

>> ALL RISE.

HEAR YE, HEAR YE, HEAR YE, THE
SUPREME COURT OF FLORIDA IS
NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEA,
DRAW NEAR, GIVE ATTENTION, YOU
SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.

LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.

PLEASE BE SEATED.

WELCOME TO THE FLORIDA SUPREME
COURT.

OUR FIRST CASE FOR THE DAY IS
HENRY V. STATE OF FLORIDA.

YOU MAY PROCEED.

>>†GOOD MORNING.

MAY IT PLEASE THE COURT.

MY NAME IS DAVID LUCK, AND
ALONG WITH PETER WEBSTER AND
CHRISTOPHER QUARTZ, I
REPRESENT THE PETITIONER,
MR. †LEIGHDON HENRY.

I RESPECTFULLY REQUEST THREE
MINUTES FOR REBUTTAL.

YOUR HONOR, THE REASON WE ARE
HERE TODAY IS TO ASK THIS
COURT TO DETERMINE WHETHER THE
STATE OF FLORIDA IS GOING TO
RECOGNIZE AND ENFORCE THE TRUE
MEANING AND MANDATE OF THE
UNITED STATES SUPREME COURT'S
DECISION IN GRAHAM V. FLORIDA,
OR WHETHER INSTEAD THIS STATE
WILL PERMIT AN END RUN AROUND
THAT DECISION WHICH ALLOWS THE
STATE TO ACCOMPLISH INDIRECTLY
WHAT IT IS PROHIBITED FROM
ACCOMPLISHING DIRECTLY.

SENTENCING JUVENILE
NONHOMICIDE OFFENDERS TO DIE
IN PRISON WITHOUT SO MUCH AS A
SINGLE PAROLE OPPORTUNITY.

>> ISN'T ONE OF THE PROBLEMS
WITH FLORIDA, AS FAR AS THE
GRAHAM V. FLORIDA DECISION IS
CONCERNED, IS OUR PAROLE
SYSTEM.

IF FLORIDA HAD A PAROLE SYSTEM, WOULD THAT BE THE CURE?

>> YES, YOUR HONOR, FROM OUR PERSPECTIVE, AS WE INDICATED IN OUR REMEDIES ARGUMENT IN OUR BRIEFING.

THIS COURT HAS THE AUTHORITY AND OBLIGATION UNDER GRAHAM, THE EIGHTH AMENDMENT AND ARTICLE 1 SECTION 17 OF THE FLORIDA CONSTITUTION TO HOLD A SINGLE SUBSECTION OF THE FLORIDA CRIMINAL CODE UNCONSTITUTIONAL AS APPLIED, WHICH WILL PERMIT JUVENILE NONHOMICIDE OFFENDERS SUCH AS MR. †HENRY AND SUCH AS GRAHAM HIMSELF TO ENJOY PAROLE CONSIDERATION.

RELIEF IS NOT GUARANTEED, BUT AT LEAST THE MEANINGFUL AND REALISTIC OPPORTUNITY TO PAROLE CONSIDERATION THAT IS REQUIRED BY GRAHAM WOULD BE PERMITTED UNDER THAT RESULT.

AND I'D ALSO LIKE TO POINT OUT THAT YESTERDAY WE FILED A NOTICE OF SUPPLEMENTAL AUTHORITY WITH THE COURT.

IT WAS A DECISION FROM THE ALABAMA SUPREME COURT.

IT'S CALLED EX PARTE HENDERSON, AND THAT DECISION THE ALABAMA SUPREME COURT WAS ATTEMPTING TO DETERMINE HOW THAT STATE WOULD COMPLY WITH THE UNITED STATES SUPREME COURT'S SIMILAR MANDATE IN MILLER V. ALABAMA FOR JUVENILE HOMICIDE OFFENDERS.

THE ALABAMA SUPREME COURT, WITHOUT PROMPTING FROM THE PETITIONERS, SUA SPONTE, THAT PORTION OF ALABAMA STATUTORY LAW THAT PREVENTED LIFE WITH PAROLE SENTENCES FOR JUVENILE HOMICIDE OFFENDERS.

WE REQUEST THE SAME RELIEF HERE.

>> DID YOU SAY LIFE WITH PAROLE?
>> LIFE WITH PAROLE, FOR JUVENILE HOMICIDE OFFENDERS.
>> OH, HOMICIDE, OKAY.
>> THAT WAS TO COMPLY WITH THE UNITED STATES SUPREME COURT'S 2012 DECISION IN MILLER.
>> IF, IN FACT, A JUVENILE -- HENRY HAD A SENTENCE OF 99 YEARS, CORRECT?
>> 90 YEARS, YES, YOUR HONOR.
>> IF HE WAS ELIGIBLE FOR PAROLE CONSIDERATION, CAN WE DETERMINE WHEN THAT WOULD BE? I MEAN, WOULD HE SERVE, NONETHELESS, 60 OF THOSE YEARS OR 50?
WHERE ARE WE IF WE CONSIDER PAROLE?
>> UNDER TITLE 23 OF THE FLORIDA ADMINISTRATIVE CODE WHICH CONSIDERS THE REGULATIONS DRAFTED BY THE PAROLE COMMISSION TO IMPLEMENT AND AFFECT CHAPTER 947, WE AT LEAST KNOW MR. HENRY -- BASED ON MY READING OF THE STATUTES AND THE REGULATIONS -- WOULD RECEIVE AN INITIAL INTERVIEW -- OR SHOULD HAVE RECEIVED AN INITIAL INTERVIEW WITHIN 24 MONTHS OF BEGINNING HIS SENTENCE.
THAT'S NOT A PAROLE HEARING. WHAT THAT IS IT'S AN INTERVIEW TO DETERMINE WHAT IS CALLED HIS PRESUMPTIVE PAROLE RELEASE DATE.
THAT PRESUMPTIVE PAROLE RELEASE DATE, WHICH IS DETERMINED BY A PAROLE HEARING OFFICER, THEN GOES TO THE COMMISSION, AND THE COMMISSION THEN HAS TO DETERMINE, I BELIEVE, WITHIN 90 DAYS OF ITS RECEIPT OF THAT PRESUMPTIVE PAROLE RELEASE DATE WHETHER IT IS GOING TO PROVIDE AN EFFECTIVE PAROLE RELEASE DATE

WHICH IS THE PAROLE RELEASE DATE THAT WOULD APPLY UNLESS AND UNTIL THE BOARD, AT A FINAL HEARING, DETERMINES THAT THE OFFENDER DOES NOT QUALIFY FOR PAROLE.

IF PAROLE IS THEN DENIED, EVERY SEVEN YEARS AFTER THAT DENIAL, MR.†HENRY AND THOSE LIKE HIM WOULD RECEIVE SUBSEQUENT PAROLE CONSIDERATION.

>> SO YOU ARE REALLY ARGUING THAT THE MERE FACT OF BEING CONSIDERED FOR IT WOULD BE SUFFICIENT?

>> YES, YOUR HONOR.

>> EVEN ON A 90-YEAR SENTENCE.

>> YES, YOUR HONOR.

>> EVEN IF HE NEVER GOT IT. THE MERE CONSIDERATION OF IT IS WHAT WOULD BE†--

>>†IT HAS TO -- ACCORDING TO OUR READING OF GRAHAM, IT HAS TO BE A REALISTIC OPPORTUNITY. IF THE PAROLE COMMISSION, UNDER NO CIRCUMSTANCES, NEVER RELEASED THE JUVENILE HOMICIDE OFFENDERS ON PAROLE DESPITE THE FACT THEY WERE ABLE, ON AN OBJECTIVE BASIS, TO DEMONSTRATE MATURATION AND REHABILITATION, WE WOULD ARGUE THAT THAT WOULD NOT COMPLY WITH GRAHAM.

