No. 10-9647

In The
Supreme Court of the United States

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arkansas

REPLY BRIEF FOR PETITIONER

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1. The Facts Regarding Kuntrell Jackson's Degree of Crime and Culpability

Arkansas concedes that Kuntrell Jackson neither committed the homicidal act nor intended the death for which he has been sentenced to life imprisonment without possibility of parole. The State frames its second Question Presented as whether the "Eighth and Fourteenth Amendments . . . prohibit the imposition of a life-without-parole sentence on a 14-year-old homicide offender who was not the triggerman *or shown to have intended the killing*, but who acted with reckless indifference to human life" (Ark. Resp't Br. i (emphasis added)). Even this characterization of the case overstates Kuntrell's culpability as found by the Arkansas Supreme Court. That Court affirmed his conviction and mandatory life-without-parole sentence solely on a finding that the jury could have concluded he "did, in fact, in some way solicit, command, induce, procure, counsel, or aid in the commission of the crime *sub judice*." *Jackson v. State*, 194 S.W.3d 757, 760 (Ark. 2004).[1] And this finding in turn rested

[1] The Arkansas Supreme Court was explicit that the "indifference" element of capital murder was satisfied if either Kuntrell or the actual killer, Derrick Shields, was found to have possessed that mental state: "In order to convict the appellant of capital murder, the State had to prove that Jackson attempted to commit or committed an aggravated robbery and, in the course of that offense, he, *or an accomplice*, caused Ms. Troup's death under circumstance manifesting an extreme indifference to the value of human life." 194 S.W.3d at 760 (emphasis added).

critically on the way the jury may have resolved the contested "question of fact as to whether Jackson said 'We ain't playin'' or 'I thought you all was playin'' upon entering the store." *Id.* at 760.[2] Any constitutional analysis that "take[s] account of special difficulties . . . in juvenile representation . . . [which] . . . put [juveniles] . . . at a significant disadvantage in criminal proceedings" (*Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010)) must recognize the fallibility of a sentence of lifelong imprisonment imposed upon a 14-year-old boy whose conviction as an accessory to felony-murder rests ultimately on a jury's choice between variant accounts of three or six words the boy spoke, and upon the jury's possible interpretation of what those few words signified about his state of mind.

2. The Facts Regarding the Extraordinary Rarity of Life-Without-Parole Sentences for Children 14 and Under

The Brief for Petitioner stated that "the current total number of 13- and 14-year-old children serving sentences of life without parole [in the United States

[2] "An earlier statement given by [co-defendant Travis] Booker reported that the appellant said, 'We ain't playin'.' However, at trial, Booker recanted, and both he and the appellant testified that Jackson said, 'I thought you all was playin'.' This court has held that it is within the province of the jury to accept or reject testimony as it sees fit." 194 S.W.3d at 760.

is] . . . 79 plus or minus one or two." Jackson Pet'r Br. 47 n.57. The reason for the marginal imprecision here is that there is conflicting information about a few of the individuals who may be in this group. We address these unclear cases in the following paragraph. They do nothing to change the picture. Significantly, the responsive briefs filed by Arkansas and Alabama, by nineteen other States and one Territory as *Amici* for Respondents, and by the National Association of District Attorneys – parties optimally situated and strongly motivated to contest the 79-plus-or-minus-two figure if it were contestable – only confirm its quintessential accuracy.[3]

Arkansas's brief suggests that that State may have identified one additional life-without-parole-sentenced individual in its prison system. Ark. Resp't Br. 19-20 n.5. Although it states that Willie Mitchell was 14 years old when his offense took place, local news coverage repeatedly and consistently reported

[3] The briefs of the Respondent States and their *amici* also confirm the data provided at Jackson Pet'r Br. 49 regarding the number of jurisdictions that currently have children 14 or younger serving life-without-parole sentences. They do not identify any additional jurisdictions that have imposed these sentences and they do not challenge the fact that only a handful of jurisdictions have more than two or three such children serving life without parole.

