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IN THE SUPREME COURT OF THE UNITED STATES

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EVAN MILLER, :

Petitioner : No. 10-9646

v. :

ALABAMA :

- - - - - x

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 10:25 a.m.

APPEARANCES:

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

JOHN C. NEIMAN, JR., ESQ., Solicitor General, Montgomery, Alabama; on behalf of Respondent.

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P R O C E E D I N G S

(10:25 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-9646, Miller v. Alabama. Mr. Stevenson.

ORAL ARGUMENT OF BRYAN A. STEVENSON
ON BEHALF OF THE PETITIONER

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

In Graham v. Florida, this Court recognized that children are inherently characterized by internal attributes and external circumstances that preclude a finding of a degree of culpability that would make a sentence of life imprisonment without the possibility of parole constitutionally permissible under the Court's Eighth Amendment excessiveness analysis.

While the issue in Graham involved juveniles that were convicted of non-homicide offenses, these deficits in maturity and judgment and decisionmaking are not crime-specific. All children are encumbered with the same barriers that this Court has found to be constitutionally relevant before imposition of a sentence of life imprisonment without parole or the death penalty.

In fact, in Roper, this Court acknowledged

1 that these differences between children and adults exist
2 even in the cases involving the most aggravated murders.
3 These deficits, these differences, are even more
4 pronounced in young children.

5 JUSTICE GINSBURG: Mr. Stevenson, but in
6 Roper, the Court also made the point -- when it ruled
7 out the death penalty, it said, "To the extent the
8 juvenile death penalty might have residual deterrent
9 effect, it is worth noting that the punishment of life
10 imprisonment without the possibility of parole is itself
11 a severe sanction."

12 So, the Court in Roper seemed to be
13 anticipating this case and suggesting that -- that it
14 was all right, it was constitutional.

15 MR. STEVENSON: There's no question, Justice
16 Ginsburg, that the -- the default sentence in Roper was
17 life imprisonment without parole, but we actually think
18 that, specifically with regard to that provision, there
19 is no greater deterrent effect, and these deficits, that
20 these problems that children experience, lend themselves
21 to an analysis that is subject when the punishment is
22 life imprisonment without parole. Like the death
23 penalty --

24 JUSTICE SCALIA: What about 50 years? Is
25 that -- is that too much?

1 MR. STEVENSON: What the Court held in -- in
2 Graham --

3 JUSTICE SCALIA: Well, you know, once --
4 once you depart from the principle that we've enunciated
5 that death is different, why is life without parole
6 categorically different from 60 years or 70 years or --
7 you know, you'd be back here next term with a 60-year
8 sentence?

9 MR. STEVENSON: Justice Scalia, I think
10 you're absolutely right, that there is a point at which
11 a term of year sentence could constitute the same kind
12 of judgment --

13 JUSTICE SCALIA: Okay.

14 MR. STEVENSON: -- as life imprisonment
15 without parole.

16 JUSTICE SCALIA: Good.

17 MR. STEVENSON: But there is a distinction
18 obviously between life imprisonment without parole and
19 any other term sentence. Those sentences in most
20 instances, if the sentence is not too extreme, do permit
21 the possibility of release. And what this Court held in
22 Graham is not that the State forfeits the ability to
23 incarcerate for life --

24 JUSTICE SCALIA: I'll change my -- I'll
25 change my question to 50 years without possibility of

1 parole.

2 MR. STEVENSON: Yes. And --

3 JUSTICE SCALIA: Then you have no -- no
4 distinction, right?

5 MR. STEVENSON: Well, I think there, it
6 would be a tough case. I think imposed on a juvenile, a
7 50-year sentence --

8 JUSTICE SCALIA: Without --

9 MR. STEVENSON: -- would not create the
10 meaningful possibility of release that this Court
11 ordered in the Graham context. It would be right on the
12 line, but I think 50 years would actually be on the
13 other side of a meaningful possibility of release. It
14 would be sort of a cynical reaction, if this Court were
15 to say we ban life without parole for these kinds of
16 offenders, it would be somewhat problematic to suggest
17 that we're going to get as close to death as possible
18 and then facilitate some kind of review. I think what
19 we're interested in --

20 JUSTICE SCALIA: How about 15 years old?
21 15, 60 years; or 14, 70 years?

22 MR. STEVENSON: I think all of the --

23 JUSTICE SCALIA: What -- what's the
24 distinction between 14 and 15?

25 MR. STEVENSON: Well, I think from a

1 sentencing perspective, all of those sentences would be
2 problematic. But the distinction between a 14-year-old
3 and a 15-year-old for constitutional purposes that, of
4 course, the younger you are, the more compelling are
5 these deficits, these distinctions, that --

6 JUSTICE SCALIA: I understand, but how are
7 we -- how are we to know where to draw those lines? We
8 can't do it on the basis of any historical tradition,
9 certainly.

10 MR. STEVENSON: Well, I think that --

11 JUSTICE SCALIA: The common law left it up
12 to the jury to take account of the youthfulness of the
13 offender.

14 MR. STEVENSON: Well, what I think --

15 JUSTICE SCALIA: They're all entitled to
16 jury trial, right, before their --

17 MR. STEVENSON: Well, that's true. But of
18 course in this case, Justice Scalia, and in the other
19 case, there was no discretion for the sentence. Neither
20 the judge nor the jury could give any effect to the age
21 of Evan Miller, who was 14. But I also think that we've
22 identified lots of laws that make these distinctions.
23 We do provide for greater responsibilities --

24 JUSTICE GINSBURG: Would that satisfy you if
25 the -- if it were not a mandatory term and it was left

1 to the trier to put -- put in all the mitigating
2 circumstances?

3 MR. STEVENSON: That would not satisfy me,
4 Justice Ginsburg, for all the reasons that this Court
5 acknowledged in Graham.

6 That -- that the problem with many of these
7 crimes is that the offense itself can overwhelm all of
8 these mitigating factors, all of these aspects of
9 juvenile decisionmaking that we think are
10 constitutionally permissible. The other problem is that
11 we still can't make good judgments about whether a
12 child -- whether these characteristics are transitory or
13 permanent.

14 JUSTICE KENNEDY: So, you're saying it would
15 be unprincipled for us to say -- or at least unsupported
16 for us to say -- that the sentence cannot be mandatory,
17 but that in some cases, it might still be imposed.

18 MR. STEVENSON: I think it would be
19 principled to -- to kind of strike down mandatory
20 sentences, but I think constitutionally what this Court
21 has recognized in Roper and in Graham, that it would be
22 a -- a mistake to equate kids with adults. And we don't
23 have the ability to make those judgments even if we
24 create a different kind of process.

25 JUSTICE SCALIA: Even --

1 JUSTICE KENNEDY: If you take that off the
2 table, then you leave us with nothing but saying that
3 the sentence is never permitted or that it's always
4 permitted.

5 MR. STEVENSON: Well, I -- I don't mean to
6 take it off the table; I just mean to argue, as we did
7 previously, that a categorical ban would be consistent
8 with the Court's understanding about child status and
9 development.

10 JUSTICE ALITO: If you could write the
11 opinion for us, what would you hold?

12 MR. STEVENSON: I would hold that children
13 are categorically prohibited from being subjected to
14 sentences --

15 JUSTICE ALITO: What's -- what's the
16 definition of a child for that purpose?

17 MR. STEVENSON: Well, we've presented data
18 in this case that would exclude a youth 14 and younger.
19 No State that has set a minimum age for life without
20 parole has set it beneath the age of 15, other than one.
21 And so, we -- we would make that holding. I do think it
22 would be --

23 JUSTICE ALITO: So, you -- you would hold
24 you can't -- there cannot be a sentence of life
25 imprisonment without parole for anyone under 15, but for

1 anybody over 15, it would be permissible.

2 MR. STEVENSON: No, I would also hold, Your
3 Honor, that a mandatory sentence for that cohort would
4 also be in violation of this Eighth Amendment principle.