>> WHAT ABOUT THOSE CASES WHERE THERE IS A 25-YEAR MANDATORY MINIMUM?

IS THAT THIS CASE?

>> NO, YOUR HONOR, THAT'S NOT THIS CASE.

THAT IS ALSO ADDRESSED UNDER CHAPTER 947 AND THE ADMINISTRATIVE REGULATION.

>> I'M ONLY SMILING BECAUSE I SAID MAYBE WE SHOULD HEAR THE TWO CASES TOGETHER.

>> WHAT IS IN THIS CASE, HOWEVER, APPLICABLE IS CHAPTER 912 WHICH REQUIRES ALL

DEFENDANTS TO SERVE 85% OF THEIR SENTENCE.

SO FOR THE PAROLE ARGUMENT THAT YOU ARE MAKING, THAT STATUTE WOULD HAVE TO BE DECLARED UNCONSTITUTIONAL AND APPLICABLE TO JUVENILES.

>> JUST TO CLARIFY, YOUR HONOR.

SECTION 921.021E STATES THAT THE PROVISIONS OF CHAPTER 947 DO NOT APPLY TO ADULT OFFENDERS WHO ARE CONVICTED OF FELONY OFFENSES AFTER, I BELIEVE, OCTOBER 1ST, 1998. SO IT'S THE SAME PROVISION THAT WE WOULD BE REQUESTING THIS COURT TO HOLD UNCONSTITUTIONAL AS APPLIED.

>> I SEE YOUR ARGUMENT THAT UNDER GRAHAM THAT THIS IS TOO LONG AND EXCEEDING A LIFE EXPECTANCY, BUT TO SAY THAT PAROLE SHOULD BE REQUIRED, SEEMS TO BE A LEGISLATIVE DETERMINATION.

SHOULDN'T IT BE UP TO THE LEGISLATURE TO DECIDE IF THEY'RE GOING TO ESTABLISH A PAROLE SYSTEM OR PERHAPS REDUCE SENTENCING IN THIS KIND OF CIRCUMSTANCE?

>> WELL, YOUR HONOR, FROM OUR PERSPECTIVE, THE LEGISLATURE CREATED THE PAROLE SYSTEM THAT WE WOULD ASK FROM OUR PERSPECTIVE WOULD STATE AS REQUIRED BY GRAHAM.

>> BUT IS NOT APPLICABLE IN THIS CIRCUMSTANCE.

>> NOT APPLICABLE IN THIS CIRCUMSTANCE.

IN BRENNAN DECISION IN 1999, A FORERUNNER OF ROPER V. SIMMONS, ULTIMATELY IN THE EIGHTH AMENDMENT CONTEXT, IT ULTIMATELY NEEDED TO DETERMINE RIGHTS AND REMEDIES WITH RESPECT TO THE CONSTITUTION STANDARDS, NOT WITH RESPECT TO

LEGISLATIVE STANDARDS.
FROM OUR PERSPECTIVE, GRAHAM
REQUIRES A MEANINGFUL AND
REALISTIC OPPORTUNITY FOR
PAROLE CONSIDERATION.
THAT IS POSSIBLE IN FLORIDA.
AND ALL THAT THIS COURT WOULD
HAVE TO DO IS HOLD
UNCONSTITUTIONAL AS APPLIED TO
THIS LIMITED CLASS OF
OFFENDER, A SINGLE SUBSECTION
OF ONE FLORIDA STATUTE.
>> BUT IT SEEMS TO -- BUT IT
SEEMS TO ME THAT WE EVEN HAVE
TO TAKE THAT A STEP FURTHER
BECAUSE EVEN IF -- ASSUMING
WE'D SAY WE CANNOT DEAL WITH
THE PAROLE ISSUE, THAT'S A
LEGISLATIVE ISSUE, AS JUSTICE
POLSTON JUST SAID.
WOULDN'T WE HAVE TO COME OUT
WITH SOME KIND OF FORMULA
ABOUT HOW MANY YEARS WOULD
EQUATE TO NOT THE LIFE OF THE
DEFENDANT?
I'M JUST TRYING TO FIGURE OUT
IF 90 YEARS, AS ONE OF THE
JUDGES SAID, IN EITHER
CONCURRENCE OR DISSENT.
IF 90 YEARS IS TOO MANY YEARS,
IF HE HAD A 50-YEAR SENTENCE,
WOULD THAT BE -- AND EVEN AT
85% OF 50 YEARS, THAT WILL BE
LESS THAN HIS LIFE EXPECTANCY.
SO WOULD THAT BE OKAY?
SO I'M JUST TRYING TO FIGURE
OUT IN EACH CASE, A JUDGE
WOULD HAVE TO FIGURE OUT THE
DEFENDANT'S LIFE EXPECTANCY,
DEAL WITH THE 85%, AND SEE
WHERE YOU COME OUT, RIGHT?
>> NO, YOUR HONOR, AND THAT'S
THE SIMPLICITY AND THE BEAUTY
OF OUR REMEDIES ARGUMENT AND
JUDGE PADOVANO EXPLAINED THIS
IN THE CONCURRENCE AND THE
SMITH CASE.
REQUIRING PAROLE CONSIDERATION
FOR ALL JUVENILE NONHOMICIDE
OFFENDERS IN FLORIDA WOULD

AVOID ENTIRELY ANY LINE-DRYING ISSUE.

>> WOULDN'T THAT GO WELL BEYOND WHAT IS REQUIRED BY GRAHAM?

BECAUSE GRAHAM DOESN'T APPLY TO ALL JUVENILES THAT HAVE BEEN ADJUDICATED AS ADULTS, AND SO YOU COULD HAVE A SITUATION WHERE A JUVENILE WAS ADJUDICATED AS AN ADULT AND RECEIVED A 10-YEAR SENTENCE, FOR EXAMPLE.

AND UNDER YOUR EXPANSIVE VIEW ABOUT THIS -- WHICH I DON'T THINK REALLY HAS ANYTHING TO DO WITH THIS CASE, AND THE PARTICULAR DEFENDANT IN THIS CASE -- THE RECIPIENT OF THE 10-YEAR SENTENCE WOULD BE ELIGIBLE FOR PAROLE.

WHY DOESN'T THAT GO FURTHER IN DISPLACING THE LEGISLATIVE CHOICES THAT HAVE BEEN MADE THAN IS REQUIRED BY GRAHAM?

>> YOUR HONOR, I SHARE YOUR CONCERNS.

HOWEVER, AND I WOULD JUST MAKE CLEAR, WE'RE NOT CONTENDING THAT A 10-YEAR ADULT SENTENCE BE APPLIED TO A JUVENILE NONVIOLENT OFFENDER.

OUR POSITION IS THE REMEDY WE PROPOSE AVOIDS THE LINE-DRYING CONCERN.

>> EXCEPT IN THIS -- AND I THINK REFLECTING WHAT THE OTHER JUSTICES ARE SAYING, THIS IS A SORT OF A SHOCKINGLY LONG SENTENCE, A 90-YEAR SENTENCE.

I DON'T THINK ANYBODY IS GOING TO DEBATE.

AND HE WAS 17, THAT A SENTENCE THAT WOULD GET HIM OUT AT 107 IS, YOU KNOW, NOT EQUIVALENT TO A LIFE SENTENCE, AND WE HAVE ANOTHER CASE WITH 60 OR 70 YEARS.

BUT I SAW SOMEBODY, ONE OF THE

DEFENDANTS THAT HAD DARTED ALL THIS HARSHNESS ON JUVENILES, THE FIRST DEFENDANT WAS SENTENCED -- RESENTENCED TO 40 YEARS.

