>>†SUPREME COURT OF FLORIDA
IS IN SESSION.
PLEASE BE SEATED.
>> THE NEXT CASE FOR THE DAY
IS FALCON V. STATE OF
FLORIDA.
YOU MAY PROCEED.
>> THANK YOU, YOUR HONOR.
AND MAY IT PLEASE THE COURT.
KAREN GOTTLIEB ON BEHALF OF
REBECCA FALCON.
ISSUE BEFORE THE COURT IS
WHETHER MILLER V. ALABAMA IS
RETROACTIVE.
THIS COURT'S DECISION IN WIT
V. STATE PROVIDES THE ANSWER,
MILLER HOLDS THAT A
SENTENCING SCHEME THAT
MANDATES LIFE WITHOUT THE
POSSIBILITY OF PAROLE FOR
JUVENILES VIOLATES THE EIGHTH
AMENDMENT.
THE QUESTION NOW IS WHETHER
UNDER WIT THIS SENTENCING
SCHEME IS OKAY FOR CHILDREN
SENTENCED AFTER MILLER BUT
FOR ALL THOSE WHOSE CASES
HAVE COMPLETED THE DIRECT
REVIEW PROCESS, WHETHER THEY
AND ONLY THEY MUST SERVE A
LIFETIME IMPRISONMENT WITHOUT
ANY POSSIBILITY OF PAROLE
CONSIDERATION.
A SENTENCE THAT WE KNOW
BECAUSE MILLER TELLS US SO,
IS DISPROPORTIONATE AND IN
VIOLATION OF THE EIGHTH
AMENDMENT IN ALL BUT THE MOST
UNCOMMON OF CASES.
UNDER WIT, THIS COURT SAID
WHEN THERE IS A SWEEPING
CHANGE OF LAW THAT
DRASTICALLY ALTERS THE
SUBSTANTIVE OR PROCEDURAL
UNDERPINNINGS OF A SENTENCE,
POST-CONVICTION RELIEF MUST
BE AFFORDED TO AVOID OBVIOUS
INJUSTICE.
>> MA'AM, LET ME JUST -- YOU
MADE A STATEMENT WHAT MILLER

SAYS, MILLER DOES NOT
PROHIBIT A LIFE SENTENCE
WITHOUT PAROLE, BUT IT SIMPLY
SAYS -- WELL, NOT SIMPLY, BUT
IT SAYS YOU HAVE TO TAKE AGE
AND OTHER AGE-RELATED
CIRCUMSTANCES INTO
CONSIDERATION WHEN MAKING THE
SENTENCING DETERMINATION, IS
THAT CORRECT?
>>†THAT'S EXACTLY RIGHT.
EXACTLY LIKE THE DECISIONS
FROM THE SUPREME COURT IN
LOCKETT V. OHIO AND HITCHCOCK
V. FLORIDA WHICH LIKEWISE,
DID NOT BAN A DEATH SENTENCE
BUT SAID INSTEAD THAT IN
ORDER TO GIVE THAT SENTENCE,
YOU MUST PROVIDE AN
INDIVIDUALIZED SENTENCING.
THAT'S WHAT THE EIGHTH
AMENDMENT REQUIRES.
>> AND SO ONCE YOU'VE GONE
THROUGH THAT PROCESS, THE
TRIAL JUDGE CAN MAKE A
DETERMINATION THAT A LIFE
WITHOUT PAROLE FOR A HOMICIDE
COMMITTED BY A JUVENILE IS
APPROPRIATE.
I JUST WANT TO MAKE SURE.
>> YES, BUT MILLER CAUTIONS
THAT THAT SENTENCE IN LIGHT
OF EVERYTHING THAT THE
DECISION DISCUSSES IN TERMS
OF HOW CHILDREN ARE
DIFFERENT, JUST LIKE DEATH IS
DIFFERENT, CHILDREN ARE
DIFFERENT.
EVERYTHING THAT THE COURT
SAYS IN MILLER ABOUT WHY
CHILDREN ARE DIFFERENT MEANS
THAT THAT SENTENCE SHOULD BE
UNCOMMON.
>> I WAS GOING TO ASK YOU
ABOUT THAT.
THE STATEMENT, BECAUSE AFTER
LOCKETT, THE ABILITY TO
CONSIDER MITIGATING
CIRCUMSTANCES STILL HAVE THE
DEATH SENTENCE IN MANY OF

THOSE CASES AFTER THEY WERE REMANDED, BUT IS THE STATEMENT IN MILLER THAT SAYS THAT AFTER YOU CONSIDER THE CHILD'S AGE AND ALL THE OTHER CIRCUMSTANCES THAT THE IMPOSITION OF A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE FOR A CHILD, LIKE THIS WAS A 15-YEAR-OLD, WOULD BE UNCOMMON?
IS THAT A STATEMENT OF THE HOLDING, OR IS THAT DICTA FOR MILLER?
THAT TO ME WAS A SORT OF A STARTLING STATEMENT, WHICH IS RIGHT NOW WE HAVE MANDATORY LIFE WITHOUT PAROLE, NO MATTER WHAT.
THAT STATUTE HAS TO BE UNCONSTITUTIONAL UNDER MILLER.
>> YES.
>> OKAY, AND THEN THE QUESTION IS, FOR THOSE WHO ARE SENTENCED BEFOREHAND, THAT STATEMENT, THAT IT WOULD BE UNCOMMON, IT'S NOT MERELY A PROCEDURE, THAT'S WHAT I THINK IS BEING ARGUED, THIS IS JUST A PROCEDURE, YOU DO THAT AND CAN YOU RESENTENCE THEM TO LIFE WITHOUT PAROLE.
WHAT EFFECT IS THAT PARTICULAR STATEMENT, THAT IT WOULD BE UNCOMMON TO HAVE A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE FOR A JUVENILE?
>> I THINK IT'S CRITICALLY SIGNIFICANT.
I WOULD POINT OUT THAT THAT STATEMENT IS CONTINUED THROUGHOUT EVERY DECISION THAT IS PART OF THE MILLER DECISION.
IN OTHER WORDS, EVEN THE DISSENTS SEIZE UPON THAT CRITICAL STATEMENT THAT A LIFE WITHOUT PAROLE SENTENCE

FOR A JUVENILE IS TO BE
UNCOMMON.
IS TO BE FOR THE RARE
JUVENILE WHICH THE COURT
CONTINUES TO SAY AS BEING
REALLY THE END RESULT OF
EVERYTHING THE COURT HAS SAID
THROUGHOUT THE DECISION.
>> IS IT TRUE?
IS OUR STATUTE -- HAVE WE
ISSUED AN OPINION THAT SAYS
THE STATUTE, THAT IS LIFE
WITHOUT THE POSSIBILITY OF
PAROLE FOR JUVENILES IS
UNCONSTITUTIONAL?
HAVE WE MADE THAT STATEMENT
YET?
>> NO, BUT SEVERAL WEEKS AGO,
THE SECOND DISTRICT DID SO
STATE.
>> IN TERMS OF DECIDING THE
RETROACTIVITY, THE BOTTOM
LINE IS THAT LIFE -- A
MANDATORY SENTENCE WITHOUT
THE POSSIBILITY OF PAROLE AS
THE SECOND DISTRICT HAS SAID
IS NOT LEGAL -- THAT CANNOT
BE A LEGAL SENTENCE IN
FLORIDA AFTER MILLER,
CORRECT?
>> THAT'S CORRECT.
775082 IS UNCONSTITUTIONAL AS
APPLIED TO THE LAW.
>> IN A WAY THIS IS STRONGER
THAN THE LOCKETT CASES, THEY
DIDN'T SAY THE DEATH PENALTY
WAS UNCONSTITUTIONAL.
THEY SAID YOU GOT TO CONSIDER
MITIGATING CIRCUMSTANCES.
HERE, THEY'RE SAYING YOU
CANNOT HAVE MANDATORY LIFE
SENTENCES WITHOUT THE
POSSIBILITY OF PAROLE.
>> EXACTLY.
>> DOES THAT MAKE A
DIFFERENCE IN THE WIT OR EVEN
IN THE TEAGUE ANALYSIS IF WE
WERE TO LOOK AT THAT?
>> IT MAKES A DIFFERENCE IN
TEAGUE, FOR EXAMPLE, IN

