherent with what the Court
15 has recognized in these other cases. And so I do think
16 it's defensible there. While it's true that you are
17 more developed than a child of 14 or a child of 10, it's
18 also true that you are not an adult. And we make that
19 distinction in lots of ways.

20 JUSTICE BREYER: Any other distinction that
21 you have been able to think of growing out of the
22 literature or growing out of the law where the cutoff
23 for some roughly comparable series of things is between
24 14 and 15 or between 14 and 16, or something like that.

25 MR. STEVENSON: Well, yes, this Court in

1 Thompson made a distinction between offenders that were
2 under the age of 15, 15 and younger, then older
3 offenders. And for 20 some years, the law in this
4 country was you could not subject younger offenders to
5 the death penalty in ways that you could older
6 offenders. And so there is clearly precedent for that
7 and we have appended also lots of statutes, I mean, that
8 also make those kinds of distinctions. I mean, we do
9 draw these lines frequently in a range of areas, not
10 just dealing with the constitutional questions that we
11 are dealing with here.

12 But just kind of to complete my analysis,
13 Justice Kagan, about these comparisons. The other point
14 that I will reference is that in Thompson, this Court
15 was also struggling over this question about frequency
16 and rarity. And what the Court did there was actually
17 look at the number of juveniles that were sentenced to
18 death under the age of 16 that were on death row and
19 compared them to the number of people on death row at
20 the time, and they noted that it was .36 percent of the
21 population of people on death row.

22 If you did the same thing here, the
23 Sentencing Project reports that there are over 41,000
24 people in the United States serving sentences of life
25 imprisonment without parole. And if you compare our

1 number of 79 to that, that is actually again a lower
2 proportion of people serving life without parole than
3 the Court found to be constitutionally significant in
4 Thompson.

5 So I think Thompson and Coker all reinforce
6 what we are saying here, that this is an exceedingly
7 rare sentence where the majority of States have never
8 chose to impose it. That would provide a basis for this
9 Court to conclude that it is cruel and unusual.

10 JUSTICE GINSBURG: You are making an
11 argument now in Jackson's case. Jackson was the felony
12 murder case and I think at least in your brief, you made
13 the argument it was just happenstance and bad luck that
14 in Jackson's case the shop attendant was killed. And in
15 Graham's case, the person who was assaulted survived.

16 But your argument to us seems to make no
17 distinction between the two cases.

18 MR. STEVENSON: No, no, I -- I -- I don't
19 intend to do that Justice Ginsburg. I think -- I think
20 there is a distinction, there is no question that there
21 is a stronger argument that by traditional measures
22 there is lower culpability in Kuntrell Jackson's case.
23 He was not found to have specifically intended to kill.
24 In the State of Alabama he could not have been subject
25 to life without parole, and there are States where he

1 would not be subject to that, based on his degree of
2 culpability.

3 I -- I guess my -- my -- my point is that
4 even there, there is a challenge that if the Court wants
5 to engage in that kind of thinking, what children intend
6 because they are children is a very complicated
7 question. It's a very different question.

8 I don't mean to concede that it's an
9 irrelevant question. I think the Court absolutely can
10 and should conclude that there is diminished culpability
11 in the Jackson case, and that is evident based on the
12 facts in the crime. Actually it was the dissenter in --
13 in the Jackson case that made this observation about the
14 consequences of crime. And, of course, for many
15 non-homicide crimes there are these kind of fortuities
16 that sometimes prevent death wonderfully, and we were
17 grateful for that.

18 My problem is that the differences between
19 children and adults, these internal attributes, if you
20 will, these deficits in judgment are not crime specific.
21 The person who intends to kill doesn't actually have any
22 better judgment, any more character, any more maturity,
23 any more impulse control than the person who doesn't.
24 And a way of characterizing a rule would be to recognize
25 that and to create a categorical ban.

1 If there are no further questions, I will
2 reserve the rest of my time for rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Holt?

5 ORAL ARGUMENT OF KENT G. HOLT

6 ON BEHALF OF THE RESPONDENT

7 MR. HOLT: Thank you, Mr. Chief Justice, and
8 may it please the Court:

9 The decision below falls squarely within the
10 framework of Roper and Graham, and there are three
11 reasons to affirm this judgment. First, murder is the
12 worst of all crimes. Society has drawn that line.