SO IT SEEMS TO ME, IN TERMS OF ADVOCATING FOR YOUR CLIENT, THAT THE ISSUE HERE IS THAT A 90-YEAR SENTENCE IS UNCONSTITUTIONAL UNDER GRAHAM. NOW THE QUESTION IS, IS THE REMEDY, THEN, RESENTENCING TO A SHORTER SENTENCE, OR AS TO THIS DEFENDANT RESENTENCING TO A SHORTER SENTENCE AND PAROLE. IF YOU COULD JUST ADDRESS THIS CASE, WHAT YOU SEE ARE THE COURTS.

IT SEEMS TO ME THIS CASE IS CLEARLY A GRAHAM EQUIVALENT.

>> RIGHT.

>> AND WE DON'T HAVE TO EVERY DAY FIGURE OUT, OKAY, 30 ISN'T.

WE'VE GOT THIS CASE.

WHAT ARE THE OTHER OPTIONS? AND YOU'VE THOUGHT ABOUT IT. YOU MENTIONED THE REMEDIES, THAT THE COURT WOULD HAVE? OTHER THAN DECLARING THAT STATUTE UNCONSTITUTIONAL AS APPLIED TO ANY JUVENILE SENTENCE, WHICH I THINK IS WHAT YOU WERE SAYING, BUT AS APPLIED TO THIS CASE, MAYBE. WOULDN'T THE OTHER OPTIONS BE RESENTENCING TO A SHORTER TERM?

GIVE ME THE OTHER OPTIONS.

>> YOUR HONOR, THIS IS AN EXTREME CASE AND I WANT TO POINT OUT THAT THE STATE DOESN'T DISPUTE, AND I'VE NEVER SEEN IT DISPUTED THAT ANYONE HERE DISAGREES WITH THE FACT THAT LEIGHDON HENRY WILL, IN FACT, DIE IN PRISON UNDER HIS CURRENT SENTENCE.

IN TERMS OF OTHER POTENTIAL REMEDIES, OTHER THAN HOLDING

SECTION 921.0021E AS
UNCONSTITUTIONAL AS APPLIED.

>> THAT'S APPLIED TO HIM.
THAT'S DIFFERENT THAN SAYING
AS APPLIED TO EVERY JUVENILE
DEFENDANT.

>> CORRECT, AS APPLIED TO HIM,
THIS IS CONSISTENT WITH
DECISIONS ACROSS THE COUNTRY.
MOST NOTABLY THOSE IN
CALIFORNIA AND THE RAINIER
DECISION FROM THE COLORADO
COURT OF APPEALS.

THOSE CASES HAVE LOOKED AT THE
CENTERS FOR DISEASE CONTROL
NATIONAL VITAL STATISTICS
REPORTS, AND THERE'S AN
EXCERPT IN THE RECORD IN THIS
CASE THAT INDICATES THAT
MR. HENRY'S LIFE EXPECTANCY IS
64.3 YEARS.

IN THAT SITUATION, GIVEN THE
90-YEAR AGGREGATE SENTENCE AND
64.3-YEAR LIFE EXPECTANCY,
THAT SENTENCE EXCEEDS HIS LIFE
EXPECTANCY FOR AT LEAST THREE
DECADES.

FOR THAT TYPE OF SENTENCE, THE
COURT COULD HOLD SECTION
921.0021E UNCONSTITUTIONAL AS
APPLIED AND WOULD NOT APPLY TO
JUSTICE CANADY'S HYPOTHETICAL
OF JUVENILE THAT RECEIVED ONLY
A 10-YEAR SENTENCE.

>> IF WE DO THAT -- AND I'M
BACK TO WHEN YOU GET TO -- IF
YOU DO THAT, YOU SEND IT BACK
TO THE TRIAL COURT FOR
RESENTENCING.

WHAT ARE THE PARAMETERS?

WHAT IS THE TRIAL JUDGE FACED
WITH?

>> WELL, GO AHEAD, YOUR HONOR.

>> ASSUMING THE TRIAL JUDGE
WANTS TO STILL SENTENCE THE
DEFENDANT TO A TERM OF YEARS,
WHAT WOULD BE THE CUTOFF?

I MEAN, IF HE'S SENTENCED THE
JUVENILE TO 50 YEARS, FOR
EXAMPLE, WOULD THAT BE STILL A

GRAHAM VIOLATION, ASSUMING THAT THE 90 IS?

>> IF YOUR HONORS ADOPTED CDC NATIONAL VITAL STATISTICS APPROACH DEPENDING ON WHAT THE JUVENILE OFFENDER'S LIFE EXPECTANCY IS, I WOULD IMAGINE THAT PERHAPS, AND THIS IS†--

>>†THEN THE JUVENILE'S LIFE EXPECTANCY WOULD BE OKAY?

>> UNDER THOSE COURT'S DECISIONS.

I'M NOT SAYING WE'D AGREE WITH THAT APPROACH, WHICH IS WHY WE PROPOSE THE REMEDY WE PROPOSE.

>> WHAT WAS THE SENTENCING OPTIONS FOR THE JUDGE ORIGINALLY?

IN OTHER WORDS, THE NEXT CASE, IT WAS A RECOMMENDATION OF SIX YEARS AND HE GOT SEVEN YEARS.

WHAT WERE THE GUIDELINES SENTENCED FOR THIS JUVENILE?

>>†THE SENTENCING SCORE SHEET, WHICH IT'S IN THE RECORD, THE ORIGINAL SENTENCING SCORE SHEET FROM 2008 IS IN VOLUME 2 OF THE TRANSCRIPT TO RECORD AT 223-242, AND THEN THE SCORE SHEET FROM THE RESENTENCE IS IN THE RECORD AND WHAT THE 50 CA LABEL, THE 3800B RECORD AT PAGES 14-31 INDICATES THAT THE CRIMINAL PUNISHMENT CODE MINIMUM SENTENCE FOR MR.†HENRY WAS 26.4 YEARS, WHICH IS CONSISTENT TO THE PLEA BARGAIN THE STATE OFFERED TO MR.†HENRY BEFORE HIS TRIAL WHICH IS 30 YEARS FOR ALL OFFENSES.

JUST TO BE CLEAR SO THIS DOESN'T GET LOST -- AND THIS IS A†--

>>†THIS IS -- ISN'T THAT THE REAL PROBLEM OF WHAT'S GOING ON HERE?

THAT WE HAVE, IN THIS STATE, AND WE LEAD THE NATION IN DIRECT FILES, WE HAVE SO GONE BEYOND THE IDEA THAT

JUVENILES, YOU KNOW -- YES,
WE'RE GOING TO PUNISH THEM,
BUT WE'RE JUST REALLY
ESSENTIALLY TAKING THE KEY AND
LOCKING IT UP.

THE QUESTION, THOUGH, IS, THE
JUDGE HAS RESENTENCED AND MADE
A DECISION TO THE 90 YEARS?

>> CORRECT.

>> SO -- BUT MY CONCERN AND
MAYBE WHAT JUSTICE QUINCE IS
SAYING, IF YOU KEEP 90 YEARS
BUT GIVE PAROLE, I WOULD THINK
THAT THE PAROLE COMMISSION
WOULD THINK SOMEBODY WITH A
90-YEAR SENTENCE IS GOING TO
SERVE A MUCH LONGER TIME THAN
IF THIS DEFENDANT HAD GOTTEN A
50-YEAR SENTENCE.

90 SOUNDS LIKE THE WORST OF
THE WORST PERSON.

HOW DOES THAT WORK?

ARE YOU SAYING THAT WE DO NOT
NEED TO SEND IT BACK FOR
RESENTENCING AND ONLY SAY THAT
THE PAROLE OPTION MUST BE
AVAILABLE?

OR SHOULD THERE BE ANOTHER
RESENTENCE?

>> WELL, WE WOULD CERTAINLY
APPRECIATE IF YOUR HONORS WERE
WILLING TO SEND THIS BACK DOWN
TO A SHORTER SENTENCE FOR
MR. †HENRY.