RENDERING THE HOLDING OF
MILLER A SUBSTANTIVE HOLDING.
IN WIT, THE SUBSTANTIVE
DICHOTOMY HAS NOT BEEN
ADOPTED.
MAJORITY OF STATE SUPREME
COURTS WHO CONSIDERED THE
RETROACTIVITY UNDER THE
STRICTER TEAGUE STANDARD HELD
IT IS RETROACTIVE BECAUSE IT
IS SUBSTANTIVE AND THEY HAVE
LOOKED TO THE FACT THAT IT
HAS REQUIRED THE STATE TO
CHANGE THEIR STATUTE.
IT HAS SUBSTANTIVELY ALTERED
THE PENALTY WHEN IMPOSED ON A
JUVENILE.
AND I'D LIKE TO POINT OUT†--
>>†COULD I JUST, YOU TALKED
ABOUT THE PROCEDURE, AND I
DON'T KNOW IF YOU WANT TO
STRONGLY OR RELY ON THE FACT
THAT MILLER, THERE WERE TWO
CASES WITH MILLER.
ONE WAS A DIRECT APPEAL.
>> YES.
>> THE OTHER WAS
POST-CONVICTION.
>> YES.
>> SOME OF THE COURTS THAT
HAVE SEIZED ON, IN FACT NOW,
LOOKS LIKE THE APPELLATE --
FEDERAL APPELLATE COURTS ARE
AT LEAST ALLOWING JUVENILES
TO FILE POST-CONVICTION
MOTIONS AND SOME CASES IT
LOOKS LIKE THE STATE IS OR
THE -- WHOEVER IS CONCEDING
IT'S RETROACTIVE.
>> YES, IT HAS BEEN.
>> WHAT'S THE -- NOT BINDING
BUT THE FACT THAT SOMEBODY
WAS GIVEN POST-CONVICTION
RELIEF UNDER MILLER AT THE
EXACT TIME THAT THE DIRECT
APPEAL WAS BEING GUIDED.
>> I THINK THE IOWA SUPREME
COURT PUT IT BEST.
THEY SAID THEY MUST HAVE
TAKEN BOTH CASES FOR A

REASON.
IN OTHER WORDS, THIS WASN'T SIMPLY THEY TOOK A CASE.
IT HAPPENED TO BE A POST-CONVICTION CASE ON COLLATERAL REVIEW, AND THEY GRANTED RELIEF, AND WE KNOW FROM THE LANGUAGE OF TEAGUE THAT ONCE THE COURT GRANTS RELIEF IN A COLLATERAL REVIEW CASE, EVEN-HANDED JUSTICE REQUIRES THE SAME RELIEF FOR SIMILARLY SITUATED DEFENDANTS, THAT'S THE GENERAL RULE.
>> IT'S KIND OF AN UNUSUAL SITUATION, THOUGH, THERE'S NO DISCUSSION OF RETROACTIVITY.
>> THAT'S CORRECT.
>> IS IT POSSIBLE THAT WHAT HAPPENED THERE IS SIMPLY THE STATE CONCEDED ON THAT ISSUE, OR DID NOT CONTEST THE ISSUE BUT INSTEAD DETERMINED THAT THEY WOULD FOCUS ON THE MERITS OF THE EIGHTH AMENDMENT ISSUE, AND THEN CONCEDE ON WHETHER IT SHOULD BE RETROACTIVELY APPLIED.
>> I THINK WHAT'S SIGNIFICANT IS THE COURT CHOSE TO TAKE TWO CASES.
THEY COULD HAVE JUST TAKEN MILLER AND DECIDED TO TAKE BOTH.
BUT YOU KNOW, WE TREAT THAT AS AN ADDITIONAL REASON FOR THIS ACTIVITY.
>> DOES MILLER CONTAIN AN ANNOUNCEMENT THAT IT IS RETROACTIVE?
>> NO.
RETURNING TO THE WIT TEST WHICH IS, OF COURSE, WHAT IS THE DETERMINATION FOR RETROACTIVITY.
>> YOU WOULDN'T REALLY -- WE WOULD BE SPECULATING AS TO WHAT THE U.S. SUPREME COURT IS DOING.

SO YOUR POSITION IS A WISE ONE THAT WE SHOULD FOCUS ON WHETHER THIS IS RETROACTIVE UNDER ALL THE PRONOUNCEMENTS WE HAVE MADE.
>> I WOULD LIKE TO POINT OUT SINCE WE WERE DISCUSSING LOCKETT AND HITCHCOCK.
NOT ONLY DO WE HAVE A STATUTE THAT IS UNCONSTITUTIONAL AS APPLIED BUT WE HAVE FAR MORE SIGNIFICANT PREJUDICE IN TERMS OF THE CHILDREN SENTENCED UNDER THIS MANDATORY LIFE WITHOUT PAROLE SCHEME.
BECAUSE THERE WAS NO MITIGATION CONSIDERED.
ONCE THEY WERE CONVICTED.
THERE WAS AN AUTOMATIC SENTENCE.
AT LEAST IN THE CAPITAL CASES PRIOR TO LOCKETT AND HITCHCOCK, OUR STATUTE PROVIDED FOR CONSIDERATION OF A RATHER WIDE SCOPE OF STATUTORY MITIGATING FACTORS.
SO THERE WAS AN INDIVIDUALIZED SENTENCING DETERMINATION THAT WE KNOW THE EIGHTH AMENDMENT REQUIRES FOR AN ACCURATE, RELIABLE, FAIR SENTENCING.
BUT FOR THESE CHILDREN, THERE HAS BEEN NO SENTENCING DETERMINATION.
THERE HAS BEEN NO INDIVIDUALIZED SENTENCING.
THERE HAS BEEN NO ACCURATE SENTENCING DETERMINATION THAT THIS IS A PROPORTIONAL SENTENCE, AND THEN, I THINK WE HAVE TO AGAIN LOOK AT THE SIGNIFICANCE OF THE SUPREME COURT SAYING EVERYTHING WE'VE SAID ABOUT CHILDREN IN THIS CASE MEANS THAT A LIFE WITHOUT PAROLE SENTENCE IS ONLY APPROPRIATE IN THE UNCOMMON CASE.