13 Second, legislatures have the power to
14 authorize sentences that are commensurate with crimes
15 like murder.

16 Third, Jackson has not demonstrated any
17 consensus in this case against the practice, and in
18 fact, there is a supermajority of States and of
19 governments that authorize this sentence.

20 The landscape of this case is -- is
21 different than Graham, because in Graham no one was --
22 no one was killed. Terrence Graham was lucky no one was
23 killed, because he acted with a reckless disregard for
24 human life as well, but it's an important thing in our
25 law that the law punishes the -- the result, the harm

1 that is inflicted. And if I could, go to the Arkansas
2 statute.

3 Jackson was charged with the highest crime
4 you could be charged with in Arkansas, it was capital
5 felony murder. In that the legislature has set out
6 several enumerated, several violent felonies that if you
7 commit this particular crime -- and aggravated robbery
8 is one of them -- if you commit that crime and in the
9 course and furtherance of that, you or an accomplice act
10 with extreme indifference to the value of human life
11 during the commission of it or in the flight from it,
12 then you are guilty of capital felony murder.

13 So, in this case the jury was called upon,
14 because there were other accomplices with Kuntrell
15 Jackson, they were called on to determine whether or not
16 Kuntrell Jackson acted as an accomplice, whether he
17 aided and assisted and whether or not he or an
18 accomplice acted with extreme indifference to the value
19 of human life.

20 In that process, Kuntrell Jackson asserted
21 the affirmative defense that essentially is available
22 for capital murder. He said that, I did not have -- I
23 was not the triggerman, and I did not -- I did not
24 commit the homicide offense, and I did not aid or
25 procure counsel, all of those are listed -- the exact

1 words of the affirmative defense are listed in our brief
2 at page 4. And -- but he asserted that defense.

3 The Arkansas Supreme Court noted in its
4 opinion that in his challenge to the sufficiency of the
5 evidence, that there was sufficient evidence to convict
6 him of capital murder and that the jury was well within
7 its right to believe that he said that he -- that when
8 he walked in and took -- took the lead in this robbery
9 that he said, "We ain't playing," and after that the
10 clerk responded that she was going to call the police --

11 JUSTICE SOTOMAYOR: Counsel, I -- I -- I
12 know that this seems like block building, but I -- I
13 think of law as sort of logical. If you are involved in
14 a felony, and you counsel the felony where someone dies
15 under Arkansas law, you are guilty of felony murder,
16 correct?

17 MR. HOLT: Of capital felony murder, yes,
18 Your Honor.

19 JUSTICE SOTOMAYOR: So whether or not that
20 he intended to counsel the crime, he was guilty of
21 felony murder, unless he could prove the affirmative
22 defense, right?

23 MR. HOLT: Yes, Your Honor.

24 JUSTICE SOTOMAYOR: So obviously he didn't
25 prove the affirmative defense, but that doesn't mean

1 that the jury actually found that he used one set of
2 words or another. It just means that they didn't
3 believe that he had proven by his burden of proof that
4 he had not counseled, correct?

5 MR. HOLT: That's correct. The Arkansas
6 Supreme Court said they could -- they could accept that
7 as -- they pointed to that as --

8 JUSTICE SOTOMAYOR: As a possibility --

9 MR. HOLT: As a possibility, yes.

10 JUSTICE SOTOMAYOR: But not that it was an
11 actual finding by the jury?

12 MR. HOLT: No. No, Your Honor. It was not
13 an actual finding --

14 JUSTICE SOTOMAYOR: All right.

15 MR. HOLT: -- because an actual -- in regard
16 to sentences in terms of years, we don't require that
17 individualized responsibility that we do, for instance,
18 in a death penalty case. So --

19 JUSTICE BREYER: Well, so in Arkansas if a
20 13-year-old or a 14-year-old is in a get-away car and
21 knowingly accepts the money that someone gets from a
22 robbery and intends to drive off with it, and that other
23 person shoots the teller and kills him, then that
24 individual who is 14 years old is guilty of felony
25 murder, capital felony murder?