HOWEVER, OUR READING OF GRAHAM
INDICATES IT'S NOT THE LENGTH
OF THE SENTENCE THAT IS HANDED
OUT THAT IS THE PROBLEM, IT IS
THE ABSENCE OF PAROLE
CONSIDERATION.

>> AND MY READING OF IT SEEMED
TO SAY THAT WE'RE TALKING
ABOUT A MEANINGFUL REVIEW AND
THE EMPHASIS SHOULD BE ON THE
REHABILITATION AS OPPOSED TO
RETRIBUTION, WHICH IS THE
BACKBONE OF FLORIDA STATUTE.
THIS PARTICIPATION OF
DEFENDANTS HAS TO BE GIVEN A
MEANINGFUL OPPORTUNITY FOR

REHABILITATION, BECAUSE IT SAYS THAT THESE PEOPLE ARE DIFFERENT, JUST LIKE DEATH IS DIFFERENT AND THE SAME STANDARD DOESN'T APPLY AS ADULTS.

IT SEEMS TO ME THAT IF THIS IS GOING TO BE MEANINGFUL, YOU KNOW, YOU CAN'T SAY, WELL, 40, 50 YEARS IS OKAY, AND THE JUDGE SENTENCES AND THE PAROLE COMMISSION SAYS 50 YEARS?

WELL, WE SHOULDN'T GIVE HIM A CHANCE.

THAT'S NOT A MEANINGFUL REVIEW.

>> CORRECT.

>> IT'S NOT A GUARANTEE, BUT IT'S A MEANINGFUL OPPORTUNITY TO BE RELEASED BEFORE HE HAS AN OPPORTUNITY TO CONTRIBUTE TO SOCIETY.

IF HE IS.

>> YES, YOUR HONOR, I AGREE COMPLETELY AND APPRECIATE THE FACT YOU BRING UP THE REHABILITATION POINT.

IT'S IMPORTANT TO EMPHASIZE, UNDER FLORIDA LAW UNDER CHAPTER 947, THE CRIMINAL PUNISHMENT CODE AND THE DEPARTMENT OF CORRECTIONS REGULATIONS, AND PAROLE COMMISSIONS REGULATIONS, BECAUSE MR.†HENRY'S SENTENCE, AND THOSE SIMILARLY SITUATED, IS WITHOUT PAROLE CONSIDERATION.

BECAUSE OF THE LENGTH OF HIS SENTENCE AND THE ABSENCE OF PAROLE CONSIDERATION, HE IS NOT ENTITLED TO VOCATIONAL PROGRAMS, HE IS NOT ENTITLED TO EDUCATIONAL PROGRAMS.

ONLY THING, ACCORDING TO THE RECORD, THAT MR.†HENRY HAS BEEN ALLOWED TO DO TO REHABILITATE HIMSELF IS BIBLE STUDY COURSES.

I'M NOT AT ALL DENIGRATING THE

VALUE OF THAT TYPE OF PROGRAM.

>> I HAVE ONE QUESTION AND WANT TO ASK YOU WHAT'S IMPORTANT TO MY THINKING, THE SITUATION WITH MANDATORY MINIMUMS.

THIS COMES FULL CIRCLE TO WHERE WE STARTED THIS ARGUMENT THAT PAROLE IS A FIX-IT FOR THIS.

YOU HAVE A MANDATORY MINIMUM. WOULD A 25-YEAR SENTENCE MANDATORY MINIMUM, WOULD THE ELIGIBILITY FOR PAROLE FIX THE PROBLEM?

WE ESTABLISHED THE SITUATION WHERE A GUN WAS USED, SOMEBODY WAS SHOT, MANDATORY MINIMUM APPLIES.

WOULD THAT BE THE FIX-IT, 25-YEAR MANDATORY MINIMUM? THAT'S NOT EXCESSIVE.

IT WOULDN'T BE WELL EXCEEDING HIS LIFE EXPECTANCY.

>> RIGHT.

>> AND THEN ELIGIBILITY FOR PAROLE.

IN SITUATIONS WITH MANDATORY MINIMUM, WOULD THAT BE THE FIX-ALL?

>> I DON'T BELIEVE THAT THE MANDATORY MINIMUM SITUATION -- THAT THAT WOULD VIOLATE GRAHAM.

AFTER THE MANDATORY 25 YEARS IS SERVED, THAT INDIVIDUAL WOULD BE ELIGIBLE FOR PAROLE CONSIDERATION, WHICH I THINK IS CONSISTENT WITH GRAHAM'S MESSAGE; WHILE FOR SERIOUS OFFENSES, EVEN NONHOMICIDE OFFENSES, THE DEFENDANT CAN BE SENTENCED TO SIGNIFICANT PERIODS OF TIME IN PRISON. HE OR SHE CANNOT BE DENIED THE ABILITY TO†--

>>†THE ONLY STATUTE THAT WOULD INTERFERE WITH THE FIX-IT WOULD BE THE STATUTE THAT REQUIRES DEFENDANTS TO SERVE

85% OF THE SENTENCES.
THAT WOULD HAVE TO BE, BY THIS
COURT, DECLARED INAPPLICABLE
IN JUVENILE CASES FOR THIS TO
WORK.

>> UNDER OUR PROPOSED REMEDY
FOR THIS TO WORK, THAT STATUTE
WHICH SAYS PAROLE DOES NOT
APPLY TO ADULT OFFENDERS WOULD
HAVE TO BE HELD
UNCONSTITUTIONAL AS APPLIED,
AND WHETHER THE COURT WANTS TO
DO THAT FOR THOSE WHO
SENTENCES EXCEED LIFE
EXPECTANCY, OR WHETHER YOU
WOULD DO THAT ACROSS THE BOARD
AS TO ALL JUVENILE NONHOMICIDE
OFFENDERS TO AVOID THE
LINE-DRYING PROBLEM, EITHER
ONE WOULD SATISFY OUR CLIENT
AND WOULD SATISFY OUR READING
OF GRAHAM.

>> WOULD YOU ADDRESS WHAT
AUTHORITY DOES THIS COURT HAVE
TO DRAW REMEDIES THAT ARE NOT
REQUIRED BY A CONSTITUTIONAL
CONSIDERATION?

WE'RE TALKING ABOUT JUST
BLANKET ALTERING THINGS THAT
ARE TRADITIONALLY LEGISLATIVE
ARENA AND THOSE THINGS DON'T
VIOLATE GRAHAM.

WHERE IS OUR AUTHORITY?
WE THEN BECOME A SENTENCING
BODY?

>> YOUR HONOR, I WOULDN'T
AGREE YOU WOULD BECOME A
SENTENCING BODY.
UNDER OUR PROPOSED REMEDY, WE
WOULDN'T BE CHANGING THE
LENGTH OF SENTENCES IMPOSED.
IT WOULD SIMPLY BE PAROLE
CONSIDERATION, AND I WOULD
THINK THAT IS CONSISTENT WITH
THE COURT'S AUTHORITY, ON AN
APPLIED BASIS TO CRAFT A
REMEDY, IN ORDER TO FURTHER
CONSTITUTIONAL RIGHTS.
WHILE IT MAY NOT VIOLATE
GRAHAM ITSELF, FOR SOMEONE

WITH A 10-YEAR SENTENCE AND NOT HAVE PAROLE CONSIDERATION, IT VIOLATING THE TENURE OF THE JUSTICE JURISPRUDENCE WHICH INDICATES -- AND THIS INCLUDES MILLER, ROPER, THOMPSON V. OKLAHOMA.

WE CAN GO BACK FURTHER. CHILDREN ARE DIFFERENT IN TERMS OF SENTENCING, AND THE LEGISLATURE IS PROHIBITED OF TREATING THEM AS ADULTS CONSTITUTIONAL FOR CRIMINAL SENTENCE.