WE HAVE EVERY CHILD SENTENCED
TO LIFE WITHOUT PAROLE IN
THESE CASES, WITH NO REVIEW
OF ANY FACTOR ABOUT THEIR
YOUTH AND THE ATTENDANCE
CIRCUMSTANCES, SO THEIR LACK
OF JUDGMENT IMPETUOUSNESS,
IMMATURITY.
PROSPECT FOR REHABILITATION
AND REFORM, PEER INFLUENCES,
OUTSIDE INFLUENCES, NONE OF
THAT HAS BEEN CONSIDERED.
>> THERE ARE TWO DIFFERENT
ANALYSIS UNDER WIT, ONE IS IF
IT'S A DECISION OF
FUNDAMENTAL SIGNIFICANCE.
>> YES.
>> YOU CONTEND THAT IT IS.
>> ABSOLUTELY.
>> OKAY, BUT IF YOU GO TO THE
LINKLETTER THREE FACTOR TEST
DOES IT MEET THE THREE
PROMPTS.
>> AS THE SECOND DISTRICT
CONCLUDED IN TOI, IT MEETS
BOTH STANDARDS.
FIRST, AS I SAID BEFORE, IT
ABSOLUTELY DECLARES
UNCONSTITUTIONAL AS APPLIED
775802, THERE IS NOTHING THAT
COULD BE MORE SUBSTANTIVE,
MORE OF A FUNDAMENTAL CHANGE
IN THE LAW THAN MAKING A
STATUTE UNCONSTITUTIONAL AS
APPLIED.
BUT IN TERMS OF THE THREE
FOLD PURPOSE, RELIANCE
EFFECT.
LET'S TALK ABOUT THE PURPOSE
OF WIT.
MILLER RECOGNIZES THAT
BECAUSE CHILDREN ARE
DIFFERENT, BECAUSE JUST LIKE
DEATH IS A DIFFERENCE, AND
THEY MAKE A POINT OF DRAWING
THE ANALOGY OF LIFE WITHOUT
PAROLE FOR A CHILD TO A DEATH
SENTENCE FOR ADULT, IT IS
AKIN TO A DEATH SENTENCE.
SO THE PURPOSE OF MILLER TO

ENSURE AN INDIVIDUALIZED
SENTENCING TO ENSURE AN
ACCURATE SENTENCING, TO
ENSURE THAT ALL OF THE
MITIGATING FACTORS ATTENDANT
TO YOUTH ARE CONSIDERED BY
THE SENTENCER BEFORE
PRONOUNCING SENTENCE.
>> I WAS LOOKING AT WHETHER
ROPER, THERE HAD BEEN A CASE
WHICH TALKED ABOUT WHETHER
THAT'S RETROACTIVE.
AND I THINK EVERYONE JUST
KNEW AFTER ROPER, YOU WERE
NOT GOING TO BE HAVING A
CHILD WHO HAD BEEN SENTENCED
BEFORE TO DEATH, EXECUTED.
NO ONE SEEMS TO MENTION THAT,
BUT TO ME, FRANKLY, THAT
SEEMS PRETTY COMPELLING THAT
IF IT IS AKIN TO A DEATH
SENTENCE, HOW COULD IT NOT --
THIS IS A FRIENDLY QUESTION,
HOW COULD IT NOT BE APPLIED
TO ALL OF THE YOUTH, THE
JUVENILES SINCE 1994, THAT
HAVE HAD A LIFE WITHOUT
POSSIBILITY OF PAROLE
SENTENCE?
>> I THINK IT'S SO OBVIOUS
THAT IT HAS TO BE
RETROACTIVE.
>> BECAUSE ROPER -- THERE
ISN'T A CASE THAT SAID ROPER
IS†--
>>†NO ONE TRIED TO EXECUTE
ANYONE, JUST LIKE AFTER
WOODSON V. NORTH CAROLINA AND
ROBERTS V. LOUISIANA IN 1976,
NO ONE SAID NOW WE'RE GOING
TO TRY TO EXECUTE PEOPLE
UNDER A MANDATORY DEATH
PENALTY SYSTEM.
IT WAS, AGAIN, TESTED IN
SUMNER V. SHUEMAN WITH THE
MANDATORY DEATH SENTENCE FOR
PEOPLE SERVING LIFE WITHOUT
THE POSSIBILITY OF PAROLE.
>> BUT THERE IS A DISTINCTION
IN THAT THAT WAS A

CATEGORICAL PROHIBITION ON
THE IMPOSITION OF THAT
PUNISHMENT ON A PARTICULAR
CLASS.
>> I WOULD DISAGREE.
>> IT WAS NOT?
IT WAS NOT A CATEGORICAL
PROHIBITION ON THE IMPOSITION
OF THE DEATH PENALTY ON A
PARTICULAR CLASS?
>> NO, THOSE INDIVIDUALS
STILL COULD FACE THE DEATH
PENALTY.
THEY JUST HAD TO HAVE THE
EIGHTH AMENDMENT
INDIVIDUALIZED SENTENCING
DETERMINATION, CONSIDERATION
OF MITIGATION.
>> WHAT CASE ARE YOU TALKING
ABOUT NOW?
>> I'M TALKING ABOUT SUMNER.
>> I'M TALKING ABOUT ROPER.
>> OH, IN ROPER.
>> I THOUGHT WE WERE TALKING
ABOUT ROPER.
>> I SHIFTED GEARS TO TALK
ABOUT SUMNER.
>> OKAY, SUMNER, THAT'S A
DIFFERENT QUESTION.
BUT IN ROPER, ISN'T THERE A
DISTINCTION BECAUSE OF THAT
CATEGORICAL PROHIBITION ON
THE IMPOSITION OF THE
PENALTY?
THERE IS NOT A CATEGORICAL --
THERE'S A CATEGORICAL
PROHIBITION ON MANDATORY LIFE
SENTENCES WITHOUT PAROLE, BUT
THERE'S NOT A CATEGORICAL
PROHIBITION ON LIFE SENTENCES
WITHOUT PAROLE.
>> I DON'T THINK WE CAN
PRETEND THAT MANDATORY HAS NO
SIGNIFICANCE ANY MORE THAN
WHEN THE SUPREME COURT
DECIDED WOODSON AND DEALT
WITH A MANDATORY DEATH
PENALTY SCHEME, THEY DIDN'T
SAY WE CAN'T HAVE A DEATH
PENALTY IN THIS SITUATION.

THEY SAID YOU CAN'T HAVE A
MANDATORY DEATH PENALTY IN
THIS SITUATION.
BECAUSE THE EIGHTH AMENDMENT
REQUIRES CERTAIN THINGS AND
REQUIRES A RELIABLE, ACCURATE
SENTENCING DETERMINATION, IT
REQUIRES AN INDIVIDUALIZED
SENTENCING DETERMINATION, AND
THAT'S EXACTLY WHAT MILLER IS
HOLDING, AND THAT'S EXACTLY
WHAT LOCKETT HELD, THAT'S
EXACTLY WHAT HITCHCOCK HELD,
AND THAT'S EXACTLY WHAT THIS
COURT HELD RETROACTIVE ON
POST-CONVICTION RELIEF IN
INNUMERABLE CASES.
IN HARVARD, THOMPSON, WE
COULD GO ON AND ON, WE LIST
MANY OF THEM IN THE BRIEF.
IT WAS UNIFORMLY RETROACTIVE
NOT BECAUSE IT BANNED THE
DEATH PENALTY IN FLORIDA.
AND AGAIN I WOULD POINT OUT
THOSE DEFENDANTS AT LEAST HAD
THE OPPORTUNITY TO PRESENT
STATUTORY MITIGATING FACTORS
TO THE SENTENCER, WHERE OUR
CHILDREN HAD NO OPPORTUNITY.
NOT EVEN THE FACT THAT SHE'S
15 YEARS OLD.
NOTHING WAS PRESENTED,
NOTHING COULD BE CONSIDERED.
GOING TO THE EFFECT AND THE
RELIANCE.
THE SECOND AND THIRD PRONG OF
THE STOVO-LINKLETTER ARE TEST
UNDER WITT.
WE'RE DEALING WITH
APPROXIMATELY 200 CHILDREN
SCATTERED AMONGST THE 20
CIRCUITS OF THIS STATE.
THE CONVICTION IS NOT AT
ISSUE.
THE EFFECT OF HOLDING MILLER
RETROACTIVE WILL BE NO NEW
JURY SENTENCING, OBVIOUSLY,
NO NEW TRIAL, ONLY THE
INDIVIDUALIZED SENTENCING
PROCEEDING THAT THE ABILITY