1 MR. HOLT: Your Honor --

2 JUSTICE BREYER: He aided? Is that right or
3 not?

4 MR. HOLT: Yes.

5 JUSTICE BREYER: Okay. If that's right,
6 do -- do you think that such a person is less culpable,
7 knowing only that, than a person who actually takes out
8 a gun and shoots the teller? Morally speaking?

9 MR. HOLT: Yes, Your Honor. Yes.

10 JUSTICE BREYER: Okay. Now, if the answer
11 to that question is yes, what is the argument for not
12 being able to tell that to the jury or judge who is
13 going to impose the sentence? What is the argument for
14 not allowing a judge or a jury, at least to think about
15 that question, before they have -- before imposing
16 mandatory life without parole?

17 MR. HOLT: Well, Your Honor, that -- that --
18 telling a jury about that doesn't go to their guilt.

19 JUSTICE BREYER: I know. I mean my obvious
20 point is that -- that the Arkansas system, once we have
21 he was the get-away driver or assisted the get-away
22 driver, they must sentence him at that age, or despite
23 that age, to life without parole.

24 And so, the other side is saying, well, at
25 the very least -- he has three other positions -- but at

1 the very least, the Constitution, maybe it's the due
2 process clause, requires the sentencer to take that into
3 account, the fact that he was just the assistant
4 get-away driver and may not have thought about the
5 murder in reality, and may not have expected it in
6 reality. Why not have to take that into account in
7 sentencing? That's the argument.

8 I want to hear directly your answer to that,
9 which is taking the fourth or possibly the least weakest
10 of his positions or the least radical. What's your
11 answer to that?

12 MR. HOLT: Your Honor, it's -- a legislative
13 judgment has been made with regard to drawing a baseline
14 for all murderers, whether they are juvenile murderers,
15 whether they are get-away drivers. And when you -- when
16 you counsel or aid or do anything that gets you
17 liability for being a capital murderer, then that's
18 the -- that is the minimum sentence.

19 What he has gotten, on account of his youth,
20 is he's gotten -- this -- this Court decided in Roper in
21 that he could not -- he could not get the death penalty.
22 All of those individualized characteristics that would
23 give him the lesser penalty, he doesn't even have to put
24 on. It's swept off the table because he is not exposed.
25 And that is -- those are all those factors in terms of

1 what he -- what he might -- that might mitigate.

2 So he would actually would sort of be double
3 dipping to come back again and say, oh, and by the way,
4 I'm a youth, so I should even -- I should get not the
5 lesser punishment, I should get the lesser, lesser
6 punishment.

7 So there is a certain symmetry that this
8 case has with the Graham case, in that the Graham case
9 was very specific about the way it defined itself. One
10 commentator has made the note that the majority opinion
11 in Graham contained the word non-homicide 47 times.

12 Graham essentially said what it wasn't. It
13 wasn't a homicide. It was that other line that society
14 draws between homicide and every other crime. And
15 crimes are -- the criminal statutes are scalar. There's
16 a certain amount of culpability that's built into each
17 one of those, whether it be capital murder or
18 first-degree murder, or second-degree murder. And it
19 does go on what you know, the -- the knowledge that you
20 have. Maturity is taken into consideration, or
21 immaturity is taken into consideration in capital murder
22 in that you can't get the worst -- if you've been shown
23 to do these acts, you can't get the worst punishment.

24 JUSTICE GINSBURG: What is the standard in
25 Arkansas for moving a child from the juvenile system?

1 We heard, I think, in Alabama it was -- was age 13?

2 MR. HOLT: Yes. Your Honor --

3 JUSTICE GINSBURG: It was age 12.

4 MR. HOLT: Yes. Your Honor, Arkansas has
5 sort of a three-tier system. The age for moving into
6 the adult system is 14. And -- but the middle- tier
7 system in Arkansas is called extended juvenile
8 jurisdiction. And in that particular case -- in those
9 cases, the prosecutor can move to take a younger age and
10 put in -- and it's a blended sentence between the -- and
11 a youth is just found delinquent of a crime and not --
12 and found guilty.