5 JUSTICE GINSBURG: Well, you could say you
6 reserve that question for another day.

7 MR. STEVENSON: Well, I think that the
8 problem, Justice Ginsburg, is -- is that these cases
9 with the mandatory sentencing aspects to them create
10 kind of a data issue that this Court has usually relied
11 on to kind of generate an interest.

12 I think right now, we know that excluding
13 considerations of age and character in a sentencing
14 determination of life imprisonment without parole is
15 problematic. The Court in --

16 JUSTICE ALITO: Can you tell us where the
17 age line needs to be drawn for constitutional purposes?

18 MR. STEVENSON: I -- I would draw it at 18,
19 Justice Alito, because we've done that previously; we've
20 done that consistently.

21 JUSTICE ALITO: That's where you think the
22 logic of your argument leads.

23 MR. STEVENSON: That's exactly right.

24 JUSTICE ALITO: And you would say that a
25 17 -- a person of 17 years and 10 months, 11 months, who

1 commits the worst possible string of offenses still --
2 and demonstrates great maturity -- still cannot be
3 sentenced to life imprisonment without parole.

4 MR. STEVENSON: That's right, for the same
5 reasons that we made that determination in Graham and
6 that the Court made that determination in Roper. I
7 understand that there are some tensions when we draw
8 those kinds of lines --

9 JUSTICE SOTOMAYOR: I'm sorry. I thought
10 you just said a second earlier that you had a bifurcated
11 rule: No life without parole whatsoever for 15 and
12 under, and no mandatory life for 16 -- 15 and over.

13 MR. STEVENSON: That -- that would be -- I'd
14 have two rules, Justice Sotomayor. My preferred rule
15 would be a categorical ban on all juveniles under the
16 age of 18. And I don't want to retreat from that in any
17 way. All of these deficits, all of these
18 characteristics, that we're talking about have been
19 recognized to apply to all youth up until the age of 18.

20 JUSTICE SOTOMAYOR: How do you -- how do you
21 write the opinion to do the bifurcated rule? What
22 justifies an absolute ban at a certain age and a
23 modified ban above an age, and how do you deal with
24 Harmelin with respect to the second part of your rule --

25 MR. STEVENSON: Yes.

1 JUSTICE SOTOMAYOR: -- if Harmelin says we
2 don't look at individualized sentencing? So, how do we
3 get rid of the mandatory if that's what we're were going
4 to do?

5 MR. STEVENSON: It's a challenge, and I --
6 and I concede that. But I -- so, the first part of my
7 answer would be that I think the easier rule to write
8 would be that there is a categorical ban on all life
9 without parole sentences for all children up until the
10 age of 18, acknowledging --

11 JUSTICE SCALIA: How -- how do I come to
12 that decision? What do I -- just consult my own
13 preferences on this matter? Something like 39 States
14 allow it. I mean, the American people, you know, have
15 decided that that's the rule. They allow it. And the
16 Federal government allows it.

17 So, I'm supposed to impose my -- my judgment
18 on -- on what seems to be a consensus of the American
19 people?

20 MR. STEVENSON: Well, at least in this case,
21 you'd look to your precedent in Roper and in Graham,
22 which drew that line.

23 JUSTICE SCALIA: Well, that's not going to
24 help me, you know.

25 MR. STEVENSON: I understand --

1 (Laughter.)

2 MR. STEVENSON: I understand,
3 Justice Scalia, but I don't think you can draw much
4 comfort in the fact that 39 jurisdictions make this
5 theoretically possible. That same number existed in the
6 Graham context. Most of those jurisdictions have not
7 addressed a minimum age for life without parole.

8 In fact --

9 JUSTICE ALITO: What do you mean when you
10 say that, that they have not addressed it? If State law
11 allows it, have they not addressed it?

12 MR. STEVENSON: Yes. That is, what the
13 State permits is that --

14 JUSTICE ALITO: So, legislators don't
15 understand that their law permits this?

16 MR. STEVENSON: I don't think we can read
17 into a transfer judgment, which is the only judgment
18 that they've made. They've said that some children of
19 some age can be treated like adults. They haven't
20 talked about what that -- what the punishment should be.
21 And the reason why I say that, Justice Alito, is that in
22 many of these States, there's no minimum age for trying
23 a child as an adult.

24 JUSTICE ALITO: But I don't really
25 understand this argument. You mean the legislatures

1 have enacted these laws, but they don't realize that,
2 under these laws, a -- a person under the age of 18 may
3 be sentenced to life imprisonment without parole for --
4 for murder. They don't understand that?

5 MR. STEVENSON: They -- they have not
6 considered that or adopted or endorsed it, would be more
7 accurate.

8 JUSTICE KENNEDY: That's difficult because
9 the statistics show there are 2,300 prisoners now under
10 sentence of -- with life without parole for juvenile
11 murders and they're -- that were committed under 18.
12 2,300 nationwide.

13 MR. STEVENSON: That -- that's correct.

14 JUSTICE KENNEDY: So, it's very difficult to
15 assess your answer to Justice Alito that, oh, the
16 legislatures don't know about this.

17 MR. STEVENSON: Well, in -- that answer --
18 that number, Your Honor, is partly rooted in the fact
19 that these sentences are mandatory. There is no one
20 capable, once the court makes a decision to try the
21 child as an adult, to do anything to consider the status
22 of children.

23 JUSTICE KAGAN: Mr. Stevenson --

24 JUSTICE ALITO: If you think these
25 legislators don't understand what their laws provide,

1 why don't you contact them? And when they -- when you
2 tell them, do you realize that in your State a -- a
3 16-year-old or a 17-year-old may be sentenced to life in
4 prison without parole for murder, they'll say: Oh, my
5 gosh, I never realized that. Let's change the law.

6 MR. STEVENSON: Well, I -- I mean, I don't
7 think there are any legislatures that are -- that are
8 quick to make their sentences less -- more
9 compassionate, more responsive to -- to juvenile crime
10 of any sort.

11 JUSTICE ALITO: So, they've made a decision
12 on this. Now maybe it's a bad decision --

13 MR. STEVENSON: Yes.

14 JUSTICE ALITO: -- but I really don't
15 understand how you can argue that they have not made a
16 decision on this --

17 MR. STEVENSON: I think --

18 JUSTICE ALITO: -- and they are not aware of
19 what their law provides.

20 MR. STEVENSON: Yes. I think the strength
21 of my argument, Justice Alito, is that the States that
22 have actually considered, discussed, and passed laws
23 setting a minimum age for life without parole have all
24 set that minimum age above 15. That's my primary
25 argument. Thirteen States have done it; all of them

1 except for one have set it at 18 --

2 JUSTICE ALITO: And you think there is a
3 difference between the State that says expressly a
4 juvenile below a certain age may be sentenced to life
5 imprisonment without parole and a State that says that
6 if a person is convicted of capital murder, that
7 sentence may be imposed and, in another -- in another
8 provision, says that juveniles may be transferred for
9 prosecution as adults.

10 MR. STEVENSON: I --

11 JUSTICE ALITO: There's a difference between
12 those two?

13 MR. STEVENSON: There is. And that's
14 because the -- the transfer question, which is what
15 informs whether children can be subject to these
16 sentences or not, is a very different question. It's a
17 question about whether the juvenile system that may
18 mandate release at age 18 or age 21 is adequate for an
19 offender. It's not a judgment that that child should
20 therefore be subject to life imprisonment without
21 parole.

22 And so, you have this disconnect. You have
23 transfer judgments, which this Court recognized in
24 Thompson and in Graham were not proxies for sentencing
25 judgments. And because of that, it is a very different

1 calculation.

2 The second point is that if there is no
3 minimum age for trying children as adults or even
4 prosecuting children as adults, I think we'd have to
5 concede that there is an age at which a life without
6 parole sentence would be constitutionally impermissible
7 for any crime. And to the extent that the State hasn't
8 addressed that, which they clearly haven't -- you know,
9 in this cohort of 79 children with life without parole
10 for crimes at 14 and younger, more than half come from
11 States where there's no minimum age for trying children
12 as adults.