AMENDMENT REQUIRES TO MAKE
SURE WE HAVE ACCURATE,
RELIABLE SENTENCING IN THIS
STATE.
>> REBUTTAL TIME.
>> THANK YOU.
>> MAY IT PLEASE THE COURT.
TRISHA MEGGS PATE
REPRESENTING THE STATE OF
FLORIDA ALONG WITH CO-COUNSEL
JOSH HELLER.
REQUIRES INDIVIDUALIZED
SENTENCING IS MANDATED TO
APPLY RETROACTIVELY AND THE
STATE'S POSITION IS IT'S NOT
LOOKING AT THE WITT TEST, IT
WAS NOT -- IT'S NOT A
SUBSTANTIVE CHANGE IN LAW OR
FORBIDS THE STATE FROM
IMPOSING SENTENCE.
IT IS NOT A CATEGORICAL BAN
ON LIFE WITHOUT PAROLE
SENTENCING.
IT ALLOWED FOR THE SENTENCING
EVEN IF APPLIED
RETROACTIVELY, SHE MAY GO
BACK TO THE TRIAL COURT AND
FACE THE EXACT SAME
PUNISHMENT.
>>†AND WE UNDERSTAND SHE MAY
NOT, AND IT WOULD BE UNCOMMON
IF SHE DID UNDER WHAT MILLER
SAID.
>> CORRECT, WE'RE HERE ON A
VERY LIMITED RECORD, SHE'S
PRESENTED MITIGATING FACTORS.
SHE MAY NOT, WHAT IF THE
COURT IS LOOKING AT THE
MORGAN CASE, THE 11TH CIRCUIT
CASE.
I DON'T KNOW IF YOU READ THE
FACTS ON THAT, WHERE THE 11TH
CIRCUIT SAID THAT THEY
WEREN'T GOING TO APPLY MILLER
RETROACTIVELY AND IN MORGAN,
MORGAN WAS INVOLVED WITH A
CO-CONSPIRATOR TO RIP OFF A
DRUG DEALER.
MORGAN SHOT HIM IN THE BACK
OF THE HEAD, LATER HIS

GIRLFRIEND NOTICED THE BLOOD
IN THE CAR, SO THEY DECIDED
TO KILL HER.
THEY THEN TRIED TO LURE HER
TO THE MIAMI AREA WHERE THEY
WERE SAYING SHE WOULDN'T
COME.
>> SEEMS TO ME THE BOTTOM
LINE OF MILLER IS THAT YOU
NEED TO HAVE AN
INDIVIDUALIZED SENTENCING
PROCEEDING, AND EVEN IN
MORGAN, YOU'RE TALKING ABOUT
ALL OF THOSE FACTORS THAT A
COURT WOULD TAKE INTO
CONSIDERATION IN DETERMINING
WHETHER OR NOT THE SENTENCE
IS, IN FACT, APPROPRIATE?
AND SO WHY WOULDN'T WE, UNDER
THE CIRCUMSTANCES, IF WE'RE
TALKING -- AND I DON'T HAVE
ANY ISSUE, DO YOU HAVE ANY
WISH HER STATEMENT ABOUT 200
AND SOME JUVENILES WHO HAVE
BEEN SENTENCED TO LIFE
WITHOUT PAROLE?
>> I HAVEN'T VERIFIED THE
FACTS, I THINK IT'S CLEARLY
UNDER 400 AND 200 COULD BE
CORRECT.
>> OKAY, AND SO WHY WOULDN'T
WE THEN, IF WE ARE LOOKING AT
WHETHER OR NOT THIS SENTENCE
IS APPROPRIATE BECAUSE THEY
NEED AN INDIVIDUALIZED
SENTENCING, WHY WOULDN'T WE
SAY THAT FOR THESE JUVENILES,
THAT WE GIVE THEM A TIME
PERIOD THAT THEY CAN BRING
THESE CLAIMS AND LOOK AT THEM
UNDER THE STANDARD
ARTICULATED IN MILLER?
>> IT'S NOT A CATEGORICAL
BAN.
>> I UNDERSTAND THAT.
THE BAN IS IT CAN'T BE
MANDATORY.
THESE PEOPLE WERE, IN FACT,
SENTENCED BECAUSE OUR
STATUTE, AT LEAST SINCE 1994,

HAS SAID THAT IT IS A
MANDATORY SENTENCE IF A
JUVENILE CONVICTED OF
FIRST-DEGREE MURDER, IF THE
MANDATORY SENTENCE IS LIFE
WITHOUT PAROLE.
>> YES, BUT MILLER ACTUALLY
PRECLUDED SENTENCES LIFE
WITHOUT PAROLE, SENTENCES
WITHOUT INDIVIDUALIZED
SENTENCING FOR HOMICIDE
OFFENSES, SO THAT WOULD
INCLUDE FIRST- AND
SECOND-DEGREE MURDER.
SECOND DEGREE IS NOT A
MANDATORY SENTENCE, IT IS A
FIRST DEGREE PUNISHABLE BY
LIFE UP TO A TERM OF YEARS UP
TO LIFE.
>> WE'RE NOT TALKING -- HERE
WE'RE TALKING ABOUT JUST --
RIGHT NOW, HOMICIDE, FIRST
DEGREE, YOU BROUGHT UP OTHER
FACTS OF THE CASE, YOU DON'T
WANT TO TALK ABOUT THE FACTS
OF THIS CASE, THEY PUT FORTH
SOMETHING ARE IN 15-YEAR-OLD
GIRL, IT MIGHT BE EXACTLY
WHAT MILLER WAS INTENDING TO
COVER.
AND I'M TRYING TO UNDERSTAND
FROM THE STATE'S POINT OF
VIEW.
THERE'S NO QUESTION THAT
AFTER MILLER, THAT OUR
STATUTE AS APPLIED IS
UNCONSTITUTIONAL.
DO YOU AGREE WITH THAT?
>> AS APPLIED TO CERTAIN
INDIVIDUALS, IT IS.
>> BUT IT HAS TO BE
INDIVIDUALIZED, CORRECT?
>> INDIVIDUALIZED FOR
PIPELINE CASES.
>> NO, MILLER†--
>>†THERE IS NO QUESTION THAT
EVERY JUVENILE AFTER MILLER
IS GOING TO HAVE AN
INDIVIDUALIZED SENTENCE AND
NOT BE SUBJECT TO MANDATORY

LIFE WITHOUT THE POSSIBILITY
OF PAROLE, CORRECT?
>> BUT WE'VE GOT CHILDREN FOR
THE LAST 20 YEARS WHO NO
MATTER WHAT THE
CIRCUMSTANCES, WHETHER
SOMEBODY WAS -- THEY WERE
SOMEBODY'S GIRLFRIEND OR
BOYFRIEND, THEY GET, AND THE
TRIAL JUDGE SAYS I DON'T WANT
TO HAVE TO GIVE THIS
SENTENCE, BUT I HAVE NO
CHOICE, WHICH IS, THEY GET
LIFE WITHOUT THE POSSIBILITY
OF PAROLE AT THE TUNE OF
HUNDREDS OF THOUSANDS OF
DOLLARS TO THE STATE OF
FLORIDA, THE STATE IS REALLY
SAYING YOU THINK THAT IT
WOULD NOT -- THAT WITT
DOESN'T REQUIRE THIS BE
APPLIED RETROACTIVELY?
>> LET ME CLARIFY, MILLER
APPLIES TO SECOND-DEGREE
MURDER CONVICTIONS THAT
RECEIVE LIFE AS WELL.
THOSE ARE NOT MANDATORY
SENTENCES.
JUST TO CLARIFY THAT.
IF WE'RE MOVING TO
SIGNIFICANT MAGNITUDE UNDER
THE WITT FACTORS, THAT'S WHEN
YOU LOOK AT THE PURPOSE OF
THE RULE, THE RELIANCE ON THE
RULE, AND THE EFFECT ON THE
ADMINISTRATION OF JUSTICE.
>> LET'S START WITH THE
FUNDAMENTAL SIGNIFICANCE.
FACT THAT THE SUPREME COURT
OF THE UNITED STATES SAYS
THAT IT WOULD BE THAT
MANDATORY LIFE SENTENCING
WITHOUT THE POSSIBILITY OF
PAROLE, WITHOUT THE
OPPORTUNITY FOR
INDIVIDUALIZED SENTENCING IS
AN EIGHTH AMENDMENT
VIOLATION, SIMILAR TO, IN MY
VIEW, IT MAY BE AND I THINK
JUSTICE CANADY IS CORRECT,

