OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: JOE HARRIS SULLIVAN, Petitioner, v. FLORIDA

CASE NO: No. 08-7621

PLACE: Washington, D.C.

DATE: Monday, November 9, 2009

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IN THE SUPREME COURT OF THE UNITED STATES

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JOE HARRIS SULLIVAN, :

Petitioner :

v. : No. 08-7621

FLORIDA. :

- x

Washington, D.C.

Monday, November 9, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

BRYAN STEVENSON, ESQ., Jacksonville, Fla.; on behalf of the Petitioner.

SCOTT D. MAKAR, ESQ., Solicitor General, Tallahassee, Fla.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:01 a.m.)

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

Mr. Stevenson.

ORAL ARGUMENT OF BRYAN STEVENSON

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

this case, which is not a death case?

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

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

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

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

JUSTICE GINSBURG: Let me -- let me --

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

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

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

What was wrong with that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. STEVENSON: That's correct.

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

MR. STEVENSON: That's right. That comes

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

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

JUSTICE SOTOMAYOR: Can I --

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

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

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

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

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

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

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

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

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

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

MR. STEVENSON: Yes.

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

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

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

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

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

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

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

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

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

MR. STEVENSON: Sorry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

we think it's an honest question.

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

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

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

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

With regard to Joe Sullivan, we don't have

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

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

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

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

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

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

MR. STEVENSON: Yes.

JUSTICE BREYER: Life without parole?

MR. STEVENSON: Yes.

JUSTICE BREYER: Under the age of 18 when committed?

MR. STEVENSON: Yes. That would be 111.

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

MR. STEVENSON: Seventy-seven.

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

MR. STEVENSON: Six.

JUSTICE BREYER: Six.

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Stevenson.

Mr. Makar.

ORAL ARGUMENT OF SCOTT D. MAKAR

ON BEHALF OF THE RESPONDENT

MR. MAKAR: May it please the Court:

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

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

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

JUSTICE BREYER: Not in your own system?

MR. MAKAR: Oh, I'm sorry.

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

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

JUSTICE BREYER: Non-homicide, life without

parole, under the age of 18 when committed.

MR. MAKAR: One hundred and fifty.

JUSTICE BREYER: And they say 77?

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

JUSTICE BREYER: What? Sorry.

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

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

MR. MAKAR: I apologize, Your Honor.

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

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

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

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

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

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

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

JUSTICE SCALIA: Yes.

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

JUSTICE SCALIA: Right.

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

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

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

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

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

Now, was he convicted of killing someone?

MR. MAKAR: Yes, and he was --

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

MR. MAKAR: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: I'm sorry, which one?

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

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

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

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

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

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

believe is just the wrong methodology.

CHIEF JUSTICE ROBERTS: My --

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

CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

defendant got 20.

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

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

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

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

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

Okay. And -- and to interpret it their way

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

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

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

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

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

did file, I believe, a habeas --

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

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

JUSTICE KENNEDY: What age was he at that point?

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: All right.

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

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

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

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

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

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

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

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

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

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

MR. MAKAR: I'm –-

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

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

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

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

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

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

MR. MAKAR: Well, my --

JUSTICE SOTOMAYOR: -- to consider the Apprendi challenges?

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

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

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

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

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

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

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

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

ground.

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Makar.

Mr. Stevenson, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF BRYAN STEVENSON
ON BEHALF OF THE PETITIONER

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

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

file within the 2 years.

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

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

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

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

JUSTICE ALITO: And you address this in

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

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

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

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

JUSTICE GINSBURG: I thought that in your

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

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

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

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

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

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

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

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

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

My time is up. Thank you.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Stevenson, Mr. Makar.

The case is submitted.

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

CERTIFICATION

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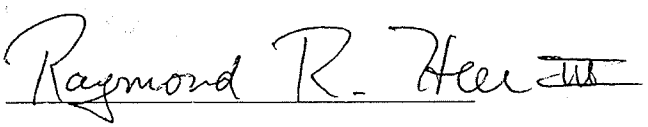

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