13 That means in that State, a 10-year-old
14 child would arguably have been contemplated by the
15 legislature to be an appropriate person for life without
16 parole, or an 8-year-old child and a 6-year-old child,
17 and I think that asks too much of these statutes.

18 JUSTICE SOTOMAYOR: Counsel, there is no
19 question that you're dealing with a much smaller
20 universe of children sentenced to life without parole
21 who are 14 and under. There's an argument that that's
22 because so few of them commit the crimes. But putting
23 that aside, the universe is rather small.

24 MR. STEVENSON: Yes, Your Honor.

25 JUSTICE SOTOMAYOR: All right? There is a

1 much, much larger group, as Justice Kennedy pointed out,
2 for life without parole for juveniles at 15 and above.

3 MR. STEVENSON: Yes.

4 JUSTICE SOTOMAYOR: Go back to my question.

5 MR. STEVENSON: Yes. Yes.

6 JUSTICE SOTOMAYOR: I need an answer to it.

7 MR. STEVENSON: Yes.

8 JUSTICE SOTOMAYOR: Which is, assuming --

9 MR. STEVENSON: Yes.

10 JUSTICE SOTOMAYOR: -- the bifurcated theory
11 that you proffered, tell me how we get around Harmelin.
12 How would you write that decision?

13 MR. STEVENSON: Yes. Well, I think that,
14 first of all, what this Court has relied on when it has
15 looked at these numbers, what it has been trying to
16 figure out, are these objective indicia of society's
17 standards, its mores, its decency meter, if you will.
18 And we've looked at these numbers to inform us, are
19 these sentences that are -- that are consistent with
20 evolving standards of decency, or are they now beyond a
21 maturing society? And we've always found in these data
22 some measures.

23 In the death penalty context, we've looked
24 at that in the Roper area, in the Atkins area, and we've
25 been able to make some judgments. The reason why we

1 could do it in these death penalty cases is that unlike
2 the cases here, the death penalty determination is
3 discretionary. The sentencer is required to consider
4 and evaluate a range of mitigating circumstances and
5 facts, including age, that help us assess whether the
6 determination that death is the appropriate punishment
7 means something in a society still trying to evolve.

8 Here that's not true. The majority of these
9 sentences are mandatory. So, the number tells us less
10 about what the Constitution requires --

11 JUSTICE KAGAN: Mr. Stevenson, do you have
12 statistics about how many of these sentences are imposed
13 in under 18-year-olds in nonmandatory States?

14 MR. STEVENSON: The -- the data on the
15 larger population is not as precise, Justice Kagan, as
16 it is with our younger population, but the majority of
17 States are mandatory States, and the estimates are about
18 that 85 percent of those sentences are mandatory
19 sentences. Certainly, the States that have the largest
20 populations -- Michigan, Pennsylvania -- these
21 States have mandatory regimes.

22 JUSTICE KAGAN: So, you think it would be
23 true, going up to age 18, that 80-plus percent are
24 imposed in States that have mandatory systems?

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

1 And, in fact, the overwhelming majority of those
2 sentences come from a handful of States where there is
3 very little discretion to impose a sentence other than
4 life imprisonment without parole.

5 And because of that feature, I don't think,
6 Justice Sotomayor, that the -- that the reliance on the
7 number is quite as powerful here as it has been in the
8 death penalty context, where that number represented a
9 very communal judgment with a lot of factors.

10 JUSTICE SOTOMAYOR: There wasn't a majority
11 in theory in Harmelin, and -- but at least three
12 Justices spoke about a gross disproportionality.

13 MR. STEVENSON: Right.

14 JUSTICE SOTOMAYOR: Is it your views that
15 life -- a mandatory life without parole for someone like
16 a juvenile is grossly disproportionate?

17 MR. STEVENSON: It is, for the very reasons
18 that the Court articulates in both Roper and Graham.
19 We're not arguing that life without parole is
20 disproportionate to the crime of aggravated murder.
21 We're arguing that the status of children, with all of
22 the deficits that childhood status creates, make that
23 kind of judgment cruel.

24 JUSTICE KENNEDY: If we can focus on the
25 mandatory aspects of the case, I think -- I know you'd

1 prefer a more general rule -- it may be that we have to
2 have your general rule. I'm not sure. If I'm the trial
3 judge, and I have to determine whether or not I'm going
4 to give life without parole, and it's discretionary,
5 what -- what do I look at? Are -- can I get social
6 scientists to come in and tell me what the chances of
7 rehabilitation are? Are there -- are there statistics?

8 Now, we have some quite compelling stories
9 of rehabilitation in this case. I don't know if they're
10 isolated; I don't know where they are in the statistical
11 universe of how often rehabilitation is -- is
12 demonstrated and is real. What do I look at? What's a
13 judge supposed to do?

14 MR. STEVENSON: Well, I think one of the
15 problems, Your Honor, with -- with trying to make these
16 judgments is that -- that even psychologists say that we
17 can't make good long-term judgments about the
18 rehabilitation and -- and transitory character of these
19 young people. That's the reason why in Graham this
20 Court didn't permit that kind of discretion. We know
21 that --

22 JUSTICE SCALIA: Well, I thought that modern
23 penology has abandoned that rehabilitation thing, and
24 they -- they no longer call prisons reformatories or --
25 or whatever, and punishment is the -- is the criterion

1 now. Deserved punishment for crime.

2 MR. STEVENSON: Well --

3 JUSTICE SCALIA: Now, if that's the
4 criterion, is everything that you say irrelevant?

5 MR. STEVENSON: I --

6 JUSTICE SCALIA: Let's assume I don't
7 believe in rehabilitation, as I think sentencing
8 authorities nowadays do not. Both at the Federal and
9 the State levels, it's been made clear.

10 MR. STEVENSON: Well, I -- I -- no. I think
11 it would still be relevant, Justice Scalia, but -- but I
12 also don't think that correctional facilities have
13 identified themselves as having no role to play in the
14 rehabilitative process. I mean, one of the problems
15 with this sentence of life imprisonment without parole
16 is that it actually bans and shields this population
17 from a whole range of services that are specifically
18 designed to rehabilitate: education services, treatment
19 services, anger management programs. All of these
20 programs exist within prisons, including the Federal
21 prisons, because we do care how people perform when they
22 are released. And so, corrections is still very much
23 the heart and soul of what we do.

24 But even if it wasn't, punishment
25 nonetheless has to be proportionate, and recognize that

1 it can be excessive. And what this Court has said is
2 that when you're looking at children, to equate the
3 failings of a child and an adult would be cruel. It
4 would be unfair to -- given our knowledge and
5 understanding of what developmental science has taught
6 us and what we know about kids.

7 JUSTICE KENNEDY: Well, again, it seems
8 you're just forcing us into a -- a bipolar position.
9 We're either going to say that you can't prevail at all
10 or that everyone under 18 is -- cannot get life without
11 parole. I don't see this middle course --

12 MR. STEVENSON: Yes.

13 JUSTICE KENNEDY: -- which you seem to have
14 abandoned, and you can't tell me how a judge would apply
15 it if we -- if we chose not to abandon it.

16 MR. STEVENSON: Well, I -- I don't intend to
17 abandon it, Justice Kennedy. I mean, obviously, I'm
18 arguing for this categorical ban, but I think the Court
19 could obviously do something else.

20 We think that there is a basis for
21 concluding, unquestionably, that a child under the age
22 of 15 should not be exposed to life without parole based
23 on this Court's precedents and on the data that's
24 presented. The Court could set a categorical line there
25 and, at the same time, make a determination that

1 subjecting any child under the age of 18 to life without
2 parole where there is no ability to consider age is
3 fundamentally at odds with what this Court has now
4 constitutionally recognized in both Roper and Graham.

5 JUSTICE GINSBURG: Mr. Stevenson, may I ask
6 you a case -- a question specifically about the Miller
7 case? There were two boys involved in this horrendous
8 crime. The older one took a plea and got life with
9 parole. Was the plea offered to Miller?