JUVENILES CANNOT GET THE
DEATH SENTENCE BUT FOLLOWING
ALONG THAT LINE.
THAT'S NOT FUNDAMENTAL
SIGNIFICANCE IN TERMS OF THE
UNITED STATES SUPREME COURT
STAYING IS EIGHTH AMENDMENT,
IT IS DISPROPORTIONATE TO DO
THAT?
>> IT IS NOT A CATEGORICAL
BAN.
IT IS NOT A SUBSTANTIVE
CHANGE THAT FORBIDS THE STATE
FROM IMPOSING THAT PENALTY.
JUDGES ARE NOT PROHIBITED.
IT MAY BE UNCOMMON.
>> I GUESS THE HITCHCOCK LINE
OF CASES WERE THE ONES THAT
STRUCK ME.
IF WE WERE RESENTENCING DEATH
PENALTY DEFENDANTS WHO AS
POINTED OUT ALREADY HAD SOME
MITIGATING CIRCUMSTANCES
PLACED THERE, AND THE UNITED
STATES SUPREME COURT NEVER
SAID ANYTHING THAT IT WOULD
BE UNCOMMON TO SENTENCE
PEOPLE TO DEATH, HERE, WHERE
THERE'S NO INDIVIDUALIZED
SENTENCING, THAT WAS EVER
GIVEN, IT WOULD BE UNCOMMON,
HOW COULD THAT NOT BE JUST
FUNDAMENTALLY FAIR OR WITH
PRECEDENT, HOW IS IT
DIFFERENT FROM THE DEATH
PENALTY CASES AFTER HITCHCOCK
AND LOCKETT AND WHAT WE DID
IN HARVARD AND ALL THOSE
OTHER CASES?
>>†AND I'M GLAD YOU BROUGHT
THAT UP.
IN THE REILLY AND FOSTER
OPINIONS WHERE THEY HELD THEY
WERE RETROACTIVE, THEY DIDN'T
PROVIDE ANALYSIS UNDER WITT.
IT MAKES IT MORE DIFFICULT TO
DISTINGUISH.
IF YOU LOOK AT WITT FACTORS,
IT'S THE PURPOSE OF THE RULE,
IMPACT OF THE ADMINISTRATION

OF JUSTICE AND RELIANCE ON
THE RULE.
AND HITCHCOCK AND LOCKETT
WERE BASED ON FLORIDA SUPREME
COURT CASE IN COOPER, WHICH
HAPPENED IN 1976.
WHERE IT SAID, IT WAS
INTERPRETED BY MANY OF THE
TRIAL COURTS THAT YOU COULD
NOT CONSIDER NONSTATUTORY
MITIGATION, BUT ONLY TWO
YEARS LATER IN SONGER, THE
FLORIDA SUPREME COURT SAID
THAT'S NOT WHAT WE SAID, YOU
CAN CONSIDER NONSTATUTORY
MITIGATION, WE WERE ONLY
INCLUDING IRRELEVANT EVIDENCE
IN COOPER.
YOU ARE TALKING ABOUT A
TWO-YEAR PERIOD.
THE RELIANCE ON THE RULE WAS
ONLY TWO YEARS, IT WASN'T THE
PIPELINE CASES, THEY WERE
CASES THAT WERE FINAL IN THE
TWO-YEAR PERIOD.
THEY WERE VERY RECENT BECAUSE
IT DIDN'T OCCUR OVER A LONG
PERIOD OF TIME, AGAIN, A
SHORT PERIOD OF TIME, AND THE
EFFECT ON THE ADMINISTRATION
OF JUSTICE, AND I BELIEVE IT
WAS ONLY A HANDFUL OF CASES
THAT IT WAS AFFECTED.
I THINK ABOUT 11 TALKING TO
SOME OF OUR CAPITAL
ATTORNEYS, THAT IT WAS ONLY
11 CASES.
WE ARE TALKING ABOUT
RESENTENCING, THESE ARE NOT
JUST PAPER RESENTENCING,
THESE ARE FULL RESENTENCING
HEARINGS WHICH ARE VERY
SIMILAR TO CAPITAL
RESENTENCING HEARINGS IN 200
CASES.
LET'S ACCEPT THE NUMBER 200.
>> WHAT WOULD YOU SAY OF THE
200 CASES IF IT'S UNCOMMON TO
SENTENCE JUVENILES TO LIFE
WITHOUT THE POSSIBILITY OF

PAROLE.
WE KNOW HOW MANY OF THOSE 200
AND SOMETHING ARE ONES THAT
WOULD SURELY GET A SENTENCE
LESS THAN LIFE WITHOUT THE
POSSIBILITY OF PAROLE?
>> WE HAVE NO IDEA BECAUSE
YOU'RE GOING TO HAVE TO
CONDUCT A FULL, ALMOST LIKE
CAPITAL SENTENCING HEARING.
YOU'RE GOING TO HAVE
WITNESSES, FACTS ABOUT THE
CRIME SCENE, HOW THE CRIME
OCCURRED.
WHAT HAPPENED?
MEDICAL EXAMINERS.
SOME OF THE CASES ARE 20
YEARS OLD, THEY'VE BEEN FINAL
FAIR LONG TIME.
THOSE WITNESSES, YOU KNOW I
THINK THE DCA JUDGES POINTED
OUT THE EFFECTS OF THE
ADMINISTRATION, IT'S EASY TO
SAY WE GOT 20 JURISDICTIONS,
IT'S 200 CASES, NO PROBLEM,
BUT THAT IS.
YOU'RE HAVING TO MUSTER UP
WITNESSES†--
>>†CAN I ASK A QUESTION AS
YOU'RE GOING THROUGH THE
LITANY OF HORRIBLES.
SHOULD THE FACT WE FACTOR IN
OUR CHILDREN BE FACTORED INTO
THE EQUATION IN SOME WAY?
>> WELL I THINK WE'RE DEALING
WITH JUVENILE MURDERERS AND ONLY
JUVENILE MURDERERS.
>> I UNDERSTAND.
THEY ARE CONSIDERED JUVENILES,
SO MY QUESTION IS THEN, SHOULD
WE NOT CONSIDER, IF YOU DON'T
LIKE MY WORD CHILDREN, SHOULD WE
NOT FACTOR IN THAT WE ARE
DEALING WITH THE JUVENILES OF
FLORIDA AS A CONSIDERATION IN
THE RELATIVE DISCUSSION?
>> WELL I THINK YOU DO BUT I
THINK ALSO, IN LOOKING AT WITT,
YOU LOOK AT WHAT ALTERNATIVES
THEY HAVE UP AND I'M NOT SAYING