him as being 15 at the time.[4] Michigan suggests that the Michigan Department of Corrections has identified two additional individuals. Mich. et al. *Amicus* Br. 18 n.11. Undersigned counsel has been informed that one of these individuals is Cedric King. The sentencing judge, the prosecuting attorney, and the Attorney General's Office have all publicly stated that Cedric King is parole-eligible.[5] The other individual

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[4] *See*, *e.g.*, Betty Adams, *Barton Honor Student Killed in Carjacking Incident on Sunday*, Daily World (Helena-West Helena, Ark.), Oct. 16, 1995, at 1 (stating Mr. Mitchell's age as 15); Emmett George, *3 Held in Slaying of Boy, 14, Washing Car Before Church*, Ark. Democrat-Gazette, Oct. 17, 1995, at 1A (same); *Four Teens Are Charged in Slaying Arkansas Youth, 14, Abducted Near Store*, Dallas Morning News, Oct. 17, 1995 (same); Betty Adams, *Fourth Suspect Apprehended in Bogan Murder*, Daily World (Helena-West Helena, Ark.), Oct. 18, 1995, at 1 (same); *4th Teen Still Sought in Death of Boy, 14*, Ark. Democrat-Gazette, Oct. 18, 1995, at 3B (same); *4th Teen-Age Suspect Arrested in Killing of West Helena Boy*, Ark. Democrat-Gazette, Oct. 19, 1995, at 2B (same); Betty Adams, *Four Suspects in Bogan Slaying Arraigned Friday*, Daily World (Helena-West Helena, Ark.), Oct. 29, 1995, at 1 (same); Betty Adams, *Ackward Given Two Life Sentences*, Daily World (Helena-West Helena, Ark.), May 21, 1996, at 1 (same); *Capital Murder Trial Delayed Until June*, Ark. Democrat-Gazette, May 23, 1996, at 12D (same); *Helena Youth Receives Two Life Sentences in 1995 Bogan Slaying*, Daily World (Helena-West Helena, Ark.), May 25-26, 1996, at 1 (same).

[5] John Barnes, *A Life Sentence or Not? The Confusing Case of Cedric King*, Grand Rapids Press, Nov. 7, 2011, *available at* http://www.mlive.com/news/grand-rapids/index.ssf/2011/11/a_life_sentence_or_not_the_con.html (explaining that the Michigan DOC has repeatedly misidentified Cedric King as someone serving life without parole, attaching a letter written by the sentencing judge to the DOC at the request of both prosecutor and defense counsel indicating that Mr. King is parole-eligible, and quoting Assistant

(Continued on following page)

identified by Michigan is T.J. Tremble. Tremble's conviction has been overturned by a federal court.[6]

Thus any factual dispute about the precise number of persons nationwide who are currently serving sentences of life without parole imposed for crimes at age 14 and under is very small, understandable, and insignificant. Whether the figure is 79 or 82 (the maximum number accruable from the data offered by Respondents and their *amici*), it is about two-thirds of the 123 non-homicide life-without-parole sentences that the Court considered in *Graham* before concluding that "[t]he sentencing practice now under consideration is exceedingly rare." 130 S. Ct. at 2026.

To be sure, *Graham* noted that over 380,000 juveniles had been arrested in 2007 for nonhomicide offenses. 130 S. Ct. at 2025. Arkansas and Alabama seize upon this figure[7] to argue that the "proportion of life-without-parole sentences imposed upon . . . [homicide offenders of 14 and under] is exponentially greater than the proportion the Court concluded demonstrated rarity in *Graham*." Ark. Resp't Br. 21;

Attorney General Peter Govorchin as agreeing that Mr. King is parole-eligible despite confusion on the point).

[6] *Tremble v. Burt*, No. 06-CV-13945, 2010 WL 3488636 (E.D. Mich. Sept. 1, 2010).