10 MR. STEVENSON: No plea was offered to
11 Miller. The -- what tends to happen, and there was some
12 evidence of this that was developed earlier, is that the
13 question was who was going to give a statement first,
14 who was the most cooperative, whose lawyer is most
15 effective at accomplishing that. There were some
16 complaints. There's a postconviction pending now that
17 makes some allegations about what the lawyer didn't do
18 to facilitate a plea. But, no, there was no offer of
19 life with parole made to Evan Miller.

20 And one of the difficulties, of course, in
21 these cases is that, you know, the younger you are, the
22 more vulnerable you are, the less experienced you are,
23 and the less capable you are of managing these dynamics
24 in the criminal justice system that sometimes can be
25 very outcome-determinative.

1 CHIEF JUSTICE ROBERTS: Any idea how many
2 juveniles subject to a sentence of life without parole
3 do plead to a lesser sentence?

4 MR. STEVENSON: Well, no, it's very hard to
5 determine, mostly because states don't keep data --

6 CHIEF JUSTICE ROBERTS: Right.

7 MR. STEVENSON: -- on the issue.

8 CHIEF JUSTICE ROBERTS: Is there any reason,
9 just -- I realize it's speculation, but wouldn't you
10 think prosecutors would view that as a particularly
11 attractive offer to someone who's young in the sense
12 that they may regard the sentence as extraordinary
13 themselves, that it may be particularly attractive to
14 someone who's young in a way that it wouldn't be a
15 40-year-old, a -- an offer of 25 years may not be as
16 attractive as it is to a 15-year-old?

17 MR. STEVENSON: Well, they might. And I
18 would concede, Your Honor, that this population is kind
19 of less equipped to make determinations about whether to
20 take a plea or whether to not take a plea than an adult.

21 CHIEF JUSTICE ROBERTS: It might be also a
22 basis for -- to question the statistics you put forward
23 about how often --

24 MR. STEVENSON: Yes.

25 CHIEF JUSTICE ROBERTS: -- this sentence is

1 actually imposed. In other words, the evolving
2 standards of decency you suggest -- the prosecutors in
3 the state may not be immune to that evolution, either.

4 MR. STEVENSON: They may not be, Your Honor,
5 but we haven't found sort of -- at least in this
6 population, any evidence that they are capable of
7 protecting children who, we believe at least, should be
8 protected. And one of the interesting things at least
9 looking at this cohort of 79, a great number of them
10 have older codefendants. Both of the kids in the cases
11 before the Court today have older codefendants who got
12 sentences that were less than life without parole. In
13 the Kuntrell Jackson case --

14 CHIEF JUSTICE ROBERTS: Well, but those
15 statistics aren't very helpful because we have no idea
16 in the particular cases as to whether or not perhaps the
17 older offender was less -- less guilty than the 16-,
18 17-, 15-year-old.

19 MR. STEVENSON: That -- that's right.
20 Although in some of these cases when you read the
21 opinions, you do see the evidence of the shooter not
22 getting the life without parole sentence and the
23 accomplice getting it. And I guess my point would be is
24 that --

25 JUSTICE SOTOMAYOR: That happened in

1 Jackson.

2 MR. STEVENSON: Yes, it did. Yes, it did.

3 And my point would be that it -- this younger population
4 is going to be disadvantaged in managing this aspect of
5 the process that I think is quite important when the
6 Court is trying to consider whether there should be a
7 categorical ban or something less than a categorical
8 ban.

9 And, Justice Kennedy, I don't mean to
10 suggest that the Court cannot, consistent with its
11 precedents, make a categorical ban under 17. But I also
12 don't mean to suggest that if the Court can't do that,
13 that there aren't ways of reconciling the precedents,
14 drawing a line at 15 and striking down mandatory life
15 without parole. I would urge, for the reasons that
16 we've stated, that in these circumstances it's better to
17 have a sentence where you can make a judgment about
18 rehabilitation and public safety later in life.

19 We're not arguing that the State has to give
20 away the authority to incarcerate someone even for the
21 rest of their life -- life without parole, which is
22 available in this State, Alabama, would facilitate that,
23 but creates a meaningful possibility of release that
24 this Court has ordered to be constitutionally necessary
25 in *Graham v. Florida*.

1 I see my white light is on. I'll reserve
2 the rest of my time for rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Stevenson.

5 Mr. Neiman.

6 ORAL ARGUMENT OF JOHN C. NEIMAN, JR.,

7 ON BEHALF OF THE RESPONDENT

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

10 Imposing life without parole sentences on
11 aggravated murder offenders like Evan Miller is in line
12 with the national consensus, is morally justified, and
13 is consistent with legitimate penological goals.

14 I'd like to touch on all three of those
15 points at some juncture today if I can, but I'd like to
16 start if I can with the conversation Mr. Stevenson was
17 having with a few of the Justices about the national
18 consensus issue in this case and more particularly what
19 we can infer about the judgment of legislatures and
20 ultimately the people based on the statutes we have in
21 this case and the very different set of circumstances
22 we're looking at here then the circumstances the Court
23 was looking at in Graham.

24 Exhibit A on that front is the fact that out
25 of the 39 States or jurisdictions that allow this

1 sentence, as Mr. Stevens has indicated -- or Mr.
2 Stevenson has indicated, a good chunk of them, 27 in
3 all, make the sentence the minimum sentence under the
4 statute. That's an important fact both because it tells
5 us a little bit about the retributive goals that the
6 legislatures were trying to achieve through these
7 statutes, but it also --

8 JUSTICE KENNEDY: Life without parole is the
9 minimum?

10 MR. NEIMAN: Life without parole is the
11 minimum sentence for anyone who commits an aggravated
12 murder or at least certain kinds of aggravated murders
13 in 27 of those jurisdictions.

14 JUSTICE KENNEDY: That's also -- that's also
15 the maximum because there could be no death penalty.

16 MR. NEIMAN: For a juvenile, yes, Justice
17 Kennedy, that's correct. And effectively the message
18 that the legislatures are sending is that with respect
19 to aggravated murders, the worst of the worst kinds of
20 murders, there are effectively two sentences. There is
21 either the death penalty or there is some sort of
22 mitigating circumstance. The person is at least going
23 to serve life without parole in order to --

24 JUSTICE BREYER: Of the numbers, the 79 to
25 82 -- I guess there's some disagreement whether it's 82

1 or 79. Regardless, in your opinion, or maybe it's in
2 the briefs, I just can't remember it, of those, say, 79,
3 how many are there for reasons of mandatory sentence
4 where they would not -- no one could consider the
5 individualized nature of the crime or the criminal?

6 MR. NEIMAN: We don't have precise
7 statistics, sir. I should say I --

8 JUSTICE BREYER: What's your estimate?

9 MR. NEIMAN: I can't vouch to the statistics
10 on that point.

11 JUSTICE BREYER: That's all right. What's
12 your estimate?

13 MR. NEIMAN: My answer is I don't know, in
14 terms of how many are mandatory and how many are not.
15 Mr. Stevenson --

16 JUSTICE BREYER: Well, how many come from
17 the States that have this mandatory system? That
18 shouldn't be too hard to find out.

19 MR. NEIMAN: Well, overall, Mr. Stevenson
20 cited about 8 who were sentenced pursuant to
21 non-mandatory schemes of the 79 to 82.

22 JUSTICE BREYER: Non-mandatory. So --

23 MR. NEIMAN: Correct.

24 JUSTICE BREYER: So, you think it's
25 almost -- it's probably 90 percent.

1 MR. NEIMAN: According to Mr. Stevenson's
2 statistics, it's about 90 percent of the cohort that
3 comes from the mandatory jurisdiction.

4 JUSTICE BREYER: And that's -- all right.
5 It's about 70 or 71, and I remember reading a statistic
6 somewhere where they managed to count up the number of
7 possibilities, i.e., serious murders committed by those
8 under 15 over 50 years or some long number of years, and
9 it was somewhere in the 70,000s, what was it? Or
10 20,000s? What was it?

11 MR. NEIMAN: Your Honor, the statistics I
12 have seen that Mr. Stevenson cited in his reply brief
13 had 7500 --

14 JUSTICE BREYER: Seventy-five hundred?

15 MR. NEIMAN: -- as the number of arrests of
16 persons under the age of 15 for committing homicide or
17 non-negligent manslaughter.