THAT CLEMENCY IS AN ALTERNATIVE
FOR A PIPELINE CASES BUT MILLER
IS SATISFIED BY A PAROLE
HEARING.
AND --
>> I'M SORRY.
MILLER IS SATISFIED BY --
>> MILLER WERE, WOULD BE
SATISFIED IF THEY WERE UP FOR
PAROLE, MILLER WOULD BE
SATISFIED.
THESE CASES LONG SINCE FINAL,
THEY'RE STILL ELIGIBLE FOR
CLEMENCY. I'M NOT SAYING IT
WOULD BE SUFFICIENT FOR PIPELINE
CASES BUT THEY CAN STILL
CONSIDER, THE CLEMENCY BOARD,
IT'S DIFFERENT BOARD BUT CAN
CONSIDER THOSE FACTORS SO --
>> THAT IS TOTALLY, CLEMENCY IS
TOTALLY AT THE DISCRETION OF THE
LEGISLATURE.
THAT DOES NOT, IN MY ESTIMATION,
HOW IN THE WORLD DOES THAT
SATISFY OUR REQUIREMENT THAT
JUVENILES HAVE AN INDIVIDUALIZED
SENTENCING PROCEEDING IN THESE
KIND OF SITUATIONS?
>> WE'RE TALKING ABOUT CASES THAT
ARE FINAL BECAUSE, AND I
THINK ALL THE CASES --
>> SO WE JUST TURN OUR BACKS ON
THE FACT THAT THEY ARE 200 AND
SOME, EVEN IF YOU SAY 500 OF
THEM, YOUNG PEOPLE, WHO ARE
SITTING IN JAIL FOREVER, AND WE
JUST TURN OUR BACKS ON THAT WHEN
THE SUPREME COURT HAS SAID
CLEARLY THAT, THAT IS NOT A, AN
APPROPRIATE SENTENCE IF THEY
HAVE HAD NOT HAD THE OPPORTUNITY
TO HAVE THEIR SITUATION LOOKED
AT INDIVIDUALLY?
>> WELL, CORRECT BUT IN, IN A
RETROACTIVITY ANALYSIS THE
COURT, ALL THE COURTS HAVE
PLACED HEAVY WEIGHT ON FINALITY,
AND EXCEPTIONAL CASES ARE
SUPPOSED TO BE VERY FEW AND FAR
BETWEEN.

>> I SEE, I GUESS WE'RE
APPROACHING IT IN DIFFERENT WAYS
WHAT IS THE EFFECT ON
ADMINISTRATION OF JUSTICE.
THIS COURT EVERY DAY SPENDS A
GREAT DEAL OF ITS TIME ON A VERY
FEW CAPITAL CASES BECAUSE THE
STATE OF FLORIDA HAS DECIDED
THOSE CASES DESERVE THE UTMOST
ATTENTION.
AND WE GIVE THOSE DEFENDANT,
EVERY SINGLE ONE OF THEM, WHO
HAVE COMMITTED SOME OF THE MOST
HEINOUS MURDERS, WE GIVE THEM
INDIVIDUALIZED SENTENCING
BECAUSE WE UNDERSTAND HOW
SERIOUS IT IS TO IMPOSE THE
DEATH PENALTY.
SO WE SPEND A GREAT PERCENTAGE
OF OUR TIME DOING IT.
NOW WE'RE TALKING ABOUT, WHETHER
YOU CALL THEM CHILDREN,
JUVENILES, CHILDREN UNDER 18,
IS, THESE ARE CHILDREN,
JUVENILES, THAT ARE, HAVE BEEN
NOW, THE UNITED STATES SUPREME
COURT HAS SPOKEN ON THE 8TH
AMENDMENT VIOLATION.
WE'RE NOT TAKING ABOUT RETRYING
THEM.
WE'RE NOT TALKING ABOUT RETRYING
THEM.
225 GUILT PHASE TRIALS.
WE'RE NOT TALKING ABOUT
CONVENING A JURY.
WE'RE NOT TALKING ABOUT APPRENDI
KIND OF CASES THIS WILL BE
DECIDED BY A JUDGE VERSUS A JURY
WHERE APPRENDI HAD NOTHING
DECLARED UNCONSTITUTIONAL WITH
OUR SENTENCING SCHEME.
SO WE'RE NOW TALKING ABOUT WHAT
YOU SAY IS A LOT.
AND I GUESS WHEN I SAW THE
NUMBER, I THOUGHT, HOW COULD
SOMEONE SAY THIS IS GOING TO
HAVE A, WHAT'S THE TERM EFFECT?
>> THE IMPACT ON THE
ADMINISTRATION OF JUSTICE.
>> WHEN WE ALL THE TIME, WHEN

YOU THINK ABOUT WHAT THIS COURT SPENDS ON A RELATIVELY FEW DEATH PENALTY CASES.
SO I GUESS IT IS REALLY, MAYBE IT IS IN THE EYE OF THE BEHOLDER OF WHAT IS THE EFFECT ON THE ADMINISTRATION OF JUSTICE BUT I ALWAYS THOUGHT SENTENCING EASIER TYPE OF CASE TO FIND RETROACTIVITY THAN WHEN IT WAS A CONVICTION WHERE THE SANCTITY OF THE CONVICTION, THE VALIDITY OF THE CONVICTION WAS UPHELD.
HOW DOES, HOW DOES THE STATE SEE THAT?
>> AND I THINK SENTENCING IS, ACCEPTED IN THESE CASES, IT IS GOING TO BE MORE LIKE A PENALTY PHASE SENTENCING HEARING BECAUSE YOU HAVE TO BOOTSTRAP A LOT OF FACTS.
IS IT, HEINOUS, ATROCIOUS, CRUEL, IS IT PREMEDITATED.
YOU WILL HAVE TO HAVE A LOT MORE INDIVIDUAL FACTS DID HE QUALIFY FOR HABITUAL OFFENDER SENTENCE OR NOT.
>> IF HELD RETROACTIVE WOULD MILLER BE SATISFIED BY AN AVAILABILITY
OF PAROLE FOR THE 200?
>> YES BUT, AND THE STATE'S POSITION, IF YOU DO HOLD IT RETROACTIVE, I THINK EVERYONE WOULD BE ENTITLED TO AN INDIVIDUALIZED SENTENCING HEARING.
I THINK IT WOULD ONLY BE FAIR FOR THE COURT TO ADDRESS, AND I THINK THE ISSUE OF WHAT TO DO THEN, IF THE SENTENCE, THE JUDGE SAYS, OH, LET THESE CASES --
>> LET ME MAKE SURE I UNDERSTAND.
ARE YOU SAYING THAT THE 200 GET AN AUTOMATIC RESENTENCING, OR WOULD IT BE SUFFICIENT JUST TO PROVIDE THEM THE POSSIBILITY OF PAROLE?

>> I THINK, IT'S THE STATE'S
POSITION THAT THE REMEDY, IF IT
IS RETROACTIVE, IS THEY'RE
ENTITLED TO AN INDIVIDUALIZED
SENTENCING PROCEEDING.
THE COURT CAN --
>> BUT ISN'T THE CASE THAT
THE CONSTITUTIONAL PROBLEM WOULD
BE CURED IF THEY WERE MADE
ELIGIBLE FOR PAROLE?
THE REALLY KIND OF TWO DIFFERENT
ROUTES THIS COULD GO.
TO CURE THE CONSTITUTIONAL
PROBLEM.
>> THAT WOULD CURE IT.
I THINK THE JUDGE COULD DECIDE,
IS THIS ONE OF THE UNCOMMON
CASES WHERE THEY DESERVE A LIFE
WITHOUT PAROLE SENTENCE.
IF NOT, THEY SAY NO, THIS PERSON
HAS SIGNIFICANT MITIGATION, THAT
THEY DO NOT DESERVE A LIFE
WITHOUT PAROLE SENTENCE, THEN I
THINK THE COURT WOULD HAVE TO
ENGAGE IN STATUTORY REVIVAL, GO
BACK TO THE CONSTITUTIONAL
PROVISION, THE CONSTITUTIONAL
STATUTE, WITT WOULD BE UPHELD
WHICH ALLOWS YOU ELIGIBILITY
TO --
>> I DON'T UNDERSTAND THAT
BECAUSE IT SEEMS LIKE THE, TO
ME, ONCE THEY HAVE THE
INDIVIDUALIZED EVALUATION THEN
THE PAROLE IS NOT, IT IS NOT
REQUIRED BECAUSE, THE, IF I
UNDERSTAND THE HOLDING IN MILLER
CORRECTLY, THAT IF, THAT A COURT
COULD IN FACT DETERMINE THAT A
PARTICULAR JUVENILE, CONSIDERING
THE MITIGATING FACTORS AND OTHER
THINGS THAT SHOULD BE
CONSIDERED, SHOULD BE SENTENCED
TO LIFE IN PRISON WITHOUT THE
POSSIBILITY OF PAROLE, AND THAT
WOULD BE CONSTITUTIONAL UNDER
THE 8th AMENDMENT, ISN'T
THAT CORRECT?
>> CORRECT.
BUT IF HE FIND THEY ARE NOT