I WOULD ASK THAT THE REMEDY BE CONSISTENT WITH THE CASE LAW. I'M ALREADY EATING INTO MY REBUTTAL TIME HERE.

[LAUGHTER]

>> I WILL GIVE YOU AN EXTRA MINUTE ON REBUTTAL.

>> THANK YOU, YOUR HONOR.

>>> MAY IT PLEASE THE COURT. GOOD MORNING.

MY NAME IS KELLIE NIELAN, AND I'M HERE ON BEHALF OF THE STATE OF FLORIDA.

COULD YOU CLARIFY, HALF OF THE BEGINNING -- THE DEFENDANT HAD A 25-YEAR MINIMUM.

THAT WAS ANOTHER CASE.

>>†THIS DOES NOT.

>> THIS DOES NOT INVOLVE THE 25 YEARS.

>> HE ALSO DOES NOT HAVE A 90-YEAR SENTENCE.

HE HAS GOT CONSECUTIVE SENTENCES THAT TOTAL 90 YEARS. HE DOES NOT HAVE A 90-YEAR SENTENCE.

>> WOULDN'T HE SPEND HIS ENTIRE LIFE IN PRISON?

>> NO, YOUR HONOR, I DON'T THINK IT IS.

IF I COULD BACK UP RIGHT TO THE BEGINNING HERE, WE TALKED ABOUT THE SPIRIT OF GRAHAM AND THE MEANING OF GRAHAM, BUT WHAT I THINK WHAT WE NEED TO FOCUS ON IS THE HOLDING OF

GRAHAM, WHICH IS THAT A SENTENCE OF LIFE WITHOUT PAROLE, WITHOUT AN OPPORTUNITY FOR REVIEW, VIOLATES THE EIGHTH AMENDMENT.

THE COURT SPECIFICALLY LIMITED ITS HOLDING ONLY TO THOSE SENTENCES.

AND IT'S SIGNIFICANT IN ARRIVING AT THEIR DECISION. THEY CONDUCTED A PROPORTIONALITY IN ANALYSIS UNDER A CATEGORICAL CHALLENGE. CATEGORICAL CHALLENGES ARE EXCEEDINGLY RARE.

THEY ONLY PREVIOUSLY HAVE BEEN DONE ON DEATH PENALTY CASES. AND WHAT THEY DID IS STARTED WITH THE INDICIA OF NATIONAL CONSENSUS, THEY LOOKED AT LIFE WITHOUT PAROLE SENTENCES THAT WERE IMPOSED.

THERE WERE 109 ACROSS THE NATION, AND THEY FOUND AN ADDITIONAL NUMBER TO LOOK AT TO BRING IT UP TO 123.

THERE WAS NO CONSIDERATION OF JUVENILES WHO RECEIVED A LONG TERM OF YEARS, JUVENILES WHO HAVE CONSECUTIVE SENTENCES THAT EQUATE TO EXTENDED TERM OF YEARS.

>> YOU KNOW, I HEAR WHAT YOU'RE SAYING, BUT THERE ARE SOME THINGS THAT ARE JUST -- IT'S IMPOSSIBLE TO CHARACTERIZE THEM AS ANYTHING BUT EQUIVALENT TO A LIFE SENTENCE.

YOU GET 100 YEARS OR 90 YEARS. THAT IS A LIFE SENTENCE.

AND ANY REASONABLE UNDERSTANDING OF IT.

NOW LET ME ASK YOU -- I HEAR WHAT YOU'RE SAYING, BUT IT SEEMS TO ME TO BE A VERY FORMALISTIC WAY, A HYPERFORMALISTIC WAY OF ANALYZING WHAT THE SUPREME COURT HAS SAID, AND IT SEEMS

TO BE SOMEWHAT DETACHED FROM
THE REASONING THAT THE SUPREME
COURT EMPLOYED IN REACHING THE
RESULT THEY REACHED IN GRAHAM.
LET ME ASK YOU ONE -- ABOUT
ANOTHER CASE.

MILLER.

NOW, UNDER MILLER, IF A
JUVENILE WHO HAD COMMITTED A
HOMICIDE WAS GIVEN A SENTENCE
OF 90 YEARS, NOT LIFE, BUT 90
YEARS, WOULD THAT VIOLATE
MILLER?

>> UNDER THE EXPRESS TERMS OF
MILLER, NO, IT WOULD NOT.

>> I UNDERSTAND YOUR POSITION.
>> IT DEPENDS ALSO IF IT WAS A
MANDATORY 90 YEARS.

BECAUSE WHAT MILLER PROHIBITS
IS A MANDATORY LIFE SENTENCE.
IF, AFTER THE JUDGE CONSIDERS,
EXERCISES HIS OR HER
DISCRETION IN EVALUATING ALL
THE FACTORS -- WHICH IS WHAT A
JUDGE WOULD DO IN IMPOSING A
90-YEAR SENTENCE IF IT WAS NOT
A MANDATORY SENTENCE --
THAT WOULD BE PERFECTLY
ACCEPTABLE UNDER MILLER.

>> UNDER FLORIDA LAW, WOULD
THAT BE A LIFE SENTENCE?

IF 90 YEARS -- EVEN FOR A
HOMICIDE UNDER FLORIDA LAW,
WOULD THAT BE 90 YEARS?

IF YOU CONSIDER THAT, YOU HAVE
TO DO 85% OF THAT SENTENCE?

>> FOR A HOMICIDE CRIME,
THAT'S FINE.

FOR A NONHOMICIDE CRIME, I
THINK I'M STARTING TO GET
THESE TWO -- CONFUSED HERE.

>> LET'S TALK ABOUT
NONHOMICIDE, THAT'S WHAT THIS
IS.

ARE YOU SAYING THIS 90-YEAR
SENTENCE IS NOT EQUIVALENT TO
A LIFE SENTENCE?

>> I'M SAYING THAT YOU CAN'T
APPLY GRAHAM TO IT.

LET THE UNITED STATES SUPREME

COURT ADDRESS THIS ISSUE AND CLARIFY WHAT THEY MEANT IN GRAHAM.

>> WELL, IF WE DECIDE THAT IT DOES, THE UNITED STATES SUPREME COURT WILL HAVE AN OPPORTUNITY TO ADDRESS IT.

>> ABSOLUTELY THEY WILL.

>> JUST LOGIC, YOU KNOW, ASIDE AND SAY ACTUARIALLY HE'LL LIVE 69 YEARS.

THAT DOES NOT MAKE A LIFE SENTENCE.

>> WELL, AGAIN.

>> AND IT VIOLATES THE SPIRIT OF GRAHAM.

>> BUT YOU HAVE TO HAVE A CATEGORICAL CHALLENGE.

AND LIFE WITHOUT PAROLE, THAT IS A SPECIFIC SENTENCE.

HERE, YOU COULD HAVE ONE SENTENCE THAT'S 90 YEARS.

YOU COULD HAVE A DEFENDANT LIKE HENRY WHO'S GOT EIGHT SENTENCES.

YOU CAN HAVE OTHER DEFENDANTS LIKE ARE ALSO PENDING BEFORE THE COURTS THAT HAVE THREE SEPARATE CASES FROM THREE SEPARATE COUNTIES WITH CONSECUTIVE SENTENCES.

>> WHERE IS THE OPPORTUNITY OF REHABILITATION THAT THE COURT SEEMS TO GIVE, GIVEN WHAT YOU HAVE JUST SAID?

THE COURT DIDN'T SAY YOU MUST RELEASE BUT HAVE A MEANINGFUL OPPORTUNITY.

IF IT'S SO BAD AND HE DIDN'T REHABILITATE, HE COULD SPEND THE REST OF HIS LIFE IN PRISON.