18 JUSTICE BREYER: I'll read it.

19 MR. NEIMAN: But that --

20 JUSTICE BREYER: It's about 1 percent.

21 MR. NEIMAN: It --

22 JUSTICE BREYER: One percent. If I carry
23 that number around in my mind, that 1 percent of those
24 who might have obtained this terrible penalty, 1 percent
25 are actually given it?

1 MR. NEIMAN: Your Honor, as Graham
2 indicated, that denominator is crucial. But the 7500
3 number cannot be the appropriate denominator for
4 determining whether actual sentencing practices indicate
5 a national consensus against this practice. The reason
6 why is because that 7500 number is not the number of
7 convictions; it's not the number of opportunities that
8 judges would have had to impose this sentence. It is
9 the number of arrests. And it's the number of arrests
10 over the course of 40 years in every jurisdiction,
11 including those that don't impose life without parole at
12 all.

13 JUSTICE BREYER: I see. All right.

14 JUSTICE SOTOMAYOR: Counsel --

15 JUSTICE ALITO: It's not even for homicide
16 offenses that would qualify for life imprisonment
17 without parole for an adult. It's for any non-negligent
18 homicide; isn't that right?

19 MR. NEIMAN: That's correct, Justice Alito.
20 And the real denominator here, the one the Court ought
21 to look at when it considers the role that actual
22 sentencing practices play in the analysis, ought to be
23 the number of aggravated murder convictions.

24 JUSTICE BREYER: All right, but what's
25 the --

1 MR. NEIMAN: That's a number we don't have.

2 JUSTICE BREYER: It must be easier to get to
3 this, I guess, so I'll -- but I want to be sure you do
4 at some point. And I'm not certain it's a cruel and
5 unusual punishment argument. It may be more of a due
6 process argument. But I want to know the
7 justification -- given all those statistics that you've
8 seen and that was in Roper and so forth, procedurally
9 speaking, what is the justification for not giving the
10 defendant any opportunity to point to mitigating
11 features in his lack of development, in his age, in his
12 upbringing, et cetera? That to me is a difficult
13 question, but before we get to that topic, I'd -- go
14 ahead.

15 JUSTICE SOTOMAYOR: Actually, I do want to
16 ask, and it dovetails with what Justice Breyer is
17 asking, the Edmund/Tison line for adults, which is we
18 can't execute someone who hasn't killed, intended to
19 kill or was reckless in killing. This is a question
20 more in the Jackson case, because I think it's an issue
21 there. But although all murder is heinous and
22 regrettable, there are different kinds of murder.
23 That's why some people are subject to the death penalty
24 and others are not. And I do see a world of difference
25 between the Miller killing and the Jackson killing,

1 vis-à-vis, the individual defendants' personal
2 liability.

3 So, assuming there are different kinds of --
4 of killings -- of murder, should we be looking at the
5 Edmund/Tison line at all? Should we be talking about
6 its application to juveniles in a different way?
7 Edmund/Tison basically, okay, felony murder if you know
8 that there's a gun involved, but should that line be the
9 same for juveniles?

10 And, if so, then how do you go back to
11 justifying, as Justice Breyer spoke about, the mandatory
12 nature of life imprisonment without parole, given that
13 not every juvenile is equal and not every murder is
14 equal with respect to them?

15 MR. NEIMAN: Justice Sotomayor, the clearest
16 line the Court could draw on this front would be the
17 line that the Court initially set out in Graham as
18 between homicide and non-homicide offenses. Perhaps
19 there would be some question about whether an Edmund
20 type felony murder counts as a homicide offense or not,
21 but my suggestion is that it would, at least if the
22 Court is looking for a clear line that wouldn't
23 undermine too much of what the Court set out in Graham
24 in terms of clearly distinguishing between homicide and
25 non-homicide offenders.

1 Nonetheless, I certainly agree that there
2 are fundamental differences between certain kinds of
3 murders, and I think that judgment is reflected in the
4 legislation we have in at least 27 of these States,
5 where aggravated murder in the very least carries with
6 it a life without parole sentence for any defendant
7 regardless of the mitigating circumstances.

8 JUSTICE SOTOMAYOR: That is not an
9 individual legislative determination. That is -- that
10 is just --

11 MR. NEIMAN: It is a legislative
12 determination that aggravated murder as a class of
13 offenses is so contrary to society's values, and so
14 contrary to the dignity that we assume that every victim
15 ought to be afforded, that life without parole is the
16 appropriate sentence.

17 So I think there is an inference to be made
18 there about the legislative judgment, particularly
19 because the sentence is a minimum one. The three
20 Justice concurrence, you mentioned, Justice Sotomayor,
21 from Harmelin makes this point -- point quite vividly.

22 In *Solem v. Helm*, the Court had struck down
23 a sentence under the gross disproportionately analysis,
24 and the Harmelin concurrence indicated that the Court
25 was a little more comfortable doing that, because the

1 sentence in that case was above the minimum, and thus,
2 did not reflect the judgment of the legislature.

3 But when we are talking about the minimum
4 sentence, it's fair to infer that that is the sentence
5 that the legislature not as a class, in terms of a class
6 of offenses, that would be the minimum appropriate
7 sentence for that particular crime. Now,
8 Justice Breyer --

9 CHIEF JUSTICE ROBERTS: When you -- it's a
10 little confusing to me, but when you refer to "minimum,"
11 I assume that was because of the statutes prior to
12 Graham had death as one of the other options, that that
13 is no longer an option. So it's -- it's a little
14 awkward to refer to it as minimum when it's also the
15 maximum.

16 MR. NEIMAN: That's correct,
17 Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: When you have --
19 when an individual is prosecuted for an aggravated
20 murder that carries this sentence, is it typical to also
21 charge lesser included offenses?

22 MR. NEIMAN: Yes, Mr. Chief Justice, and --

23 CHIEF JUSTICE ROBERTS: And -- and in
24 general, what is the distinction between exposure to
25 the -- the maximum crime and a lesser included crime?

1 In other words, what is the difference between
2 aggravated murder and manslaughter? It typically turns
3 on the state of mind, doesn't it?

4 MR. NEIMAN: That's correct,
5 Mr. Chief Justice.

6 CHIEF JUSTICE ROBERTS: So, is there any
7 reason to think that juries in the case where they have
8 the option for lesser included offenses might be
9 concerned in light of the age of the defendant about
10 whether or not the requisite intent was formed?

11 It seems to me that some of the issues that
12 we have suggested justify a different treatment of
13 juveniles have to do with mental development, and those
14 same issues would be taken into account by a jury in
15 considering which of a list of offenses the juvenile
16 should be convicted of.

17 MR. NEIMAN: Mr. Chief Justice, it is
18 certainly within the realm of reason and possibility
19 for --

20 JUSTICE GINSBURG: Was it -- was it a factor
21 in Miller's case? Was there a lesser -- lesser offense
22 that was charged?

23 MR. NEIMAN: Yes, Justice Ginsburg, there
24 were lesser included charges of at least felony murder
25 which has a very different intent type element to it.

1 But Miller, at least with respect to the charge on
2 capital murder committed in the course of arson which is
3 an intentional murder was found guilty by the jury on
4 that charge.

5 JUSTICE GINSBURG: He was -- the -- there
6 was also a felony murder charge in the Miller case?

7 MR. NEIMAN: Yes, Justice Ginsburg, there
8 were two felony murder charges, one as to the robbery in
9 the case and one as to the arson in the case.

10 JUSTICE SCALIA: So -- so it may not be
11 realistic to speak of mandatory life without parole.
12 It's only mandatory if the youth is convicted of the
13 highest charge brought, but it remains within the power
14 of the jury, in light of the youth, to convict him of a
15 lesser offense which would not produce mandatory life
16 imprisonment without parole?

17 MR. NEIMAN: I suppose that's so,
18 Justice Scalia.

19 JUSTICE KENNEDY: Are juries instructed that
20 life without parole is a necessary consequence of their
21 decision? I suppose a defense attorney could argue it.

