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IN THE SUPREME COURT OF THE UNITED STATES

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KUNTRELL JACKSON, :

Petitioner : No. 10-9647

v. :

RAY HOBBS, DIRECTOR, ARKANSAS :

DEPARTMENT OF CORRECTIONS. :

- - - - - 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 11:25 a.m.

APPEARANCES:

BRYAN A. STEVENSON, ESQ., Montgomery, Alabama; for Petitioner.

KENT G. HOLT, ESQ., Assistant Attorney General, Little Rock, Arkansas; for Respondent.

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P R O C E E D I N G S

(11:25 a.m.)

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

Welcome back.

(Laughter.)

ORAL ARGUMENT OF BRYAN A. STEVENSON

ON BEHALF OF THE PETITIONER

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

1 MR. STEVENSON: I think --

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

4 MR. STEVENSON: Yes, I hear --

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

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

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

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

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

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

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

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

20 JUSTICE SOTOMAYOR: It doesn't matter.

21 MR. STEVENSON: Yes.

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

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

1 exactly right.

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

4 MR. STEVENSON: That's exactly right.

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

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

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

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

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

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

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

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

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

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

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

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

19 JUSTICE BREYER: Yes. Yes.

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

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

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

3 MR. STEVENSON: Well --

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

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

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

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

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

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

25 MR. STEVENSON: That --

1 JUSTICE BREYER: -- which I don't know that
2 you could --

3 MR. STEVENSON: That's --

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

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

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

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

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

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

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

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

8 MR. STEVENSON: Yes.

9 JUSTICE ALITO: -- to kill there.

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

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

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

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

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

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

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

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

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

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

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

16 MR. STEVENSON: That's right.

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

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

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

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

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

17 JUSTICE ALITO: Some States, but not in all
18 of the States.

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

21 JUSTICE ALITO: That's a really -- you've
22 got a very imprecise denominator. You have arrests --

23 MR. STEVENSON: Yes.

24 JUSTICE ALITO: -- for a broader category of
25 offenses.

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

3 JUSTICE ALITO: We don't know how much
4 smaller that number would be if we narrowed it down
5 appropriately, do we?

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

16 So, I'd actually argue that we're dealing
17 here with a category definition that is much more
18 precise than what we dealt with in Graham.

19 And, Justice Kagan, to return to your
20 question we do have some precedents that help us with
21 this. In Coker v. Georgia, this Court was trying to
22 make an assessment about the propriety of the death
23 penalty for the crime of rape. And what this Court
24 noted was that 9 out of 10 of the juries that made decisions
25 about life versus death chose life. And there we were

1 talking about kind of a death rate, if you will, of 10
2 percent. Here, with a larger universe, we're talking
3 about a rate of 1 percent.

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

15 But suppose that -- that there's something
16 to be said for not leaving it up to the legislature, at
17 least for the numbers that were in that range. But how
18 would you defend the cutoff at -- for no life without
19 parole at, say, 14, older than 14, rather than older
20 than 15, rather than older than 13?

21 What kind of argument is there that isn't
22 totally random for picking that number as the age below
23 which you cannot impose life without parole even for the
24 most horrendous murder?

1 MR. STEVENSON: Yes. I think two nonrandom
2 arguments can be made for two ages. I'll start with the
3 young age of 14.

4 JUSTICE BREYER: Okay.

5 MR. STEVENSON: When you consider the fact
6 that 13 jurisdictions have thought about this and have
7 all but one set the age above 14, I think we can then
8 rely on that to make a determination that if there's a
9 minimum age, it's above 14.

10 I think we can also, consistent with this
11 Court's precedents, look at the frequency of the
12 sentence for this population. Most States have never
13 sentenced a child to -- to life without parole for a
14 crime at 14. They've just never done it. Thirty-two
15 States, there are no children 14 and younger serving
16 life without parole. And so, I think that allows this
17 Court in a very nonrandom way to defend that judgment.

18 But I also think a nonrandom argument can be
19 made to draw the line at 18; that is, offenders under
20 the age of 18. That's exactly what this Court has done
21 in Roper. It's what this Court has done in Graham.
22 What we've relied on about juvenile status is applicable
23 to that pool. I concede that these other indicia are
24 not quite as compelling.