IT DOESN'T SAY YOU CAN'T.

HE MUST HAVE THE OPPORTUNITY TO REHABILITATE AND TO GET OUT OF PRISON SO HE CAN STILL FUNCTION IN SOCIETY.

>> UNDER A LIFE SENTENCE. OKAY.

LET'S SAY THIS COURT FINDS

THAT GRAHAM APPLIES TO ALL THESE DIFFERENT SENTENCES, WHICH IS GOING TO CREATE A HUGE SLIPPERY SLOPE, WHAT IS THE FUNCTIONAL EQUIVALENT OF A LIFE SENTENCE?

>> HOW ABOUT WE STAY WITH THIS CASE.

>> SAY THERE IS ONE, THEN YES, A REMEDY IS NECESSARY.

I DON'T THINK ANYONE'S MADE AN ARGUMENT THAT THE PAROLE STATUTES CAN BE DECLARED UNCONSTITUTIONAL†--

>>†ISN'T THAT REALLY -- AGAIN, AND I UNDERSTAND THIS, AND IT'S QUITE OF CONCERN TO ME -- PAROLE DOES SEEM TO BE THE ANSWER FOR A MEANINGFUL OPPORTUNITY FOR REHABILITATION SINCE I ASSUME THAT'S WHAT THE PAROLE BOARD IS THERE TO DO TO SEE THIS CHILD AT 17 IS NOW 50 YEARS OLD.

IS THERE A CHANCE?

HAS HE BEEN REHABILITATED?

NOT TO MENTION WHAT MR.†LUCK SAID, AS WITH THE 90-YEAR SENTENCE, YOU'RE NOT GIVEN ANYTHING OTHER THAN BIBLE STUDY.

BUT IF WE DON'T DO THAT, IF WE DON'T DECLARE THE STATUTE AS APPLIED TO JUVENILES WHO HAVE A FUNCTION AT EQUIVALENT OF LIFE SENTENCE

UNCONSTITUTIONAL, DOESN'T IT GO BACK THEN, TO PLAY THIS GAME, OKAY, 30 YEARS IS ALL RIGHT.

26 YEARS WAS THE SENTENCE, THE JUDGE COULD HAVE CONSIDERED.

30 YEARS IS OKAY.

40 YEARS, MAYBE.

50 OKAY.

NOW HE WILL BE 67.

SO IF WE TAKE THIS CASE, IS THE STATE ARGUE -- WHAT WOULD THE STATE SAY THEN?

GO BACK FOR RESENTENCING FOR A

60-YEAR SENTENCE?
A 50-YEAR SENTENCE?
ASSUMING IT'S
UNCONSTITUTIONAL, THIS
PARTICULAR SENTENCE, THEN WHAT
IS THE STATE SUGGESTING THE
REMEDY WOULD BE?
>> AS I SUGGESTED IN MY BRIEF,
THIS COURT COULD ASK THE RULES
COMMITTEE TO PROMULGATE A RULE
THAT WOULD PROVIDE FOR
JUVENILES TO GET A REVIEW AND
OPPORTUNITY FOR RELEASE
SOMEWHERE DOWN THE ROAD.
>> BY THE TRIAL COURT?
>> YES.
>> UNDER WHAT AUTHORITY?
>> UNDER THE AUTHORITIES OF
THE RULES OF THIS COURT CAN
PROMULGATE RULES.
IT WOULD BE AKIN TO 3800C.
>> WOULD THAT CIRCUMVENT THE
NO PAROLE RULE?
>> NO.
>> IF PAROLE IS IN THE
LEGISLATIVE ARENA, AND WE DO A
RULE THAT SAYS WHAT YOU JUST
SAID, IS THAT A -- ARE WE
TRYING TO CIRCUMVENT THE
PAROLE RULE?
>> I THINK THAT WHAT YOU WOULD
BE TRYING TO DO IS FIND A
METHOD SO THAT THE SENTENCE
IMPOSED ON JUVENILES DON'T
VIOLATE THE EIGHTH AMENDMENT.
>> YOU THINK THAT'S MORE
CLEARLY WITHIN THE COURT'S
AUTHORITY SINCE, IN CARRYING
OUT THE MANDATE OF GRAHAM,
THAT THE ORIGINAL SENTENCING
JUDGE, WHO PROBABLY ISN'T
AFTER 20, 30 YEARS, ANOTHER
JUDGE, AND EVALUATE ALL THE
CIRCUMSTANCES; BUT THE
QUESTION STILL IS, IF THE
SENTENCE ISN'T REDUCED FROM 90
YEARS DOWN, THEN HOW DOES,
WITHIN PRISON, IF THE FACTS
ARE AS MR.†LUCK REPRESENTED,
HOW DOES THAT DEFENDANT GET

THAT MEANINGFUL OPPORTUNITY TO BE REHABILITATED WHILE HE'S IN PRISON IF THERE ARE NO PROGRAMS OFFERED BECAUSE OF THE LENGTH OF THE SENTENCE?

>> WELL, THEY ONLY HAVE TO DEMONSTRATE REHABILITATION AND MATURITY IS ANOTHER THING, AND THAT'S WHETHER THEY'VE GOTTEN ANY DISCIPLINARY REPORTS IN PRISON.

THERE ARE A NUMBER OF THINGS THAT OCCUR IN PRISON THAT THEY CAN COME IN AND DEMONSTRATE THAT THEY CAN ACHIEVE THIS, THAT THEY HAVE BEEN ENTITLED TO.

>> I THINK THE CASE SAID HE CANNOT BE CONDEMNED TO SPEND THE REST OF HIS LIFE IN PRISON AT THE OUTSET.

THEREFORE, THERE HAS TO BE A MECHANISM SET UP TO ALLOW HIM A MEANINGFUL OPPORTUNITY AT THE OUTSET.

A RULE WOULDN'T DO THAT. CHANGING THE PAROLE -- I MEAN, MAKING THE PAROLE THE LACK OF PAROLE UNCONSTITUTIONAL AS APPLIED WOULD DO THAT.

WE WOULD HAVE TO GO THROUGH THE MACHINATIONS.

HAS THE LEGISLATURE HAD AN OPPORTUNITY TO ADDRESS THIS ISSUE SINCE MILLER -- SINCE GRAHAM HAS BEEN HANDED DOWN?

>> YES.

>> HAVE THEY?

>> HAVE THEY ADDRESSED IT?

>> YES.

>> THERE WAS PROPOSED LEGISLATION LAST YEAR.

>> HOW MANY TIMES?

>> I'M NOT SURE.

I THINK IT'S EVERY YEAR SINCE GRAHAM, I BELIEVE.

>> TWO OR THREE TIMES?

>>†YES.

>> AND THEY HAVEN'T ACTED.

>> CORRECT.

>> DON'T WE HAVE A RESPONSIBILITY TO UPHOLD THE CONSTITUTION OF THE UNITED STATES?

>> YES, YOU DO. YOU HAVE A DUTY TO UPHOLD THE CONSTITUTIONALITY OF FLORIDA STATUTES, TOO.

>> OKAY.

>> SEEMS TO ME THIS IS A DIFFICULT SITUATION, BECAUSE WE -- AS WE ALL -- THERE ARE A LOT OF DIFFERENT THINGS TO GRAPPLE WITH HERE.

SEEMS TO ME WHAT WE HAVE TO FOCUS ON IS HOW WE CAN BEST VINDICATE THE CONSTITUTIONAL RIGHTS THAT HAVE BEEN RECOGNIZED IN GRAHAM. THAT'S REQUIRED.

WE'VE GOT TO DO THAT.

OKAY?

WHETHER WE LIKE THAT OR NOT, WHETHER THE STATE OF FLORIDA LIKES THAT OR NOT, THAT IS THE SUPREME LAW OF THE LAND.