22 MR. NEIMAN: Justice Kennedy, actually, I
23 think you are right to the extent you are suggesting
24 that juries probably don't -- aren't actually instructed
25 on that point. In fact, it would probably be reversible

1 error, I suppose --

2 JUSTICE KENNEDY: I would think so.

3 MR. NEIMAN: -- for a jury to be instructed
4 on that point. Nonetheless, the judgment that
5 legislatures have reached in terms of setting life
6 without parole as a floor for, you know, any murderer is
7 one that was -- that is reasonable and justified and --

8 JUSTICE KAGAN: Mr. Neiman, I wonder if we
9 can go back to the issue that Justice Breyer left on the
10 table, and this doesn't have much to do with how many
11 States do what, but instead just to say that in the
12 death penalty context, we have insisted on
13 individualized sentencing. And in Graham, of course, we
14 equated juveniles who were sentenced to life without
15 parole to people who -- to adults who were sentenced to
16 death and said that those two should be treated
17 equivalently.

18 And I'm wondering whether that doesn't
19 suggest that the rules we have in the death penalty
20 context about individualized sentencing ought to apply
21 to juveniles who are sentenced to life without parole?

22 MR. NEIMAN: Justice Kagan --

23 JUSTICE KAGAN: Regardless of how many
24 States do what and how many times this happened, but
25 just, you know, two facts. We have insisted on this in

1 the death penalty context, and we have equated the death
2 penalty context to juveniles without life -- parole in
3 Graham.

4 MR. NEIMAN: Justice Kagan, the answer on
5 that front, I think, is that Harmelin effectively sets a
6 bright line here such a that individualized sentencing
7 is only required in a -- in a death penalty case. And
8 it does so --

9 JUSTICE KAGAN: But Harmelin is pre-Graham,
10 and in Graham we equated these two things, adults
11 sentenced to death and juveniles sentenced to life
12 without parole.

13 MR. NEIMAN: Well, the reason why Harmelin
14 drew that line, and I guess more to the point, the
15 reason why Woodson v. North Carolina and Lockett v. Ohio
16 held that individualized sentencing was required in the
17 death penalty context was not because the sentence
18 happened to be the highest sentence that someone could
19 receive, but because the sentence was death. And there
20 were certain --

21 JUSTICE ALITO: In Graham, didn't the Court
22 reject the idea of individualized sentencing in which
23 youth would be taken into account on a case-by-case
24 basis?

25 MR. NEIMAN: That's correct, Justice Alito.

1 The States were here jumping up and down asking for that
2 precise result, and we did not get it. And the reason
3 why, the result the Court thought was appropriate was
4 rather than allowing the defendant to argue for
5 mitigating circumstances and for the State to respond
6 with aggravating circumstances in one of these cases,
7 the answer was for the juvenile to get a mitigation
8 trump card.

9 And in one of these sentencing proceedings,
10 the juvenile would be able to say, I'm a juvenile, and
11 that means that I don't get the highest sentence I
12 otherwise would get. I win the sentencing phase as --
13 as a matter of law.

14 JUSTICE KAGAN: But the fact that we said
15 that individualized sentencing was not enough in one
16 context does not suggest that individualized sentencing
17 ought not to be the rule in a different context where
18 there is no categorical bar.

19 MR. NEIMAN: Justice Kagan, the response on
20 that front, I think, is that the rule from Woodson and
21 Lockett requiring individualized sentencing was one that
22 is specifically tailored to the unique aspects of the
23 death penalty, aspects that remain unique,
24 notwithstanding Graham and the rule it imposed with
25 respect to juveniles.

1 But also Woodson and Lockett -- although I
2 realize the premise of your question is that we should
3 not look at what other States are doing, the premise of
4 Woodson and Lockett was that States had widely rejected
5 mandatory death penalty sentencing, and we know from the
6 legislative record here that States have done quite the
7 contrary when it comes to mandatory life without parole
8 sentencing --

9 JUSTICE BREYER: So is that -- I have -- I
10 understand your arguments, both sides. I think I've
11 pretty much gotten the arguments on the question of the
12 individualized sentencing. You can make an argument
13 that it should be individualized, life without parole up
14 to age 18. Say 7 through 17, and there is an argument
15 the other way which you are making, okay.

16 What I want to know is your argument the
17 opposite way on this one. What's the minimum age, in
18 your opinion, or is there any constitutional minimum at
19 all in respect to which you could give for a murder a
20 child life without parole? I mean, you could have an
21 instance of a 10-year-old or an 8-year-old. I mean, is
22 it totally up to the States, or is there a minimum? And
23 if there is a minimum, what is it in your opinion.

24 MR. NEIMAN: Yes, Justice Breyer, I think
25 there is a minimum now.

1 JUSTICE BREYER: What is it?

2 MR. NEIMAN: It -- I would be hesitant to
3 commit to a minimum without --

4 JUSTICE BREYER: Well, do your best.

5 MR. NEIMAN: Without further factual
6 development --

7 JUSTICE BREYER: Do you want to say 12? Do
8 you want to say 10? Do you want to say 9? Because as
9 soon as whatever you say, I'm going to say, "and why not
10 14?"

11 (Laughter.)

12 MR. NEIMAN: Okay. I will say -- I would
13 argue if I were the State up here trying to defend a
14 12-year-old sentence, I would argue that that was the
15 line. So a 12 -- well, no -- well, yes. Someone who's
16 either --

17 JUSTICE BREYER: Do you see the difficulty?
18 All right. So now put yourself in my position.

19 JUSTICE SCALIA: I was beginning to agree
20 with you about this case, because I thought you were
21 appealing to what the American people think about the
22 line or maybe to the common law, now that common law had
23 a rule of the age of reason. I think below 12, you
24 couldn't -- at least you couldn't impose the death
25 penalty. Maybe you couldn't even convict for a felony.

1 But you just plucked some number out of the air. Why
2 can't I pluck one out of the air if you pluck one out of
3 the air?

4 MR. NEIMAN: Justice Scalia, I was about to
5 give Justice Breyer the arguments that I would make if I
6 were the State in those circumstances about why that's
7 the line. Reason number one is national consensus.

8 JUSTICE ALITO: If we look to objective
9 indicia, as all of the cases in this line have, what is
10 the lowest age as to which you can say there is any
11 indication of a societal consensus that this is okay?
12 Would it be 14?

13 MR. NEIMAN: Well --

14 JUSTICE ALITO: How many States allow it for
15 a 13-year-old or a 12-year-old?

16 MR. NEIMAN: The number of States that allow
17 it for a 12-year-old are somewhere around -- well, I
18 suppose that number is close to 10 or so. So that's one
19 reason I would draw the line around 12 or so. If you
20 look at, for example, the table --

21 JUSTICE ALITO: 10 states will allow it for
22 a 12-year-old. How many would allow it for a
23 13-year-old? Do you happen to know?

24 MR. NEIMAN: At that point, we are getting
25 up to much more substantial numbers. I guess when we

1 get up to 14, we are somewhere in the realm of 30 or
2 more.

3 JUSTICE GINSBURG: If you take into account,
4 when the -- the child is in the juvenile system
5 initially, has to be moved to the adult system. Is the
6 judgment -- is there any cutoff on the transfer? Or can
7 a child be transferred to the adult system at any age?

8 MR. NEIMAN: Well, that I think is the
9 appropriate line in terms of thinking about what the
10 minimum is here. The answer depends on the
11 jurisdiction. In Alabama, 14 is the minimum. But that
12 number is, compared to a lot of other jurisdictions, a
13 little high.

14 JUSTICE GINSBURG: So if you are under 14,
15 you can't be transferred out of the juvenile system?

16 MR. NEIMAN: That's correct. In Alabama, if
17 you are under 14, you can't be transferred out. Now,
18 many other States, at age 13, you can be transferred
19 in -- you can be transferred into the adult system which
20 is why there are few 13-year-olds serving this sentence
21 but --

22 JUSTICE GINSBURG: If he were only 13, he
23 would get out when? When he was 21?

24 MR. NEIMAN: In Alabama, the juvenile
25 justice system's jurisdiction terminates at 21, yes.

1 JUSTICE BREYER: That's why he is arguing
2 that the legislatures don't focus on it. If you do a
3 public opinion poll, or just ask me, for example, or ask
4 anyone, you say the question is: Should -- at what age
5 should juveniles be able to be transferred out of the
6 juvenile system into the adult system?

