

**THE EIGHTH AMENDMENT AND  
JUVENILE LWOP: APPLYING THE *TISON*  
STANDARD TO JUVENILE PERIPHERAL  
ACCOMPLICES**

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#### INTRODUCTION

Under the Eighth Amendment, may a state impose a sentence of life without parole for a juvenile who plays only a minor role in a felony murder situation? Consider the following.

One November evening in 1999, fourteen-year-old Kuntrell Jackson followed two of his friends to a video store where they planned to rob the store.<sup>1</sup> Jackson was going to serve as the lookout, standing outside the door of the store to make sure no one entered and the police did not show up while his friends were inside.<sup>2</sup> While on their way to the store, Jackson learned that one of the other boys was carrying a sawed-off shotgun in his pants.<sup>3</sup> Succumbing to peer pressure, he decided to follow along anyway and carry out his role in the robbery.<sup>4</sup> After keeping a lookout for a few minutes, Jackson went inside to make sure everything was all right; at which point, his friend shot and killed the video store clerk.<sup>5</sup> The three boys ran home without taking any of the money from the store.<sup>6</sup> Police later arrested Jackson, and he confessed to his involvement in the robbery.<sup>7</sup> He was charged and convicted of capital felony murder and aggravated robbery as an adult and was sentenced to life in prison without parole.<sup>8</sup>

This was the situation in *Jackson v. Arkansas*, a companion case to the 2012 Supreme Court decision in *Miller v. Alabama*.<sup>9</sup> The problem with situations like these is juvenile accomplices, who never intend for death to occur and lack the foresight that

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<sup>1</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2461 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

their adult counterparts possess, are being punished as severely as their adult counterparts. These sentences essentially decide that the juvenile has no chance of ever being a contributing member of society, and he or she must be put in jail for life for minor involvement in a crime that unexpectedly turned out to be fatal. The *Miller* Court held that because the life without parole sentence was imposed through a mandatory sentencing scheme, it was unconstitutional; however, the trial court, at its discretion, still possessed the ability to sentence Jackson to life in prison.<sup>10</sup> Because of this, a juvenile, whose minor involvement in a felony that results in a death, can still be sentenced to life without parole, effectively sentencing him to die in prison.

Since 2005, the Court has ruled on a series of cases and limited the sentencing options trial courts have when sentencing juveniles tried as adults; however, the Court has yet to directly address the constitutionality of life without parole sentences for juveniles involved in felony murder cases. This Comment argues that life without parole sentences are unconstitutional for juveniles who play a minor role in felony murder situations. It will argue that the constitutional requirements for sentencing accomplices in felony murder cases, along with the notion that life without parole is essentially death for juveniles, leads to the conclusion that in order to face this sentence, juvenile accomplices in felony murder cases must meet the *Tison v. Arizona* standard. While this standard was originally established to determine the constitutionality of capital punishment, this Comment argues that it must be met before a court can sentence a juvenile felony murder accomplice to life without parole.

Section I of this Comment explains the Supreme Court jurisprudence on felony murder sentencing. It also provides background information on the recent string of Supreme Court juvenile-sentencing cases. Section II argues that the constitutional requirements for sentencing felony murder accomplices to death must be met in order to sentence juvenile felony murder accomplices to life without parole. Section III establishes that LWOP is the most severe punishment available to juvenile offenders, and because it is the most severe punishment, it should

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<sup>8</sup> *Id.* at 2458.

only be reserved for the worst juvenile offenders. It argues that peripheral accomplices cannot be considered the worst type of juvenile offender, and thus, should not be sentenced to LWOP. Section IV then argues that LWOP cannot be justified for peripheral accomplices using the Court's proportionality analysis. It further argues that sentencing peripheral accomplices to LWOP does not satisfy any of the recognized theories of punishment. Finally, Section V briefly addresses the problem of de facto LWOP sentences and how the Court could address the problems that arise from these de facto LWOP sentences. This Comment will argue that it is unconstitutional for courts to sentence juvenile accomplices to life without parole for accomplices whose involvement does not meet the threshold established by *Tison*.