[7] The Court in *Graham* made far less of the figure than Respondents' mathematical manipulations do. The *Graham* Court carefully noted that "it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences." 130 S. Ct. at 2025.

see also Ala. Resp't Br. 31-32 ("[T]his case appears to differ from *Graham* by, quite literally, several orders of magnitude."). Their claim is that "[t]he relatively low incidence of 14-year-old-homicide offenders serving life-without-parole sentences reflects the low incidence of 14-year-old-homicide offenders generally, not an unwillingness to impose life sentences on them." Ark. Resp't Br. 20; *see also* Ala. Resp't Br. 1, 10, 31-33.

The parties are not in disagreement that homicides committed by children 14 and younger are relatively infrequent. *See* Jackson Pet'r Br. 54-57; *id*. at 54 (observing that "[h]omicides by young adolescents do not constitute a danger of such magnitude as to warrant their exclusion from the constitutional logic of *Roper* and *Graham*"). But their number nonetheless dwarfs the number of young teens serving life without parole for homicide who have accumulated in the Nation's prisons during the four decades since the earliest of them was given that sentence.[8] Between 1971 and 2010, according to the federal government's Uniform Crime Reports, 7,475 children 14 and younger were arrested for murder or nonnegligent manslaughter.[9] Yet only 79 – or at most 82 –

[8] The earliest extant life-without-parole sentence was imposed in 1971. *See* Jackson Pet'r Br. 48 n.58.

[9] *See* Fed. Bureau of Investigation, U.S. Dep't of Justice, *Uniform Crime Reports for the United States*, Table 38 (2010), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl38.xls; *id.* (2009), http://www2.fbi.gov/ucr/cius2009/data/table_38.html; *id.* (2008), http://www2.fbi.gov/ucr/cius2008/data/table_38.html; *id.* (2007), http://www2.fbi.

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life-without-parole sentences are the product of these 40 years – a figure all the more telling "when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades" (*Graham*, 130 S. Ct. at 2024).

This Court's decisions indicate that a proper Eighth Amendment analysis considers both the "absolute numbers" of individuals who have been given a challenged sentence (*id*. at 2024) and a "comparison . . . [of that number with] the opportunities for its imposition" (*id*. at 2025).[10] A very small absolute number suggests that the sentence is immunized from legislative reconsideration, responsive to contemporary standards of decency, only because its rarity makes

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gov/ucr/cius2007/data/table_38.html; *id.* (2006), http://www2.fbi.gov/ucr/cius2006/data/table_38.html; *id.* (2005), http://www2.fbi.gov/ucr/05cius/data/table_38.html; *id.* at 290 (2004), *available at* http://www.fbi.gov/about-us/cjis/ucr/ucr; *id.* at 280 (2003); *id.* at 244 (2002); *id.* (2001); *id.* at 226 (2000); *id.* at 222 (1999); *id.* at 220 (1998); *id.* at 232 (1997); *id.* at 224 (1996); *id.* at 218 (1995); *id.* at 227 (1994); *id.* (1993); *id.* (1992); *id.* at 223 (1991); *id.* at 184 (1990); *id.* at 182 (1989); *id.* at 178 (1988); *id.* at 174 (1987); *id.* (1986); *id.* (1985); *id.* at 172 (1984); *id.* at 179 (1983); *id.* at 176 (1982); *id.* at 171 (1981); *id.* at 200 (1980); *id.* at 196 (1979); *id.* at 194 (1978); *id.* at 180 (1977); *id.* at 181 (1976); *id.* at 188 (1975); *id.* at 186 (1974); *id.* at 128 (1973); *id.* at 126 (1972); *id.* at 122 (1971).

[10] In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court did not consider how many juveniles had potentially been exposed to the death penalty (*see id.* at 564-67); nor, in *Atkins v. Virginia*, 536 U.S. 304 (2002), did it consider how many mentally retarded offenders had been arrested for homicide (*see id.* at 313-16).

its recipients invisible. A relatively small comparative ratio suggests that sentencers are resistant to imposing it when they have a choice. Both data are relevant when the Court undertakes to review the constitutionality of a sentence which exists on the statute books of a significant number of jurisdictions but is almost never used in practice. And the second datum – the comparative ratio – is of particular importance only where sentencers *do* have a choice to impose the challenged sentence or withhold it.