7 You might get one answer. Maybe 14, maybe
8 15, maybe 12.

9 But if you put the question: At what age
10 should they be receiving a mandatory life without
11 parole, the answer might be different. And his point is
12 they never ask that question. They ask the first
13 question; not the second. And that disturbs me enough
14 to think that I can't think the answer to this question
15 I asked you just relies on public opinion polls or even
16 just the number of States. I am not sure about it.

17 But that's why I want to hear your response,
18 because it sounds like we are arguing between whether it
19 should be 13, 12, or 14, in terms of an absolute cutoff.
20 So how do I approach that? I'm asking you for help on
21 that one. I know you have a side in this. But I say,
22 well, we are talking about 14, and we have all this
23 scientific literature and so forth.

24 MR. NEIMAN: Justice Breyer, the reason why
25 it's fair to infer that legislatures would have

1 concluded that a 14-year-old, for example, in Alabama
2 would be subject to a mandatory life without parole
3 sentence is precisely because it's mandatory. Surely
4 the legislatures understood that when they were
5 transferring persons who committed crimes like
6 aggravated murder that were well within the heartland of
7 the crimes for which the transfer statutes were
8 intended, those offenders would be subject to the
9 minimum sentences at least.

10 It's quite another thing to say, well, the
11 legislature might have enacted a statute providing for
12 transfer for a 14-year-old; and for a non-homicide
13 crime, they might have assumed that the person would get
14 less than the maximum in terms of life without parole.
15 But surely the legislators understood that those
16 offenders would at least get the minimum.

17 And the reason the line is more safely drawn
18 at 13 or 12, it's because if you look at, for example,
19 the tables from the Department of Justice reports that
20 both sides and the amici have cited listing the transfer
21 ages, by and large, the number seems to be cut off at 12
22 or so. And 12 would be on the very bottom of the range;
23 and if I were a defense attorney, I would be arguing
24 much harder for a line at 13 than 12. I imagine if I
25 were a defense attorney, I'd be arguing for an even

1 higher line than that.

2 But the point is that if we are going to
3 judge this in terms of objective indicia of what society
4 has decided, that seems to be the line that society has
5 drawn. That line --

6 JUSTICE KENNEDY: In the Petitioner's brief,
7 the idea of deterrence kind of drops by the way side.
8 Have there been any studies that show that there is a
9 deterrence value? I remember in Roper, there was
10 actually discussion among the young people before they
11 committed the crime as to whether or not they could get
12 the penalty. It was actually right there in the record.
13 Does the State rely on the deterrence component of the
14 punishment here?

15 MR. NEIMAN: Justice Kennedy, we think that
16 deterrence is in the mix, but it's certainly not the
17 primary goal that these statutes serve when --

18 JUSTICE KENNEDY: Is it retribution?

19 MR. NEIMAN: Retribution, Justice Kennedy,
20 would be the primary goal, bringing society's
21 retributive force to bear on those who commit the worst
22 sort of crimes.

23 JUSTICE KENNEDY: Retribution, of course, is
24 related to personal culpability. We said that in Tison,
25 and that loops back into the minor problem.

1 MR. NEIMAN: That's exactly right,
2 Justice Kennedy, but I think one point on which Mr.
3 Miller and the State fundamentally disagree here is it
4 what we can conclude about a juvenile's culpability when
5 the juvenile has committed aggravated murder. The
6 reason why Graham came out as it did, the reason why
7 life without parole was not permissible, was because
8 Graham himself had not committed murder. The Court
9 there said that meant that Graham's culpability was
10 twice diminished, once because he was a juvenile and
11 once because he had not committed murder.

12 Well, here we have the hypothetical from
13 Graham where the one level of diminishment is gone. And
14 Miller has -- Miller is entitled to a one-level
15 diminishment because of his juvenile status, but he is
16 not entitled to that second level of diminishment which
17 he is what he is seeking here.

18 JUSTICE KENNEDY: Are you aware of any
19 statistics that give us some quantitative sense as to
20 how many juveniles after years and years of prison show
21 significant rehabilitation? Do we know anything about
22 that?

23 MR. NEIMAN: Justice Kennedy, I know of no
24 statistics on that particular front. I imagine that
25 some vignettes could be told about success stories and

1 some vignettes could be told about stories that were not
2 success stories.

3 JUSTICE SCALIA: Do you have any reason to
4 think that juveniles are any better than anyone else as
5 far as learning from prison is concerned? I mean,
6 recidivism is a big problem, isn't it? People who have
7 been to prison go out and commit the same crimes again,
8 don't they?

9 MR. NEIMAN: That's exactly right,
10 Justice Scalia.

11 JUSTICE SCALIA: Is there any reason to
12 think that juveniles are any different?

13 MR. NEIMAN: Justice Scalia, I haven't seen
14 any studies that would suggest that juveniles do better,
15 particularly when they are subjected to the sorts of
16 crimes that I think everyone would have -- or the sorts
17 of offenses, let me say, that I think everyone would
18 agree the Constitution would have to permit a sentence
19 of say 40 years minimum or the like.

20 So I just don't think -- I think society --
21 society's primary goal here or the Government's primary
22 goal here is expressing the retributive judgment about
23 the wrongfulness of murder and why it's different from,
24 not homicide, but I think governments are quite
25 legitimate and quite reasonable when they also say that

1 they don't want to roll the dice on convicted murderers.
2 Society acts with particular revulsion when a convicted
3 murderer commits a crime again.

4 And even if -- and even if that difference
5 in terms of recidivism is no different, or even if the
6 possibility for recidivism is no different, the fact
7 that the person committed a murder once and might commit
8 a murder again is reason enough for legislatures to be
9 hesitant to allow for parole in these circumstances.

10 With respect to the penological purposes,
11 there's also an important purpose here with respect to
12 the unique factors and the unique circumstances that
13 murder victims and their families face.

14 I think a lot of people hear about
15 life-without-parole sentences, and if they impose them
16 on political grounds or policy-based grounds, one of
17 their sort of pragmatic responses is, well, what's the
18 cost to all this? Why not just let these guys get their
19 parole hearings, give them that hope, and likely they
20 won't get parole anyway?

21 And there's really no cost to society at
22 least in allowing that process to occur, but the cost is
23 to the victims and their families who have to endure
24 what are often very painful hearings and parole
25 hearings. And when those come up on a frequent basis,

1 that sort of re-traumatization process is something that
2 governments can legitimately take into account when they
3 decide that for aggravated murder -- not for other
4 crimes but for aggravated murder -- that a
5 life-without-parole sentence is an appropriate sentence.

6 On the moral culpability point, there would
7 be some anomalies created by the rule that Miller is
8 seeking here. Miller's asking the Court to effectively
9 hold him in the same place in terms of his moral
10 culpability as the defendant in Graham. In other words,
11 Graham can only get life -- life with parole because of
12 his reduced moral culpability. And Miller is saying he
13 should only get life without parole because of his
14 reduced culpability.

15 So that would mean one of two things:
16 either the Eighth Amendment would put a murderer on the
17 same moral level as someone who committed a non-homicide
18 crime as in Graham; or Graham himself would be back in
19 this Court or a court of another jurisdiction arguing
20 that because Graham held that Graham himself had
21 categorically less culpability than someone like Miller,
22 then Graham himself is entitled to a lesser punishment
23 than the one that Miller, in fact, received.

24 JUSTICE KAGAN: When you look at those two
25 cases and you look at the individuals, the child's

1 actions in the two cases, they really are remarkably
2 similar. They're sort of -- of a piece. Don't you
3 agree? I mean, how is it that the child's actions in
4 this case were any different from that in Graham?