WE'VE GOT TO DO IT.

WE'VE GOT TO FOLLOW THAT.

NOW, ON THE OTHER HAND, IT SEEMS TO ME THAT WE SHOULD DO THAT IN A WAY THAT DOES THE LEAST DAMAGE TO THE INTENT OF THE LEGISLATURE THAT IS POSSIBLE UNDER ALL THE CIRCUMSTANCES.

I DON'T UNDERSTAND WHY THAT ISN'T -- IN A LIMITED WAY THAT IS REQUIRED BY GRAHAM -- ALLOWING PAROLE ELIGIBILITY FOR THE DEFENDANTS WHO FALL IN THE CATEGORY WHERE THEIR SENTENCES WOULD OTHERWISE DEFEND GRAHAM.

IF WE DO THAT, THE LEGISLATURE MAINTAINED THIS PAROLE BOARD. THAT IS SOMETHING THAT IS THERE.

THAT'S A STRUCTURE THAT'S IN PLACE, AND WHEN PEOPLE ARE ON PAROLE, THERE IS SUPERVISION.

THIS IDEA THAT YOU'VE GOT ABOUT SOME KIND OF JUDICIAL PAROLE.

HOW IN THE WORLD IS THAT GOING TO WORK?

WHAT KIND OF SUPERVISION WOULD THERE BE AFTERWARDS?

THAT IS SOMETHING WE WOULD BE MAKING UP OUT OF WHOLE CLOTH, AS OPPOSED TO PAROLE SYSTEM THAT IS ALREADY IN PLACE THAT IS FUNCTIONING.

I UNDERSTAND THAT THAT PAROLE SYSTEM IS SOMETHING THAT WOULD DIE OUT AT SOME POINT, AND WHAT WE WOULD DO WOULD BREATHE LIFE INTO IT, AND EXTEND THIS LIFE, BUT, AGAIN, WE'RE JUST DEALING WITH WHAT WE HAVE BEEN CONFRONTED WITH BY THE UNITED STATES SUPREME COURT.

AND PAROLE SEEMS TO BE CENTRAL TO WHAT THEY TALK ABOUT IN GRAHAM AND IN MILLER, AND THAT'S -- SO WHY IS THAT NOT A BETTER WAY TO LOOK AT IT AND WHY DOES THAT NOT ACTUALLY DO LESS DAMAGE, AND THE OTHER THING HERE IS IF WE GO INTO A DIFFERENT DIRECTION AND SAY WE'RE JUST GOING TO ESTABLISH SOME KIND OF LIMIT, SOME LIMIT IN TERMS OF THE NUMBER OF YEARS, THAT SEEMS TO BE ALSO DOING DAMAGE TO THE LEGISLATIVE INTENT BECAUSE UNDER -- WITH PAROLE ELIGIBILITY, THAT DOESN'T MEAN THEY'LL EVER NECESSARILY GET OUT IF THEY DON'T BEHAVE, AND IF THEY DON'T DEMONSTRATE REHABILITATION, THEY'LL BE IN THERE FOR THEIR NATURAL LIVES IF THERE IS A LIFE SENTENCE. IF YOU LOOK AT THAT, YOU COME CLOSER TO PROTECTING THE LEGISLATIVE INTENT BY TAKING THAT ROUTE.

WHY AM I WRONG?

I KNOW YOU THINK I'M WRONG.

>> I DON'T NECESSARILY THINK YOU'RE WRONG.
THE PROBLEM WITH THIS IS,
FIRST OFF, NO ONE ARGUED THIS IN THE TRIAL COURT.
NO ONE PRESENTED AN ARGUMENT ON APPEAL ON THIS.
NO ONE HAS WORKED THROUGH THE DETAILS, THE MACHINATIONS AS TO HOW THIS PAROLE WOULD WORK.
AND AGAIN, A COURT CAN'T JUST DECLARE A STATE UNCONSTITUTIONAL JUST BECAUSE IT MIGHT PROVIDE A METHOD OF HANDLING THIS PROBLEM.
AND AGAIN, THERE'S THE OTHER STATUTES INVOLVED, TOO.
>> WHY NOT?
IF THERE'S A STATUTE THAT OPERATES IN AN UNCONSTITUTIONAL FASHION, WHY CAN A COURT NOT SAY THAT STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THIS CIRCUMSTANCE?
>>†THE STATUTE IS NOT OPERATING IN AN UNCONSTITUTIONAL MANNER.
I MEAN†--
>>†IT IS, IF THE JUVENILE SHOULD BE PROTECTED BY THAT STATUTE, AND IS NOT, THE UNITED STATES SUPREME COURT SAYS YOU HAVE A CONSTITUTIONAL RIGHT TO THAT.
WHY NOT?
>> IF THERE ARE OTHER REMEDIES AVAILABLE, NORMALLY DECLARING A STATUTE UNCONSTITUTIONAL IS A LOST RESORT.
>> WHAT ARE THE OTHER REMEDIES?
WE'VE BEEN HERE NOW ALMOST AN HOUR.
WHAT DOES THE STATE SAY THE REMEDY IS, OTHER THAN CREATING A COURT RULE THAT, I BELIEVE, IS JUST SHORT OF INSANE.
>> WELL, ASIDE FROM DECLARING STATUTES UNCONSTITUTIONAL OR LIMITING THE STATUTES.

>> YOU'RE ARGUMENT PRESUMES THAT THE ALTERNATIVE COURSE IS NOT GOING TO, IN EFFECT, DECLARE THE APPLICATION OF A STATUTE UNCONSTITUTIONAL, AND THAT'S WHAT WE'RE DOING, ON THESE -- ON THE MINIMUM MANDATORY STATUTES OR THE STATUTES THAT GIVE SENTENCING DISCRETION TO THE JUDGE, IF WE SAY THEY CAN'T EXERCISE THAT DISCRETION THAT'S BEEN GIVEN BY THE COURT, WE'RE, IN EFFECT, DECLARING THAT UNCONSTITUTIONAL.

EITHER WAY WE GO, WE'RE DOING THAT, IT SEEMS LIKE TO ME. AND AGAIN, THAT'S THE VIEW THE SUPREME COURT HAS REQUIRED. WHY AM I WRONG ABOUT THAT?

>> I DON'T THINK THERE'S EVER GOING TO BE A LIMIT ON THE SENTENCE THAT CAN BE IMPOSED. THAT'S NOT A PROBLEM.

A SENTENCE OF UP TO LIFE CAN BE IMPOSED.

WHAT WE NEED TO FIND IS A METHOD, AN OPPORTUNITY FOR REVIEW AND FOR RELEASE.

>> THEY TALK ABOUT, IN THE UNITED STATES SUPREME COURT, PAROLE.

HAVE YOU COME UP WITH SOMETHING ENTIRELY DIFFERENT?

>> PAROLE IS THE REMEDY AND THE LEGISLATURE HAS NOT PROVIDED THAT REMEDY.

>> THEY HAVEN'T PROVIDED ANY REMEDY.

>> THAT'S WHY I THINK IT IS UP TO THE COURT TO PROVIDE A REMEDY, AND I THINK THE ONLY THING THE COURT CAN DO IS COME UP WITH A PROCEDURAL RULE AT THIS POINT.

>> IT COULD BE FOR A MANDATORY SHORTER TERM, RIGHT?

>> THAT'S TRUE.

GRAHAM DOES NOT REQUIRE A SHORTER TERM.

>> YOU ONLY GET TO THE ISSUE OF PAROLE IF YOU HAVE TOO LONG OF A TERM SENTENCE.

GARY: CORRECT.

>> SO IF YOU HAVE A SHORTER TERM SENTENCE, YOU NEVER EVEN REACHED THE PAROLE ISSUE.