For example, in *Coker v. Georgia*, 433 U.S. 584 (1977), the Court found it significant that "in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence [for the crime of rape]" (*id.* at 597), but it cautioned that "[o]f course, the jury's judgment is meaningful only where the jury has an appropriate measure of choice as to whether the . . . [challenged] penalty is to be imposed" (*id*. at 596). In the present cases, it is uncontested that the overwhelming number of extant life-without-parole sentences imposed on children 14 and under were the product of mandatory sentencing regimes. Only eight children 14 and younger have been sentenced to life without parole where the sentencer had discretion to impose a lesser sentence.[11]

States which authorize discretionary life-without-parole sentences for young teens convicted of murder

[11] *See* Miller Pet'r Br. 24 n.31.

but *never* impose such sentences in practice cannot plausibly be supposed to have lacked opportunities to do so. Many of these States have levels of violent juvenile crime which are similar to those in the States that have sentenced young adolescents to life without parole. For example, Georgia has a higher rate of juvenile arrests for violent crime than either of its fellow Southern states of Alabama and Arkansas.[12] But Georgia makes life-without-parole sentencing discretionary (*see* Ga. Code Ann. § 17-10-31) and has not sentenced a single child 14 or younger to life without parole. Similarly, Maryland has a higher rate of juvenile arrests for violent crime than either Pennsylvania or Florida.[13] But Maryland does not make a sentence of life without parole mandatory for juveniles convicted of homicide (*see* Md. Code Ann., Crim. Law § 2-202(b)(2)), and Maryland has not imposed life without parole on any child 14 or younger, while Pennsylvania and Florida have imposed the largest number of such sentences: – 18 and 13 respectively.

In short, it is both uncontested and constitutionally significant that our Nation, with a population exceeding 300,000,000, has accreted approximately 79 life-without-parole sentences for homicides by children 14 and under during a 40-year period. The arguments

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[12] *See* Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, *Juvenile Arrests 2009* 21 (2011), *available at* http://www.ojjdp.gov/pubs/236477.pdf.

[13] *See supra* note 12.

by which Respondents and their *amici* attempt to trivialize or dodge this fact are unconvincing.

3. The Facts Regarding Kuntrell Jackson's Mandatory Sentence

Arkansas's brief argues for the first time in the course of this litigation that Kuntrell Jackson's sentence was not mandatory.[14] That argument would have astounded the sentencing judge and all parties at every stage of the litigation prior to this Court's grant of certiorari. The sentencing judge unmistakably believed that a life-without-parole sentence for Kuntrell was mandatory; he exercised no discretion in determining Kuntrell's sentence because he understood that he had none. After the jury returned its guilty verdict, the judge consulted with counsel about how to proceed given that "there's only one sentence." J.A. 54. Both the State and defense counsel agreed

[14] Although Kuntrell challenged the mandatory nature of his sentence in both state courts below and in his petition for certiorari here, Arkansas has never previously disputed the predicate fact that his sentence *was* mandatory. *See* R. 105-09; Appellee's Br. 1-3, *Jackson v. Norris*, No. 09-145 (Ark. May 18, 2009); Appellee's Supplemental Br. 1-3, *Jackson v. Norris*, No. 09-145 (Ark. Sept. 19, 2010); Ark. Br. Opp. Cert. 1-6. Because the State failed to make any such claim in the lower courts or in a Brief in Opposition to Certiorari, this Court should not countenance it now. The last three sentences of the Court's Rule 15.2 explicitly and repeatedly admonish counsel that sandbagging of this kind is impermissible.

that, for this reason, there was no need for the jury to deliberate on sentencing, as is normally required in Arkansas. *See* Ark. Code Ann. § 16-97-101. The judge then dismissed the jury, stating "the Court would instruct you on punishment and ask you to retire to consider punishment. But in view of your verdict, there's only one possible punishment, and the Court will sentence on that." J.A. 55. Without further proceedings, the judge sentenced Kuntrell Jackson to life imprisonment without parole. J.A. 56.