13 JUSTICE KENNEDY: What -- what are the
14 factors the judges and prosecutors use in making that
15 determination?

16 MR. HOLT: Your Honor, at age 14 -- and it's
17 the specific -- there are specific crimes that a
18 prosecutor would move a case into an adult court. It is
19 the prosecutor's discretion weighing -- there are 10
20 different factors that include the severity of the
21 offense, the -- and -- but they also take into
22 consideration the maturity of the -- of the youth,
23 the --

24 JUSTICE KENNEDY: But -- but if you submit
25 that as a justification for your scheme, why couldn't

1 those same factors be applied to the judge -- by the
2 sentencing judge after the conviction? In other words,
3 all of the -- all of the discretion is up front before
4 the conviction.

5 MR. HOLT: Well, there is discretion up
6 front, and that is the only -- that is the only instance
7 when a defendant can actually challenge a transfer,
8 where a prosecutor decides to put it. But there are
9 also -- so, there is -- there's discretion at the front
10 end.

11 JUSTICE KENNEDY: I guess my point is, if
12 the concern is that -- that we have too indefinite
13 standards, too few specifics to guide the judge in
14 determining whether there should be a life sentence, the
15 same criticism could apply to the determination if they
16 didn't put him in the adult system at the outset.

17 MR. HOLT: Well, Your Honor, the -- it is --
18 admittedly, it is at the discretion of the prosecutor on
19 those ages to move it into the --

20 JUSTICE KENNEDY: I assume discretion is
21 guided by certain standards or it's no discretion at
22 all. So, there are standards.

23 MR. HOLT: Well, Your Honor, the -- the
24 prosecutor -- that -- that decision to move it in there
25 is challengeable. It is reviewable by a court. He

1 moves -- the juvenile moves it to transfer it to -- back
2 to juvenile. That is appealed. That was done in this
3 case, and then the Arkansas Court of Appeals reviewed
4 that decision and said that the court -- the court's
5 decision was not erroneous. So, that -- that is the
6 discretion that one would exercise on the front end.

7 Again, on the latter end, this Court has
8 said in Harmelin that the individualized sentencing is
9 not required, and, in fact, the -- all of the -- all of
10 the -- the mitigating circumstances that would -- that
11 have been considered because it's -- he's -- the death
12 penalty has been taken off the table. That's a big --
13 that's a big deal, especially in a case like this one
14 where Kuntrell Jackson -- we believe the evidence showed
15 that he also acted with reckless indifference to the
16 value of human life, based -- based on the evidence in
17 this case. That he would be -- by way of analogy, that
18 he would be a Tison offender himself.

19 But irrespective of that, the legislature in
20 Arkansas -- it's -- the legislative judgment has been
21 that the minimum sentence that a person can receive for
22 committing a capital murder in Arkansas is life without
23 parole.

24 I would like to clarify one point that I
25 think -- earlier that was made. The two other

1 individuals in this particular case were -- one was a
2 cousin who testified against Mr. Jackson, and he was 15.
3 He had turned 15 the day before this robbery. And the
4 second, the second individual, the triggerman, was -- he
5 was also 14, and he received a sentence of life without
6 parole as well.

7 It's our position that -- as is Alabama's,
8 that the main -- the principal justification in this
9 case lies with the retributive principle that society
10 needs to convey the message that people that Laurie --
11 that Laurie Troup's life, the victim in this case, was
12 more important than the money in that cash register.
13 The harm here was irrevocable. And this kind -- the
14 punishment for this -- it's qualitative -- death -- the
15 death penalty is qualitatively different.

16 But the punishment for -- for this crime
17 reinforces the sanctity of human life and it expresses
18 the State's moral outrage that something like this could
19 happen. We think that the respect due life is -- is
20 what this message conveys, and it conveys it more as a
21 life-without-parole sentence than it does life without.

22 JUSTICE GINSBURG: You say the sanctity of
23 human life, but you're dealing with a 14-year-old being
24 sentenced to life in prison, so he will die in prison
25 without any hope. I mean, essentially, you're making a

1 14-year-old throwaway person.

2 MR. HOLT: Your Honor, I'd respectfully
3 disagree that he's a throwaway person. The -- we want
4 to -- we want him to come to an understanding of his own
5 humanity. We want him to realize the enormity of his
6 crime. I can only speak for Arkansas, but in Arkansas,
7 instances -- it's not in the record, but this particular
8 petitioner, Jackson has made efforts to obtain his GED;
9 he has taken anger management classes. You can --
10 juvenile life without parole -- people serving this
11 sentence are enrolled in vo-tech programs in prison.