## I. BACKGROUND

In order to understand why sentencing juvenile accomplices to life without parole (LWOP) should be limited in felony murder cases, it is important to understand the evolution of Supreme Court jurisprudence in regard to both juvenile sentencing and felony-murder-accomplice sentencing. The Supreme Court recently issued a series of opinions that reduced the sentences available for juvenile offenders, establishing that juveniles cannot constitutionally be sentenced to the same sentences as adult offenders in all situations. The Supreme Court also has a series of cases that establish procedural safeguards and culpability requirements for sentencing to death adult accomplices in felony-murder situations. These two lines of precedent share many similar characteristics and can be logically connected, making it important to explore them further.

### *A. Juvenile-Sentencing Jurisprudence*

Beginning in 2005, the Supreme Court issued a series of opinions that relied on various aspects of social and physical sciences to cut back on the severity of sentences available to courts sentencing juvenile offenders. Over the last seven years, the Court has followed with this trend in three opinions that reduce the severity of sentences available to juvenile offenders. Not only *how* the Court has cut back in sentencing guidelines, but also *why* is

crucial to understanding the attitude the Court has taken when dealing with sentencing juvenile offenders.

1. *Roper v. Simmons*

In 2005, the Supreme Court, in *Roper v. Simmons*, sought to answer the question of whether capital punishment constituted cruel and unusual punishment, unconstitutional under the Eighth Amendment, for juvenile offenders.<sup>11</sup> In *Roper*, prosecutors accused seventeen-year old Christopher Simmons of plotting and

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<sup>11</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

carrying out the murder of an elderly woman.<sup>12</sup> Simmons convinced two of his friends, fifteen- and sixteen-years old, to assist him in planning a burglary of the victim's house, tying up the woman, and dumping her body off a bridge to cover their tracks.<sup>13</sup> He reassured his accomplices that they would get away with the crime because they were juveniles.<sup>14</sup> Simmons was arrested at school the next day after bragging to classmates about his crimes.<sup>15</sup>

Simmons ultimately admitted to and was convicted of burglary, kidnapping, stealing, and murder in the first degree.<sup>16</sup> The State of Missouri sought the death penalty in this case, arguing that the aggravating factors—including the depraved and heinous nature of the crime and the premeditation—outweighed any mitigating factors.<sup>17</sup> The trial court ultimately sentenced Simmons to death.<sup>18</sup> Simmons appealed to the Missouri Supreme Court, claiming that the *Atkins v. Virginia*<sup>19</sup> consensus against sentencing mentally-retarded defendants to death was akin to sentencing juveniles to death, and the Missouri Supreme Court reversed the sentence.<sup>20</sup> The State then appealed to the United States Supreme Court.<sup>21</sup> The Supreme Court determined that “evolving standards of decency that mark the progress of a maturing society” required the Court to hold that capital punishment was unconstitutional under the Eighth Amendment for juveniles.<sup>22</sup> The Court determined that capital punishment must be reserved for the worst offenders and most extreme offenses—reserving the punishment for those who most deserve it—and juveniles categorically do not fit into that group.<sup>23</sup> The

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<sup>12</sup> *Id.* at 558-59.

<sup>13</sup> *Id.* at 557.

<sup>14</sup> *Id.* at 555.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 556-58.

<sup>17</sup> *Id.* at 558.

<sup>18</sup> *Id.*

<sup>19</sup> 536 U.S. 304, 316 (2002).

<sup>20</sup> *Id.* at 559.

<sup>21</sup> *Id.* at 560.

<sup>22</sup> *Id.* at 561.

<sup>23</sup> *Id.* at 553.

effect of this case was the elimination of capital punishment as a sentencing option in cases involving defendants who committed their accused crimes before the age of eighteen.