Now, however, Arkansas points to § 12-28-403(b)(1) (1999) of the Arkansas Code in effect at the time of the offense, and argues that this provision authorized the trial court to sentence Kuntrell Jackson "to the Department of Correction, suspend the sentence, and commit the youth to the appropriate division of the Department of Human Services" to participate in a "training-school program" which could qualify him to be "placed on probation" (Ark. Resp't Br. 36-37). There are several grounds on which this argument could have been dismissed out of hand if the State had raised it in courts familiar with Arkansas law and practice.

Kuntrell's life-without-parole sentence was imposed under Ark. Code Ann. § 5-4-104(b) (1999) ("A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole."). Another subsection of the same statute then provided that: "No defendant convicted

of an offense shall be sentenced otherwise than in accordance with this chapter." Ark. Code Ann. § 5-4-104(a) (1999). The code section belatedly cited by the State is not part of the chapter on sentencing but is part of a chapter governing state correctional facilities. It can therefore properly be construed as concerned with the *location* of confinement rather than the *duration* of confinement.[15]

If construed as a duration-of-confinement provision in the way that the State now proposes, § 12-28-403(b)(1) conflicted with other Arkansas statutes which specifically prohibited both term-of-years sentences and suspended sentences for the offense of capital murder. *See* Ark. Code Ann. §§ 5-4-104(b), (e)(1)(A)(i) (1999).[16] And the resolution of that conflict would have been readily at hand for any Arkansas state court confronted with it. For § 12-28-403(b)(1) was probably no longer operative at the time of

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[15] This construction is especially plausible because the statute applies only to "youthful male offenders" (Ark. Code Ann. § 12-28-403) and there does not appear to be a comparable provision for youthful female offenders. It would be absurd to assume that the legislature made the sentence for capital murder discretionary for men but mandatory for women.

[16] Under the current version of § 5-4-104(f)(1), which contains a provision similar to former § 12-28-403, this conflict may create an open question of Arkansas law. The State's request that this Court address a statutory-construction issue which its attorneys never presented to the state courts below, in a way that could cast a shadow on the open question, is all the more improvident on that account.

Kuntrell Jackson's sentencing. Section 12-28-403 was originally enacted in 1969 and codified as Arkansas Statute § 46-910. 1969 Ark. Act No. 377, § 3. In *Hunter v. State*, 645 S.W.2d 954 (Ark. 1983), the Arkansas Supreme Court found a sentence imposed pursuant to § 46-910 invalid because it was not a disposition authorized by the applicable sentencing statutes. 645 S.W.2d at 956-57. Relying on this decision, the Arkansas Attorney General's Office issued an opinion that § 46-910 had been superseded by Arkansas Statute § 41-803 and other sentencing statutes then in effect. *See* Op. Ark. Att'y Gen. No. 83-137 (July 19, 1983). Section 41-803 was later recodified as Arkansas Code § 5-4-104, the sentencing statute in effect at the time of Kuntrell Jackson's offense. *See* Ark. Code Ann. § 5-4-104(b).

The State failed to present to the state courts below its present contention that § 12-28-403(b)(1) applied to Kuntrell's sentencing – with the far-fetched consequence that the trial judge might have disposed of Kuntrell's capital murder conviction by suspending sentence, sending Kuntrell to a training school run by the Department of Human Services, and releasing Kuntrell on probation as soon as he completed his training. Ark. Resp't Br. 37.