12 JUSTICE SOTOMAYOR: I'm sorry. What hope
13 does he have?

14 MR. HOLT: Excuse me?

15 JUSTICE SOTOMAYOR: What hope does he have?

16 MR. HOLT: Your Honor, he has -- the hope
17 that he may have is that he -- is an application for
18 commutation through the parole board. Other than that,
19 he will -- or perhaps retroactive legislation --

20 JUSTICE SOTOMAYOR: I'm sorry --

21 MR. HOLT: -- if the legislature comes to
22 another view.

23 JUSTICE SOTOMAYOR: I thought he was life
24 without parole. I thought he was sentenced to life
25 without parole. How can the parole board --

1 MR. HOLT: Oh, what I'm saying is the parole
2 board is -- reviews applications for commutation in
3 Arkansas. So, he -- this particular Petitioner has
4 not --

5 JUSTICE KENNEDY: How many commutations of
6 life imprisonment sentences are ordered every year in
7 Arkansas?

8 MR. HOLT: Your Honor, I don't have figures
9 on that -- on how many per year, but there is a case
10 that -- that listed -- it's Rogers v. State. It is a
11 1979 case that actually listed -- 30 clemency requests
12 were granted in the last 5 years from that opinion.
13 They were life sentences.

14 JUSTICE KENNEDY: From life sentences? From
15 life without parole?

16 MR. HOLT: Well, life without -- life and
17 life without parole in Arkansas are the same type of
18 sentence.

19 CHIEF JUSTICE ROBERTS: Do we know how old
20 Laurie Troup was when she was shot?

21 MR. HOLT: Yes, Your Honor. Laurie Troup
22 was 28 years old when she was shot. She was discovered
23 by her mother and her 11-year old son.

24 JUSTICE BREYER: I understand the arguments,
25 which are very good ones, for the importance of Arkansas

1 emphasizing the importance of life and not killing
2 people. But a person who is an adult who is faced with
3 the death penalty, which is certainly a strong statement
4 along your lines, is permitted by the Constitution
5 nonetheless to make any mitigating argument he wants.
6 And Arkansas has to do that. They have to let him make
7 any mitigating argument he wants.

8 And so, the argument here is basically,
9 well, the same is true when a 14-year-old, because of
10 the lack of maturity, faces life without parole. And
11 that seems to be the hard issue in this case. Just
12 as -- just as the death penalty is unique for anyone and
13 therefore requires mitigating elements, isn't the life
14 without parole special enough for an adolescent that you
15 have to let him at least make any mitigating arguments
16 he wants?

17 Now, Arkansas hasn't really expressed a view
18 in its legislation on that question, or maybe it has and
19 just rejected it. But I don't know. That's -- if you
20 want to say something about that, I'd be interested.

21 MR. HOLT: That's -- that's not a view
22 that -- that I know that's been expressed.

23 JUSTICE BREYER: Yes. But I mean, that's
24 what their brief is filled with on the other side,
25 basically. And so is Roper.

1 MR. HOLT: Yes, Your Honor. But this --
2 this is qualitatively different. And -- and that's been
3 taken off the table. I think that all of -- all of
4 those things that he would put to get the -- that he
5 would -- that he would put forward to get the lesser
6 sentence is -- initially is that he would just get a --
7 as I said, a lesser -- lesser sentence.

8 JUSTICE GINSBURG: Is that because Arkansas
9 has no life with parole?

10 MR. HOLT: Your Honor, the only provision,
11 and -- and this does go to show that Arkansas has -- has
12 thought about this in ways -- has make -- taken
13 deliberate steps. In its extended juvenile
14 jurisdiction, there is the provision that -- that a --
15 for instance, a 14-year-old in this particular case, if
16 -- if they had deemed that they would go in extended
17 juvenile jurisdiction could receive a life penalty,
18 except it is life with parole, yes. So, that is -- that
19 --

20 JUSTICE GINSBURG: But that's not available
21 to an adult. That's only available to --

22 MR. HOLT: That's not available to an adult.
23 No, Your Honor.

24 As I -- as I was saying, the -- there's a
25 certain constitutional symmetry to this case and to

1 Graham's case because -- because Graham committed a -- a
2 non-homicide offense and he was a youth, and so he had
3 twice-diminished punishment. But he only received one
4 diminishment in his -- in his punishment, because he
5 had -- he was -- he had twice-diminished culpability.
6 In this particular case, Jackson does not have
7 twice-diminished culpability. He has -- he is a youth.