## 2. *Graham v. Florida*

Five years later, the Supreme Court decided *Graham v. Florida*.<sup>24</sup> *Graham* continued the Court's trend of reducing the severity of sentences available for juveniles by addressing whether LWOP was constitutional for juveniles convicted of nonhomicide offenses.<sup>25</sup> Terrance Graham, sixteen years old, conspired with two juvenile friends to rob a local barbeque restaurant.<sup>26</sup> When they entered through the back door, the manager caught them, Graham struck the manager with a metal bar, and the boys ran off without taking anything.<sup>27</sup> Graham ultimately pleaded guilty to armed robbery with assault and attempted armed robbery.<sup>28</sup> Graham wrote a letter to the court at the time of sentencing, apologizing for his actions and explaining this was his first and last time being in trouble with the law.<sup>29</sup> He was subsequently sentenced to twelve months in jail and three years of probation.<sup>30</sup>

Less than six months after his release, Graham was again arrested for his involvement in an armed home invasion burglary.<sup>31</sup> Graham was charged with violating his probation by possessing a firearm, engaging in criminal conduct, and associating with individuals involved in criminal activity.<sup>32</sup> At the sentencing hearing, Graham faced a minimum sentence of five years with a maximum of life in prison.<sup>33</sup> The Florida Department of Corrections recommended an even lesser sentence of four years imprisonment.<sup>34</sup> The sentencing judge, not the same as in his initial charges, expressed strong disappointment in Graham's

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<sup>24</sup> *Graham v. Florida*, 130 S. Ct. 2011 (2010).

<sup>25</sup> *Id.* at 2017-18.

<sup>26</sup> *Id.* at 2018.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2019.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

actions and choice to engage in this activity after being given such a favorable sentence by the original judge.<sup>35</sup> He ultimately sentenced Graham to the maximum of LWOP, as Florida had earlier abolished their parole system.<sup>36</sup>

On appeal, the Supreme Court faced the question of whether the LWOP sentence for this nonhomicide offense was constitutional for a juvenile under the Eighth Amendment.<sup>37</sup> The Court ultimately held that the sentence was unconstitutional for several reasons.<sup>38</sup> Continuing with the trend that began in *Roper*, the Court reaffirmed “that punishment for crime should be graduated and proportioned to the offense.”<sup>39</sup> It continued establishing categorical rules for sentencing by prohibiting LWOP for juvenile, nonhomicide offenders.<sup>40</sup> The Court reasoned that LWOP shares many similarities with capital punishment, especially for juveniles. Such similarities include the fact that LWOP “alters the offender’s life by a forfeiture that is irrevocable.”<sup>41</sup> In the case of juveniles, specifically, the Court stated that it shows a total denial of hope, showing that the juvenile never has a chance to be a positively contributing member of society.<sup>42</sup> The Court finally touched on the concept that the limited culpability of a juvenile offender makes this punishment so severe that it constitutes cruel and unusual punishment.<sup>43</sup>

### 3. *Miller v. Alabama*

The most recent Supreme Court case involving juvenile-sentencing guidelines is the 2012 decision of *Miller v. Alabama*.<sup>44</sup> *Miller* and its companion case, *Jackson v. Arkansas*, involved felony murder situations for juveniles, and both cases resulted in the juveniles being sentenced to *mandatory* LWOP according to

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<sup>35</sup> *Id.* at 2019-20.

<sup>36</sup> *Id.* at 2020.

<sup>37</sup> *Id.* at 2017-18.

<sup>38</sup> *Id.* at 2015.

<sup>39</sup> *Id.* at 2021.

<sup>40</sup> *Id.* at 2022.

<sup>41</sup> *Id.* at 2027.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2030.