ELIGIBLE FOR THAT SENTENCE
BECAUSE HE COULD FIND EITHER
WAY, THE TRIAL COURT COULD FIND
THEY ARE ELIGIBLE FOR LIFE
WITHOUT PAROLE SENTENCE OR AFTER
THE SENTENCING HEARING THEY MAY
FIND THAT THEY ARE NOT, THEN IT
IS THE STATE'S POSITION YOU HAVE
TO ENGAGE IN STATUTORY REVIVAL
AND --
>> BECAUSE WE HAVE SEVERAL
CASES, I DIDN'T THINK THAT THIS
CASE, AND I UNDERSTAND IN
RESPONSE TO YOUR QUESTION
JUSTICE POLSTON ASKED, INVOLVED
YET WHAT THE REMEDY WOULD BE
BECAUSE WE'RE STRUGGLING WITH
THAT IN OTHER CASES.
THERE IS A CASE, RIGHT, WHICH
TALKS ABOUT WHAT THE UNDER BOTH
MILLER AND GRAHAM EXACTLY WHAT
ARE THE OPTIONS.
BUT AS I UNDERSTAND MILLER,
UNLIKE THE GRAHAM CASES WHICH
INVOLVE A MEANINGFUL OPPORTUNITY
FOR RELEASE, MILLER CASES FOCUS
ON INDIVIDUALIZED SENTENCING.
AND, ARE THEY TWO, AND I WAS
TRYING TO FIGURE OUT ARE THEY
TWO DIFFERENT LINES OF
REASONING?
BECAUSE ONE MEANINGFUL
OPPORTUNITY FOR RELEASE CAN BE
SATISFIED BY GIVING THEM PAROLE,
INDIVIDUALIZED SENTENCING
REQUIRES WHAT YOU WERE TALKING
ABOUT, SORT OF THE HITCHCOCK
TYPE OF THING.
SO WHAT, ARE WE TALKING ABOUT
TWO DIFFERENT TYPES OF CASES
DEPENDING ON THE NATURE OF THE
SENTENCE AND, IS THE ISSUE THE
REMEDY, HAS THAT BEEN BRIEFED IN
THIS CASE?
>> THAT HAS NOT BEEN BRIEFED.
THAT ISSUE BEFORE YOU IN
HORSILY, I THINK IF YOU'RE GOING
TO FIND IT IS RETROACTIVE YOU
HAVE TO GIVE THE TRIAL COURT
REMEDIES IF THEY FIND LIFE

WITHOUT PAROLE IS NOT
APPROPRIATE --
>> BEFORE WE MAKE A DECISION IN
HAD CASE?
>> AT LEAST SIMULTANEOUSLY
BECAUSE IF NOT, YOU'RE GOING TO
LEAVE THE TRIAL COURTS WITHOUT
ANY DIRECTION WHATSOEVER.
IF THEY FIND, BECAUSE IF YOU GO
BACK TO THE INDIVIDUALIZED
SENTENCING HEARING AND THEY FIND
THAT LIFE WITHOUT PAROLE IS NOT
APPROPRIATE, THEN THEY HAVE TO
KNOW WHAT TO DO BECAUSE OUR
STATUTE IS MANDATORY AT THAT
POINT.
AND THEY HAVE DECIDED THAT THIS
INDIVIDUAL HAS SIGNIFICANT
MITIGATION, THAT THEY DON'T,
THAT THAT SENTENCE WOULD NOT BE
APPROPRIATE.
THE MANDATORY SENTENCE, THEN
WE'RE, WITHOUT --
>> INDIVIDUALIZED SENTENCING TO
ALLOW THE TRIAL COURT TO HAVE
SOME DISCRETION WHERE MANDATORY
TAKE THAT IS DISCRETION AWAY?
WHY HAVE INDIVIDUALIZED
SENTENCES IF THE SENTENCE IS
STILL MANDATORY?
THAT SEEMS, DOESN'T MAKE SENSE
TO ME.
>> BUT OUR STATUTE AS IT'S
WRITTEN NOW FOR FIRST-DEGREE
MURDER IS A MANDATORY LIFE
SENTENCE.
>> AND IT IS UNCONSTITUTIONAL
WITH RESPECT TO THIS CLASS OF
DEFENDANTS.
>> AS APPLIED TO CERTAIN
JUVENILES.
AS APPLIED TO THE JUVENILES THAT
ARE NOT GOING TO BE THE UNCOMMON
SENTENCES THAT DESERVE THAT.
>> BUT THE MANDATORY ASPECT OF
IT IS UNCONSTITUTIONAL WITH
RESPECT TO JUVENILES, ISN'T THAT
CORRECT?
>> UNCONSTITUTIONAL AS TO
JUVENILES THAT WOULDN'T QUALIFY

FOR THAT LIFE WITHOUT PAROLE
SENTENCE.
IT IS NOT A CATEGORICAL BAN.
THERE ARE STILL CERTAIN
JUVENILES --
>> TAKE YOU BACK TO EARLIER
QUESTION WE TALKED ABOUT EARLIER
AND IT IS THE PURPOSE OF THIS
RULE THAT HAS COME FROM THE
SUPREME COURT.
WHAT AGAIN DOES THE STATE SAY IS
THE PURPOSE OF THE RULE?
>> THE PURPOSE IS APPLY TO
ALLOW, AN OPPORTUNITY FOR
MITIGATION IN INDIVIDUALIZED
SENTENCING.
>> BUT ISN'T THE PURPOSE ALSO TO
MAKE THESE LIFE SENTENCES
WITHOUT PAROLE UNCOMMON?
IS THAT NOT PART OF THE PURPOSE?
>> WELL, AND I THINK YOU HAVE TO
DISTINGUISH BETWEEN FINAL CASES
AND PIPELINE CASES.
AND I THINK, BECAUSE THERE IS,
THERE NEEDS TO BE FINALITY AT
SOME POINT IN TIME.
AND WE HAVE TO LOOK AT HOW FAR
BACK DOES IT GO.
WHAT DOES IT APPLY.
ALL THE CASES THEY DON'T
DISPARAGE A RIGHT BY NOT
APPLYING FINALITY, BY NOT
APPLYING IT RETROACTIVE AND U.S.
SUPREME COURT HAS NOT SAID THIS
IS RETROACTIVE.
I THINK THAT IS PROBABLY TEED UP
TO BE REVIEWED BY THEM.
>> WHAT WERE THEY DOING IN THEIR
COMPANION CASE WHERE THEY DEALT
WITH A CASE WHICH WAS ALREADY
FINAL?
>> THE JACKSON CASE HE WAS SEEKING
RELIEF UNDER ROPER, MAKING THE
SAME ARGUMENT AS GRAHAM IN
ARKANSAS SUPREME COURT WHEN
GRAHAM WAS ISSUED.
SO HE CAME UP TO THE U.S.
SUPREME COURT ON EXTENSION OF
GRAHAM AND GRAHAM APPLIES.
>> WAS THE SENTENCE FINAL?