8 Even if he were to -- even if we were to say
9 that, well, he didn't pull the trigger, or we can't show
10 that he didn't -- that he acted -- didn't act with
11 reckless indifference -- even if we were to say that
12 that was twice-diminished, he is still criminally
13 responsible. There's not a -- there's not a special
14 class of not guilty by reason of youth. He is still
15 criminally responsible for what he did.

16 And -- and a teenager -- teenagers must know
17 that if you commit the worst crime, you will get the
18 worst punishment that's available under the
19 Constitution. And so, the symmetry here is that -- that
20 Terrence Graham was the lucky one. It's not that
21 Kuntrell Jackson was the unlucky one. This is a -- when
22 you go into a place with a sawed-off shotgun, it's a
23 dangerous activity; it's inherently dangerous. And what
24 was left out of the calculus a minute -- a few minutes
25 ago was the fact that he could -- it's not just kill or

1 intend to kill, but foresee what could happen.

2 And certainly the evidence in this case
3 demonstrated that Kuntrell Jackson could foresee that at
4 an armed robbery, someone could get hurt. And that's
5 what the law punishes, is the result.

6 If there are no further questions --

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Stevenson, you have 8 minutes remaining.

9 REBUTTAL ARGUMENT OF BRYAN A. STEVENSON

10 ON BEHALF OF THE PETITIONER

11 MR. STEVENSON: Just -- just a few points.

12 Justice Kennedy, I just want to kind of
13 remark, there is some literature out there about
14 commutation in Arkansas. And it was actually quite
15 common up until 1980, and this case that my colleague
16 referenced was prior to that date. But since then, it's
17 been very uncommon. There's only been one commutation
18 since 2007 with the current governor, and that was for a
19 non-homicide offense.

20 I -- I also want to say, but just kind of
21 consistent with my earlier argument, that this Court did
22 strike down mandatory death sentences in
23 *Woodson v. North Carolina* and *Roberts v. Louisiana* for
24 many of the reasons that the Court has highlighted here
25 that made that sentence unconstitutional and

1 inappropriate. And we think that in the same way, the
2 Court could certainly do that here.

3 But my final point is really to just say we
4 are not suggesting that States should not be able to
5 impose very harsh punishments and very severe sentences
6 on even children who commit these kinds of violent
7 crimes. That's not our position.

8 The State of Arkansas and the State of
9 Alabama have parole boards in place. They can even
10 impose sentences that give them the authority to
11 maintain control of the lives of these children for the
12 rest of their natural lives.

13 What we are arguing is that they cannot do
14 so with no hope of release, that that would be
15 incompatible with child status. And that's the rule of
16 Roper. That's the logic of Roper and Graham. It could
17 be argued that every person is more than the worst thing
18 they've ever done. And a policymaker and a
19 decisionmaker might consider that in constructing what
20 kind of sentences to impose and what kind of regime to
21 create, and that's totally up to the legislatures.

22 But what this Court has said is that
23 children are uniquely more than their worst act. They
24 are quintessentially children in a way that the
25 Constitution requires that we respect their child

1 status.

2 And our argument is simple. Our argument is
3 that it would be unusual to recognize that in virtually
4 every area of the law but when a crime is committed, to
5 simply abandon it, to simply ignore it. Roper and
6 Graham teach us that we can't do that consistently with
7 our Eighth Amendment prohibitions.

8 And so, for that reason, it is unusual, and
9 it's our judgment that it would be cruel to declare
10 these children fit only to die in prison given what we
11 now know about their status, about their development,
12 and about their potential.

13 And for those reasons, we would ask this
14 Court to reverse the lower court judgments and grant
15 relief in this case, Jackson v. Arkansas.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr.
17 Stevenson, Mr. Holt.

18 The case is submitted.

19 (Whereupon, at 12:11 p.m., the case in the
20 above-entitled matter was submitted.)

21

22

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24

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