25 JUSTICE BREYER: Eighteen, you use for a lot

1 of purposes. Eighteen -- you could say, okay, 18. The
2 difficulty with 18 is you're running into 2300.

3 MR. STEVENSON: That's correct.

4 JUSTICE BREYER: Not 79.

5 MR. STEVENSON: That's right.

6 JUSTICE BREYER: And the difficulty is that.

7 In Roper, it said, well, don't worry so much about --
8 about not having the death penalty -- the other one.
9 Don't worry so much about it because there's always life
10 without parole.

11 MR. STEVENSON: Yes.

12 JUSTICE BREYER: And the fact that
13 18-year-olds or 17-year-olds in many respects are quite
14 mature or at least can be.

15 MR. STEVENSON: Yes.

16 JUSTICE BREYER: And so, that makes 18 seem
17 not quite right.

18 MR. STEVENSON: Well --

19 JUSTICE BREYER: Or -- but there's a problem
20 with each of them. So, that's where I'm trying--

21 MR. STEVENSON: Yes, but I guess just on
22 that point, Justice Breyer, I think you're right that
23 the indicia are more complicated, but I want to just
24 stress that they're less meaningful here, because with

1 mandatory sentences, they don't tell you the same thing
2 they do in these other contexts.

3 But I also think it's true that we have
4 recognized that up until the age of 18, you are a
5 juvenile. Your status is coherent with what the Court
6 has recognized in these other cases. And so, I do think
7 it's defensible there. While it's true that you're more
8 developed than a child of 14 or a child of 10, it's also
9 true that you're not an adult. And we make that
10 distinction in lots of ways.

11 JUSTICE BREYER: Is there any other
12 distinction that you have been able to think of, growing
13 out of the literature or growing out of the law, where
14 the cutoff for some roughly comparable series of things
15 is between 14 and 15 or between 14 and 16, or something
16 like that?

17 MR. STEVENSON: Well, yes, this Court in
18 Thompson made a distinction between offenders that were
19 under the age of 15, 15 and younger, then older
20 offenders. And for 20 some years, the law in this
21 country was you could not subject younger offenders to
22 the death penalty in ways that you could older
23 offenders. And so, there's clearly precedent for that,
24 and we've appended also lots of statutes, I mean, that
25 also make those kinds of distinctions. I mean, we do

1 draw these lines frequently in a range of areas, not
2 just dealing with the constitutional questions that
3 we're dealing with here.

4 But just kind of to complete my analysis,
5 Justice Kagan, about these comparisons, the other point
6 that I'll -- I'll reference is that, in Thompson, this
7 Court was also struggling over this question about
8 frequency and rarity. And what the Court did there is
9 actually look at the number of juveniles that were
10 sentenced to death under the age of 16 that were on
11 death row and compared them to the number of people on
12 death row at the time, and they noted that it was
13 .36 percent of the population of people on death row.

14 If you did the same thing here, the
15 Sentencing Project reports that there are over 41,000
16 people in the United States serving sentences of life
17 imprisonment without parole. And if you compare our
18 number of 79 to that, that's actually, again, a lower
19 proportion of people serving life without parole than
20 the Court found to be constitutionally significant in
21 Thompson.

22 So, I think Thompson and Coker all reinforce
23 what we're saying here, that this is an exceedingly rare
24 sentence where the majority of States have never chose
25 to impose it. And that would provide a basis for this

1 Court to conclude that it is cruel and unusual.

2 JUSTICE ALITO: In Coker --

3 JUSTICE GINSBURG: Mr. Stevenson, you're
4 making an argument now in Jackson's case, and Jackson
5 was the felony murder case. And I think at least in
6 your brief, you made the argument it was just
7 happenstance, bad luck, that in Jackson's case the shop
8 attendant was killed. And in Graham's case, the person
9 who was assaulted survived.

10 But your argument to us seems to make no
11 distinction between the two cases.

12 MR. STEVENSON: No -- no, I -- I don't
13 intend to do that Justice Ginsburg. I think -- I think
14 there is a distinction. There's no question that
15 there's a stronger argument that, by traditional
16 measures, there's lower culpability in Kuntrell
17 Jackson's case. He was not found to have specifically
18 intended to kill. In the State of Alabama, he could not
19 have been subject to life without parole, and there are
20 States where he would not be subject to that, based on
21 his degree of culpability.