That contention was unlikely to survive either legal or serious practical scrutiny.[17]

4. The Problems with the State's Defense of Kuntrell's Mandatory Life-Without-Parole Sentence

Because Kuntrell's life-without-parole sentence was mandatory, his sentencer was obliged to impose

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[17] The State also suggests that Kuntrell's brief in this Court fails to preserve his mandatory sentencing claim. Ark. Resp't Br. 36. Not so. Section H of the Brief for Petitioner ("The Constitutional Rule of *Graham* Would Be Stripped of Intelligible Meaning If It Were Held Inapplicable to the *Mandatory* Life-Without-Parole Sentence Imposed on 14-Year-Old Kuntrell Jackson for a Homicide Crime Attributed to Him Through Accessorial Felony-Murder Doctrines" (Jackson Pet'r Br. 63 (emphasis added))) argues both the second and third of Kuntrell's Questions Presented (at Jackson Pet'r Br. i). This section expressly advocates the position of the Arkansas Supreme Court dissenters (beginning "As the dissent below found. . . ." (Jackson Pet'r Br. 63)), which had been stated (at Jackson Pet'r Br. 4): "The dissenters emphasized that Kuntrell's role in the offense was 'no more, if not less than, Graham's involvement had been.' J.A. 88. They noted that Kuntrell's mandatory sentence did not take account of his young age or other mitigating circumstances, as *Graham* requires. J.A. 88." The rest of section H is devoted to summarizing the individual circumstances of Kuntrell's case which Arkansas's mandatory statute categorically excluded from consideration. Even willful blindness could not fail to see that – as Arkansas's lawyers themselves recognize (at Ark. Resp't Br. 38) – "petitioner contends that his sentence is constitutionally disproportionate because it was the only sentence available for his crime of capital murder, and thus was not imposed after his sentencer was permitted to consider whether his youth justified imposing some unspecified lesser sentence" (*id*.).

it in complete disregard of all of the features of youth that were central to the holdings in *Roper* and *Graham*. His young age was obligatorily excluded from the sentencing determination, not only in its own right but as the context for assessing the significance of each of those aspects of his life experience which were conditioned by his age.[18] "'[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.'" *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). Mandatory life-without-parole for young teens inexorably banishes from the sentencing determination the entire constellation of age-dependent factors that *Roper* and *Graham* found to be indispensable considerations in aligning punishment with culpability.

Arkansas argues that a mandatory procedure for imposing life-without-parole sentences on juveniles is nonetheless consistent with *Roper* and *Graham* because those "offenders remain free to argue, on a case-by-case basis, that their sentences are grossly disproportionate under the narrow-proportionality principle traditionally applied to noncapital sentences." Ark. Resp't Br. 41-42. The implications of this

[18] The particular circumstances of Kuntrell's young life which were thus foreclosed from consideration in the assessment of his culpability are summarized in his Petition for Writ of Certiorari at pages 4-5.

position are remarkable. Since the state-law rule dictated by a mandatory life-without-parole statute is, by definition, that every juvenile convicted of a life-without-parole-eligible offense *must* be sentenced to life without parole, *state* law can provide no guidelines, principles, or standards for consideration in individualized sentencing determinations. The constitutional law of the Eighth Amendment is thus made the front-line operating code for meting out juvenile homicide sentences, and this Court is made the effective guideline-setting and sentencing-review agency "on a case-by-case basis" in juvenile homicide prosecutions. That a *State* should propose a procedure so impractical and radically at odds with the first premises of federalism is an indication of how difficult Arkansas finds it to reconcile its mandatory juvenile-life-without-parole statute with *Roper* and *Graham*.

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CONCLUSION

This case and the companion *Miller* case have been the subject of extensive briefing. To avoid unnecessary imposition on the Court, we have limited the reply briefs in both cases to discussing the very few points in the Respondents' Briefs which were not anticipated in the Briefs for the Petitioners.[19] Respondents have notably failed to counter Petitioners' initial submissions that the constitutional logic of *Roper* and *Graham* controls Kuntrell Jackson's case and requires invalidation of his sentence to lifelong incarceration.

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[19] Some matters which are raised both in Arkansas's *Jackson* Brief and in Alabama's *Miller* brief but which are developed most fully in the latter are addressed in the Reply Brief in *Miller*.