>> THE SENTENCE WAS FINAL AND
POST-CONVICTION CASE BUT UP
FOR GRAHAM REVIEW.
EVERYONE HAS SEEN GRAHAM WOULD
APPLY RETROACTIVELY BECAUSE IT'S
A CATEGORICAL BAN ON SENTENCE TO
NON-HOMICIDE, JUVENILES WHO DID
NOT COMMIT A HOMICIDE.
SIMILAR TO PADILLA.
PADILLA WAS A POST-CONVICTION
CASE INVOLVING DEPORTATION.
THEY ANNOUNCED A NEW RULE OF
LAW, EVEN THOUGH IT WAS
POST-CASE, U.S. SUPREME COURT
SAID IT DOESN'T APPLY
RETROACTIVE.
>> IT, YOU'RE SAYING IF THERE IS
ANY JUVENILE WITHIN TWO YEARS OF
MILLER, THEY COULD BRING UP
MILLER CLAIM?
>> THE U.S. SUPREME COURT
SAID THAT PADILLA DOES NOT APPLY
RETROACTIVELY.
>> PADILLA WAS A POST-CONVICTION
CASE.
>> PADILLA WAS POST-CONVICTION
CASE BUT THEY DID NOT SAY IT
APPLIED RETROACTIVE.
IF IT IS RETROACTIVE, IT WILL
SAY IT IS RETROACTIVE.
I SEE I'M OUT OF MY TIME SO I
WILL REST ON MY BRIEF.
>> THE STATE MAKES DISTINCTION
BETWEEN PIPELINE AND
NON-PIPELINE CASES.
CHARACTERISTICS OF CHILDREN
THAT MAKE THEM UNIQUE, THAT MAKE
THEM DIFFERENT THAT THE MILLER
COURT ADDRESSED ARE NO, NO LESS
APPLICABLE TO CHILDREN NOT IN
THE PEOPLE LINE.
>> THIS ISSUE OF REMEDY OCCURRED
TO ME AND WE'RE STRUGGLING, AT
LEAVE I'M STRUGGLING WITH
GRAHAM, BECAUSE I DON'T KNOW,
THE STATE IS INVOLVED IN THE ALL
THE CASES.
IF WE JUST HELD IT RETROACTIVE,
DIDN'T GIVE ANY GUIDANCE TO THE
TRIAL COURTS AS TO WHAT THEY'RE

SUPPOSED TO DO IT WOULD BE A
PROBLEM.
YOU HAVE NOT ADDRESSED THE
REMEDY HERE.
>> NO, THE PARTIES HAVE NOT
ADDRESSED THE REMEDY.
>> WE COULD ASK FOR SUPPLEMENTAL
BRIEFING IN THIS CASE.
ARE YOU AWARE OF THE HOSLEY
CASE?
>> I AM.
>> I BET YOU'RE PRETTY FAMILIAR
WITH ALL THAT LAW.
WHAT IS YOUR VIEW IN THIS CASE
IF IT HELD, RETROACTIVE WOULD AN
AVAILABILITY OF PAROLE CURE THE
MILLER UNCONSTITUTIONAL ISSUE?
>> WELL, AT THIS POINT THE
LEGISLATURE I BELIEVE HAS TO
ACT.
I DON'T THINK THIS COURT CAN, I
MEAN WE HAVE A STATUTE THAT'S
UNCONSTITUTIONAL IN ITS ENTIRETY
AS APPLIED TO A CLASS.
I'M NOT SURE THAT THE COURT CAN
FASHION A REMEDY OF PAROLE.
>> IF THEY DID ACT AND THEY
PROVIDED PAROLE FOR THESE 200,
DOES THAT SATISFY THE
UNCONSTITUTIONALITY ISSUE OR
DO THEY HAVE TO GO BACK FOR
RESENTENCING?
>> MILLER REQUIRES AN
INDIVIDUALIZED SENTENCING
DETERMINATION.
I BELIEVE IT CONTEMPLATES
PERHAPS LESS THAN LIFE WITHOUT
PAROLE.
BUT, WITHOUT THE LEGISLATURE
ACTING --
>> DOES MILLER REQUIRE
INDIVIDUALIZED SENTENCING
DETERMINATION, THIS DEALING WITH
A MANDATORY REQUIREMENT, NO?
>> THAT'S TRUE.
THAT'S TRUE.
AND IT'S, ALL OF IT IS TALK IN
TERMS OF PROPORTIONALITY
REQUIRES THE CONSIDERATION OF
MITIGATION BUT NOTHING IN MILLER

SAYS THAT LIFE WITH PAROLE IS
UNCONSTITUTIONAL.
>> SO WHAT WAS, WHAT IS THE
ANSWER TO MY QUESTION?
>> SO, I DON'T KNOW THAT THIS
COURT CAN CHANGE, CAN WRITE A
NEW STATUTE OR --
>> LET ME GO BACK.
AGAIN, THE LEGISLATURE, IF THE
LEGISLATURE HAS A STATUTE THAT
PROVIDES PAROLE, DOES THAT CURE
MILLER?
>> YES.
AND THEN WE WOULD GET INTO
MEANINGFUL OPPORTUNITY FOR
RELEASE UNDER GRAHAM.
>> OKAY.
THANK YOU.
>> THE STATE INDICATED THAT THE
EFFECT OF HITCHCOCK AND LOCKETT
WAS REALLY VERY LIMITED.
ONLY TWO YEARS AND ONLY A FEW
CASES AND I WANT TO MAKE CLEAR
AND THAT WAS NOT THE SITUATION
WHATSOEVER.
HITCHCOCK WAS DECIDED IN 1987.
SO WE HAD A --
IT WASN'T TWO YEARS, WE HAD FROM
1973 WHEN THIS COURT APPROVED
THE FLORIDA DEATH PENALTY
STATUTE IN STATE v. DIXON,
THROUGH 1987 THAT SENTENCES WERE
BEING FITTED WITHOUT THE
INDIVIDUALIZED SENTENCING
DETERMINATION REQUIRED UNDER
HITCHCOCK AND UNDER LOCKETT.
THE SUBSTANTIVE DISTINCTION
THAT THE STATE IS MAKING AS WELL
IS NOT PERTINENT.
IT WOULD BE PERTINENT IF WE WERE
LOOKING AT A TEAGUE ANALYSIS --
THIS COURT MADE CLEAR IN WITT
ADOPTING THE STANDARDS OF THE
ABA, THAT WHETHER A RULE IS
SUBSTANTIVE OR PROCEDURAL,
WHETHER IT PERTAINS TO THE
CONVICTION OR THE SENTENCE, DOES
NOT CONTROL WHETHER IT IS
RETROACTIVE.
AND I THINK THE, PROBABLY THE

BUSINESS, THE BEST ANSWER ON THE RETROACTIVITY QUESTION IS FOUND IN WITT.
WHERE THE COURT SAID, THE DOCTRINE OF FINALITY SHOULD BE ABRIDGED ONLY WHEN A MORE COMPELLING OBJECTIVE APPEARS SUCH AS INSURING FAIRNESS AND UNIFORMITY IN INDIVIDUAL ADJUDICATIONS.
CONSIDERATIONS OF FAIRNESS AND UNIFORMITY MAKE IT VERY DIFFICULT TO JUSTIFY DEPRIVING A PERSON OF HIS LIBERTY OR HIS LIFE UNDER PROCESS NO LONGER CONSIDERED ACCEPTABLE AND NO LONGER APPLIED TO INDISTINGUISHABLE CASES.
OUR CHILDREN WHO ARE NOT IN THE QUOTE, UNQUOTE, PIPELINE ARE CHILDREN WHO HAVE BEEN SENTENCED BEFORE MILLER, ARE NO LESS ENTITLED TO AN ACCURATE SENTENCING DETERMINATION, AN INDIVIDUALIZED SENTENCING AND A SENTENCE CONSISTENT WITH THE 8th AMENDMENT.
>> THANK YOU FOR YOUR ARGUMENTS.