>> I THINK, AGAIN, YOU ONLY GET TO GRAHAM IF YOU HAVE A LIFE SENTENCE, BUT THAT'S WHEN YOU START DOWN THE SLIPPERY SLOPE, TOO.

>> WHAT WOULD BE THE APPROPRIATE REMEDY IN THIS CASE WITHOUT REACHING CONSTITUTIONAL ISSUES ABOUT PAROLE AND ALL THOSE THINGS TO REMAND FOR A SHORTER TERM?

>> THAT WOULD BE WITHIN THE CONSTITUTIONAL PARAMETERS -- IF GRAHAM APPLIES TO CONSECUTIVE SENTENCES, YES, THAT WOULD BE WITHIN THE CONSTITUTIONAL PARAMETERS.

>> WHAT WOULD BE THAT TERM?

>> I'M SORRY?

>> THAT'S WHAT I GET HUNG UP ON, AND MAYBE THERE'S A SIMPLE ANSWER TO IT THAT I DON'T REALLY KNOW.

WHAT WOULD BE THAT TERM?

WHAT WOULD YOU SAY -- IF WE REMANDED THIS FOR A SENTENCE FOR A TERM OF YEARS, LESS THAN THE 90 YEARS THAT HE HAS, WHAT WOULD BE THE OUTER PARAMETERS OF WHAT A COURT COULD SENTENCE HIM TO?

>> I WOULD SAY PROBABLY 50 YEARS.

A 50-YEAR TOTAL SENTENCE.

>> WHAT DID YOU SAY?

>> 50, 5-0.

>> HOW DOES THAT ALLOW FOR REHABILITATION?

IN A MEANINGFUL REVIEW?

HOW WOULD YOU DO THAT?

>> HE HAS AN OPPORTUNITY FOR RELEASE IN 50 YEARS.

I MEAN THIS MAN COMMITTED

SEVEN VIOLENT FELONIES.
>> NOT JUST THIS CASE.
THE STATEMENT FOR GUIDANCE ON
ALL OF THESE CASES.
AND SEEMS TO ME IF SUPREME
COURT AND GRAHAM SAYS YOU
CANNOT AT THE OUTSET -- HE HAS
TO HAVE AN OPPORTUNITY FOR
MEANINGFUL REVIEW. NOT
RELEASE, BUT AN OPPORTUNITY,
AND REHABILITATION HAS TO BE
PART OF THE PENAL FUNCTION.
>> IT DOESN'T SAY WHAT POINT
HE'S ENTITLED TO THAT REVIEW,
THOUGH.
IT SAYS FROM THE OUTSET YOU
CAN'T PRECLUDE IT, WOULDN'T
YOU HAVE TO -- WOULD 50 YEARS
DO IT?
>> IT SAYS YOU CANNOT GIVE HIM
A LIFE SENTENCE WITHOUT
PAROLE.
THAT'S ALL GRAHAM SAYS.
>> MAYBE I'M READING THE WRONG
CASE.
>> JUSTICE ALITO SAYS NOTHING
IN THIS OPINION AFFECTS THE
TERM OF PAROLE.
>> IN HIS OPINION?
>> IN THEIR OPINION, REVIEWING
THE NATIONAL CONSENSUS, THEY
SAID THE INSTANT CASE CONCERNS
ONLY JUVENILES SENTENCED TO
LIFE WITHOUT PAROLE SOLELY FOR
A NONHOMICIDE OFFENSE.
>> THE SCALIA OPINION?
>> THE MAJORITY OPINION.
AS I SAID, IN ORDER TO DO A
CATEGORICAL ANALYSIS, YOU HAVE
TO START WITH NATIONAL
CONSENSUS.
WE HAVE NO NATIONAL CONSENSUS
ON TERMS OF YEARS,
PARTICULARLY CONSECUTIVE TERMS
OF YEARS.
>> YOU DO NOT AGREE WITH THE
ESSENCE OF THE OPINION.
EVEN THOUGH THAT MAY BE WHAT
YOU SAY IS THE HOLDING, BUT
WHEN YOU READ THE ENTIRE

OPINION, THIS IS THE ESSENCE OF IT, IS THAT WE WANT TO MAKE, IN THESE JUVENILE NONHOMICIDE CASES, THAT WE WANT JUVENILES TO BE SENTENCED IN A MANNER THEY CAN POSSIBLY BE RELEASED, AND THAT DURING THEIR PRISON TERM, THEY HAVE SOME MEANINGFUL OPPORTUNITY TO MATURE AND REFORM AND ALL OF THAT.

ISN'T THAT THE TRUE ESSENCE OF WHAT THE GRAHAM OPINION IS ALL ABOUT?

>> IT IS, BUT IT'S BASED ON THE FACTS OF THAT CASE, TOO. AND AGAIN, I THINK, WHEN YOU START APPLYING THAT ACROSS THE BOARD, THERE ARE SO MANY DIFFERENT SITUATIONS THAT COME UP WHICH IS WHY PERHAPS THEY COULD RAISE A GROSSLY DISPROPORTIONATE ARGUMENT. AS FAR AS A CATEGORICAL CHALLENGE, WE DON'T HAVE ONE HERE.

>> YOU EXCEEDED YOUR TIME. THANK YOU FOR YOUR ARGUMENTS.

>> YOU HAVE ONE MINUTE ON REBUTTAL.

>> JUST BRIEFLY, YOUR HONORS, I NEED TO CLARIFY THIS LOOSE QUOTATION OF LANGUAGE FROM GRAHAM, AND THIS IS A PROBLEM THAT IS IN ALL OF THESE QUOTE, UNQUOTE, AS WRITTEN GRAHAM DECISIONS FROM FLORIDA AND OTHER JURISDICTIONS.

THEY RELY ON THE LANGUAGE THAT OPPOSING COUNSEL QUOTED, "THE INSTANT CASE CONCERNS JUVENILE OFFENDERS SENTENCED TO LIFE WITHOUT PAROLE FOR A NONHOMICIDE OFFENSE."

THAT LANGUAGE COMES IN A PORTION OF THE OPINION WHERE THE COURT IS DRAWING A LINE BETWEEN HOMICIDE OFFENDERS AND NONHOMICIDE OFFENDERS.

THAT HAS NOTHING TO DO WITH

WHETHER GRAHAM APPLIES TO
AGGREGATE TERM OF YEAR
SENTENCES OR WHETHER GRAHAM
APPLIES TO MULTIPLE OFFENSES.
IN FACT, THE ACTUAL LANGUAGE
THAT THE SUPREME COURT USED IN
HOLDING, AND I THINK THIS IS
SIGNIFICANT, AND I WANT TO
QUOTE IT, IS THIS COURT NOW
HOLDS THAT FOR A JUVENILE
OFFENDER WHO DID NOT COMMIT
HOMICIDE, THE EIGHTH AMENDMENT
FORBIDS SENTENCE OF LIFE
WITHOUT PAROLE.

HOW DID THE COURT DEFINE LIFE?
THE COURT SAID THIS WAS A
CATEGORICAL CHALLENGE TO
SOMETHING IT HAD NOT FACED
BEFORE.

A TERM OF YEARS SENTENCE THAT
GUARANTEED THAT TERRANCE
GRAHAM WOULD DIE IN PRISON
WITHOUT SO MUCH AS A SINGLE
PAROLE HEARING.

THE STATE DOES NOT ACCURATELY
QUOTE GRAHAM AND THAT IS NOT
WHAT THE UNITED STATES SUPREME
COURT SAID, JUSTICE ALITO
DISSENTED AND JUSTICE THOMAS
DISSENTED.

THEY HAVE NO BEARING UNDER
ARTICLE 1 SECTION 17 OF THE
COURT'S CONSTITUTION.

>> THANK YOU.