22 I -- I guess my -- my point is, is that even
23 there, there is a challenge if the Court wants to engage
24 in that kind of thinking. What children intend, because
25 they are children, is a very complicated question. It's

1 a very different question.

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

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

21 If there are no further questions, I'll --
22 I'll reserve the rest of my time for rebuttal.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Holt.

25 ORAL ARGUMENT OF KENT G. HOLT

1 ON BEHALF OF THE RESPONDENT

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

4 The decision below falls squarely within the
5 framework of Roper and Graham, and there are three
6 reasons to affirm this judgment: First, murder is the
7 worst of all crimes. Society has drawn that line.

8 Second, legislatures have the power to
9 authorize sentences that are commensurate with crimes
10 like murder.

11 Third, Jackson has not demonstrated any
12 consensus in this case against the practice, and, in
13 fact, there is a supermajority of States and of
14 governments that authorize this sentence.

15 The landscape of this case is -- is
16 different than Graham, because in Graham no one was --
17 no one was killed. Terrance Graham was lucky no one was
18 killed, because he acted with a reckless disregard for
19 human life as well, but it's an important thing in our
20 law that the law punishes the -- the result, the harm
21 that is inflicted.

22 And if I could, go to the Arkansas statute.
23 Jackson was charged with the highest crime you could be
24 charged with in Arkansas -- it was capital felony
25 murder -- in that the legislature has set out several

1 enumerated, several violent felonies that if you commit
2 this particular crime -- and aggravated robbery is one
3 of them -- if you commit that crime and in the course
4 and furtherance of that, you or an accomplice act with
5 extreme indifference to the value of human life during
6 the commission of it or in the flight from it, then you
7 are guilty of capital felony murder.

8 So, in this case the jury was called
9 upon -- because there were other accomplices with
10 Kuntrell Jackson, they were called on to determine
11 whether or not Kuntrell Jackson acted as an accomplice,
12 whether he aided and assisted and whether or not he or
13 an accomplice acted with extreme indifference to the
14 value of human life.

15 In that process, Kuntrell Jackson asserted
16 the affirmative defense that essentially is available
17 for capital murder. He said that, I did not have -- I
18 was not the triggerman, and I did not -- I did not
19 commit the homicide offense, and I did not aid or
20 procure counsel. All of those are listed -- the exact
21 words of the affirmative defense are listed in our brief
22 at page 4. And -- but he asserted that defense.

23 The Arkansas Supreme Court noted in its
24 opinion that in his challenge to the sufficiency of the
25 evidence, that there was sufficient evidence to convict

1 him of capital murder and that the jury was well within
2 its right to believe that he said that he -- that when
3 he walked in and took -- took the lead in this robbery
4 that he said, "We ain't playin'," and after that, the
5 clerk responded that she was going to call the police --

6 JUSTICE SOTOMAYOR: Counsel, I -- I know
7 that this seems like block building, but I think of law
8 as sort of logical. If you're involved in a felony and
9 you counsel the felony where someone dies, under
10 Arkansas law, you're guilty of felony murder, correct?

11 MR. HOLT: Of capital felony murder, yes,
12 Your Honor.

13 JUSTICE SOTOMAYOR: Right. So, whether or
14 not that he intended to counsel the crime, he was guilty
15 of felony murder, unless he could prove the affirmative
16 defense, right?

17 MR. HOLT: Yes, Your Honor.

18 JUSTICE SOTOMAYOR: So, obviously, he didn't
19 prove the affirmative defense, but that doesn't mean
20 that the jury actually found that he used one set of
21 words or another. It just means that they didn't
22 believe he had proven by his burden of proof that he had
23 not counseled, correct?

24 MR. HOLT: That's correct. The Arkansas
25 Supreme Court said they could -- they could accept that

1 as -- they pointed to that as --

2 JUSTICE SOTOMAYOR: As a possibility for the
3 jury.

4 MR. HOLT: As a possibility, yes.

5 JUSTICE SOTOMAYOR: But not that it was an
6 actual finding by the jury.

7 MR. HOLT: No. No, Your Honor.

8 JUSTICE SOTOMAYOR: All right.

9 MR. HOLT: It was not an actual finding
10 because an actual -- in regard to sentences in terms of
11 years, we don't require that individualized
12 responsibility that we do, for instance, in a death
13 penalty case. So --

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

21 MR. HOLT: Your Honor --

22 JUSTICE BREYER: He aided. Is that right or
23 not?

24 MR. HOLT: Yes.

25 JUSTICE BREYER: Okay. If that's right,

1 do -- do you think that such a person is less culpable,
2 knowing only that, than a person who actually takes out
3 a gun and shoots the teller? Morally speaking.