5 MR. NEIMAN: Justice Kagan, I think that
6 Miller's actions were dramatically different from
7 Graham's actions; in part because Miller intended to
8 kill this victim, and killed the victim in a rather
9 gruesome way. So there's not an element of luck here in
10 terms of the fact that, oh, well, Graham was simply
11 lucky that he didn't commit --

12 JUSTICE GINSBURG: That's in -- in the
13 Jackson case. In the Jackson case, the crime was very
14 similar to --

15 JUSTICE KAGAN: I'm sorry. Justice Ginsburg
16 is, of course, right.

17 MR. NEIMAN: Well, I defer to my colleague
18 from Arkansas in terms of the distinctions between
19 Jackson and Graham, but certainly with respect to
20 Miller's crime, his moral culpability is greater, and
21 the law should recognize that.

22 JUSTICE KENNEDY: If the judge were to
23 determine under a -- a rule that the sentence can't be
24 mandatory whether or not life should be imposed, what
25 would be the sorts of factors that he would look at, or

1 do you think that those are just too ineffable, too
2 imprecise to be considered?

3 MR. NEIMAN: Well, Justice Kennedy, I think
4 it certainly would be possible to have a regime under
5 which a judge considered mitigating circumstances in a
6 case like this. Many jurisdictions have reasonably
7 opted for that route rather than the one that Alabama
8 and 26 other jurisdictions have.

9 JUSTICE KENNEDY: They're just the standard
10 sorts of mitigating circumstances that we see in capital
11 cases and things?

12 MR. NEIMAN: Absolutely. I think that's
13 exactly what would happen. You would have arguments
14 about certain murders being worse than others. And Mr.
15 Miller would have an opportunity to argue about other
16 mitigating circumstances relating to his background and
17 the like, as he's argued in his reply brief here.

18 But at the same time, it's reasonable for
19 legislatures to conclude that they're going to draw a
20 line in the sand with respect to aggravated murder, such
21 that -- as a floor in terms of the appropriate
22 punishment, the defendant is going to get at the very
23 least life without parole, a punishment that's no doubt
24 severe but one that is less severe than the impact that
25 the crime has had on society.

1 And for those reasons, we'd ask the Court to
2 affirm.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Neiman.

5 Mr. Stevenson, you have four minutes
6 remaining.

7 REBUTTAL ARGUMENT OF BRYAN A. STEVENSON
8 ON BEHALF OF THE PETITIONER

9 MR. STEVENSON: Thank you,
10 Mr. Chief Justice.

11 I just want to make clear that the rule we
12 seek would not require States to impose the same
13 sentence on juveniles convicted of homicides from
14 juveniles convicted of non-homicides. The States would
15 be free to do that if they chose to, but they could
16 certainly create a regime where it's life with parole
17 where there are different ages for eligibility. In
18 fact, the State of Nevada makes you eligible for parole
19 after 15 years if the crime is a non-homicide, 20 years
20 if it's a homicide.

21 The States would still have a great deal of
22 flexibility to create, consistent with this Court's
23 rule, a regime that makes these distinctions.

24 Justice Kennedy, I did want to point --
25 direct your attention to two amicus briefs that I think

1 respond to two of the questions you've raised. There is
2 an amicus brief submitted by criminologists in this
3 case, and it looks specifically at the question of
4 deterrence. And what they've found is life without
5 parole has not had any measurable deterrent effect. The
6 States that don't put juveniles -- don't subject
7 children to life without parole have actually
8 experienced the same level of decrease in violent crime
9 and homicide as the States that do. And in fact, in
10 some of those jurisdictions, the decrease is even more
11 significant.

12 I also want to address your question,
13 Justice Scalia. There is -- there are some studies that
14 have established that juveniles are more likely or less
15 likely to recidivate after an intervention than adults.
16 Generally speaking, homicide offenders are categorically
17 less likely to recidivate than many non-homicide
18 offenders. Drug offenders and property crime offenders
19 are much more likely to recidivate than -- than homicide
20 offenders.

21 And so there's a lot to support that a
22 judgment rooted in these penological concerns would be
23 well-supported here.

24 I also want to return, Justice Breyer, to
25 your question. Mr. Neiman has -- argued that we can

1 read into these statutes a commitment to imposing life
2 without parole at a particular age, and that age is the
3 age of transfer. I just want to highlight that the two
4 States with the largest populations of juveniles serving
5 life without parole by a huge margin are Pennsylvania
6 and Michigan, neither of which has a minimum age.

7 That means in those States, a child of any
8 age can be subject to a mandatory sentence of life
9 without parole. It's simply not true -- true that we
10 can read into those statutes in those jurisdictions any
11 kind of conscious commitment to thinking about age.

12 The other point I want to make --

13 JUSTICE ALITO: Do you think the legislators
14 in Pennsylvania and Michigan don't understand what their
15 laws provide?

16 MR. STEVENSON: I -- I think that they
17 haven't thought about it. Yes, I do think that. I
18 mean, for example -- this goes to the next point I was
19 about to make -- my colleague keeps talking about
20 aggravated murder. In the State of Pennsylvania, it's
21 not just aggravated murder that subjects you to a
22 mandatory life without parole; if you're convicted of
23 second-degree murder -- no intent -- diminished -- it's
24 still mandatory life without parole.

25 We have 14-year-old children -- and again,

1 that's the largest cohort in our group -- in the State
2 of Pennsylvania convicted of clearly unintentional
3 killings that have been subject to mandatory life
4 without parole.

5 South Dakota does the same thing. I think,
6 where there is no minimum age and where you have that
7 kind of regime, I cannot -- I don't think we can
8 conclude that they've thought about, yes, it's
9 appropriate --

10 CHIEF JUSTICE ROBERTS: What if they -- what
11 if they do? I mean, what if, after our decision or even
12 after the argument, States go back and say, look, the
13 decision is based on the fact that they don't think we
14 know our law, that we haven't thought about it, so let's
15 have a hearing about it, and then we vote that yes,
16 there should be -- or no, there should not be a minimum
17 age. We think at 16, whatever age they do. Then does
18 the constitutional rule change?

19 MR. STEVENSON: Yes. I --

20 CHIEF JUSTICE ROBERTS: Once we get 30
21 States saying, look, we've thought about it and this is
22 our answer, then whether the Eighth Amendment prohibits
23 it or not changes?

24 MR. STEVENSON: No, I -- I don't think it
25 changes, because there is an age at which this Court is

1 obligated under the Eighth Amendment to say a sentence
2 of this sort, a permanent judgment that life-long
3 incarceration is -- is required --

4 CHIEF JUSTICE ROBERTS: Right. But one of
5 the things we take into account is societal consensus,
6 and you say we should ignore the 30 -- whatever it is --
7 States that allow this because they didn't really think
8 about it.

9 So I'm postulating let's make -- let's see
10 if they have thought about it.

11 MR. STEVENSON: Yes.

12 Well, in -- in that regard, Justice --
13 Mr. Chief Justice, I think that we do have 13 States
14 that have thought about it, that have expressly looked
15 at this question of what the minimum age should be. And
16 in 12 of those 13 States that have set the age above 14,
17 most of those States have set the age at 18. So if
18 that's the Court's lens, then I think that would support
19 the kind of rule that we're seeking here --

20 JUSTICE SCALIA: What if, instead of
21 striking down the laws in these States, why don't we
22 just require the State legislatures to think about it,
23 all right? And -- and then see how many think about it,
24 and -- and come up with, you know, something that agrees
25 with you or doesn't agree with you.

1 MR. STEVENSON: Well, I think that's in
2 part --

3 JUSTICE SCALIA: Wouldn't that be more
4 democratic somehow?

5 MR. STEVENSON: It might be more democratic,
6 but I don't think it would be consistent with the
7 constitutional obligation that this Court has to protect
8 people who are vulnerable from excessive punishment.

9 And this is a cohort that we contend is the
10 most vulnerable and should be shielded from this
11 excessive punishment.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Stevenson, Mr. Neiman.

14 The case is submitted.

15 (Whereupon, at 11:24 a.m., the case in the
16 above-entitled matter was submitted.)

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