4 MR. HOLT: Yes, Your Honor.

5 JUSTICE BREYER: Okay.

6 MR. HOLT: Yes.

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

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

16 JUSTICE BREYER: Oh, I know. I mean, my
17 obvious point is that -- that the Arkansas system, once
18 we have he was the getaway driver or assisted the
19 getaway driver, they must sentence him at that age, or
20 despite that age, to life without parole.

21 And so, the other side is saying, well, at
22 the very least -- he has three other positions -- but at
23 the very least, the Constitution -- maybe it's the Due
24 Process Clause -- requires the sentencer to take that
25 into account, the fact that he was just the

1 assistant/getaway driver and may not have thought about
2 the murder in reality and may not have expected it in
3 reality. Why not have to take that into account in
4 sentencing? That's the argument.

5 I want to hear directly your answer to that,
6 which is taking the fourth or possibly the weakest of
7 his positions or the least radical. What is your answer
8 to that one?

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

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

24 So, he would actually sort of be
25 double-dipping to come back again and say, oh, and by

1 the way, I'm a youth, and so I should get even -- I
2 should get not the lesser punishment; I should get the
3 lesser, lesser punishment.

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

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

22 JUSTICE GINSBURG: What is the standard in
23 Arkansas for moving a child from the juvenile system?
24 We heard, I think, in Alabama it was -- was age 13?

25 MR. HOLT: Yes. Your Honor --

1 JUSTICE GINSBURG: It was age 12.

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

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

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

22 JUSTICE KENNEDY: But -- but if you submit
23 that as a justification for your scheme, why couldn't
24 those same factors be applied to the judge -- by the
25 sentencing judge after the conviction? In other words,

1 all of the -- all of the discretion is up front before
2 the conviction.

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

9 JUSTICE KENNEDY: I guess my point is, if
10 the concern is that -- that we have too indefinite
11 standards, too few specifics to guide the judge in
12 determining whether there should be a life sentence, the
13 same criticism could apply to the determination to send
14 him -- put him in the adult system at the outset.

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

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

21 MR. HOLT: Well, Your Honor, the -- the
22 prosecutor -- that -- that decision to move it in there
23 is challengeable. It is reviewable by a court. He
24 moves -- the juvenile moves it to transfer it to -- back
25 to juvenile. That is appealed. That was done in this

1 case, and then the Arkansas -- the Arkansas Court of
2 Appeals reviewed that decision and said that the
3 court -- the court's decision was not erroneous. So,
4 that -- that is the discretion that one would exercise
5 on the front end.

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

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

23 I would like to clarify one point that I
24 think -- earlier that was made. The two other
25 individuals in this particular case were -- one was a

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

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

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

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

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

11 JUSTICE SOTOMAYOR: I'm sorry.

12 MR. HOLT: -- are enrolled in vo-tech
13 programs in the prison.

14 JUSTICE SOTOMAYOR: What hope does he have?

15 MR. HOLT: Excuse me?

16 JUSTICE SOTOMAYOR: What hope does he have?

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

21 JUSTICE SOTOMAYOR: I'm sorry.

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

24 JUSTICE SOTOMAYOR: I thought he was life
25 without parole. I thought he was sentenced to life

1 without parole. How can the parole board --

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

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

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

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

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

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

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

25 JUSTICE BREYER: I understand the arguments,

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

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

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

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

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

1 basically. And so is Roper.

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

9 JUSTICE GINSBURG: Did you say that Arkansas
10 has no life with parole?

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

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

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

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

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

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

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

1 foresee what could happen.

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

6 If there are no further questions --

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Stevenson, you have 8 minutes remaining.

9 REBUTTAL ARGUMENT OF BRYAN A. STEVENSON

10 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

1 status.

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

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

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

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

18 The case is submitted.

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

21

22

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