<sup>44</sup> 132 S. Ct. 2455 (2012).

statutorily-mandated sentencing guidelines.<sup>45</sup> The juvenile defendants in both cases appealed their sentences on the *mandatory* nature of the sentence, arguing that the mandate violated the Eighth Amendment.<sup>46</sup> They presented their arguments on the grounds that the mandatory scheme prevents the sentencing judge from taking into account the youthful attributes of the defendant, something that must be accounted for as a mitigating factor.<sup>47</sup>

The Court held that the mandatory LWOP sentence for the juvenile offenders in these cases was unconstitutional.<sup>48</sup> Similar to *Graham*, the Court created a categorical rule prohibiting the mandatory aspect of the sentence when applied to juvenile offenders.<sup>49</sup> The Court followed many of the same lines of reasoning established in *Graham* to reach this holding. It recognized that juveniles were indeed different and explained that juvenile traits required individual attention at the sentencing stage.<sup>50</sup> It thought these traits were so mitigating that it be required for the sentencer to consider them before imposing a LWOP sentence.<sup>51</sup> In making this decision, the Court turned to its precedent, acknowledging that juvenile accomplices often have “twice diminished moral culpability.”<sup>52</sup> It also recognized previous holdings that equated LWOP for juveniles to the death penalty in imposing certain restrictions on issuing capital punishments.<sup>53</sup>

### *B. Felony Murder Sentencing Jurisprudence*

Along with the juvenile-sentencing jurisprudence, it is important to understand the Court’s felony murder sentencing jurisprudence in order to understand the argument put forth. The following cases involve procedural safeguards instituted by the Court and are used to determine whether a felony murder accomplice is so culpable that they are deserving of the death

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<sup>45</sup> *Id.* at 2461-63.

<sup>46</sup> *Id.* at 2461-62.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 2475.

<sup>49</sup> *Id.* at 2466-67.

<sup>50</sup> *Id.* at 2467-68.

<sup>51</sup> *Id.* at 2467.

<sup>52</sup> *Id.* at 2468.

<sup>53</sup> *Id.* at 2470-71.

penalty. These cases rely on the maxim that punishment should be proportional to the crime and should fit with the culpability of the offender. For this reason, the Court established categorical rules to determine whether an accomplice can be sentenced to death for their involvement in a felony murder offense.<sup>54</sup>

### 1. *Enmund v. Florida*

In 1982, in *Enmund v. Florida*, the Supreme Court addressed the question of whether accomplices with minimal involvement in felony murder situations can be subject to capital punishment.<sup>55</sup> The case involved the getaway driver to a robbery gone wrong.<sup>56</sup> Earl Enmund drove two people to a farmhouse to commit a burglary, while he remained in the car waiting to drive them home.<sup>57</sup> During the course of the burglary, the elderly residents of the home caught the two codefendants, and, as a result, the codefendants killed them.<sup>58</sup> The codefendants then ran back to the car, and Enmund drove them away from the scene of the crime.<sup>59</sup> Enmund, along with the others, was convicted of two counts of first-degree murder using a theory of accomplice liability and was subsequently sentenced to death.<sup>60</sup> Enmund appealed his sentence to the United States Supreme Court on the grounds that he did not kill, intend to kill, or attempt to kill, therefore it was an unconstitutional sentence under the Eighth Amendment.<sup>61</sup>

The Supreme Court agreed with Enmund and established the categorical rule against sentencing felony murder accomplices to death.<sup>62</sup> The Court explained that when issuing an accomplice sentence, especially the death penalty, the sentencer must look to the individual's culpability and not just the culpability of the primary offenders.<sup>63</sup> By doing so, the sentencer must follow the

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<sup>54</sup> See *Enmund v. Florida*, 458 U.S. 782 (1982); see also *Tison v. Arizona*, 481 U.S. 137 (1987).

<sup>55</sup> *Enmund*, 458 U.S. at 787.

<sup>56</sup> *Id.* at 784.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 785.

<sup>61</sup> *Id.* at 788.

<sup>62</sup> *Id.* at 797.

<sup>63</sup> *Id.* at 798.

standard established in this case, which states that in order for an accomplice to be sentenced to death, they must have actually killed, intended to kill, or attempted to kill in the course of the felony.<sup>64</sup> This decision relied heavily on the state trend to not permit the use of the death penalty for crimes involving death during a robbery when the defendant did not commit the homicide.<sup>65</sup> The Court also looked to the use of this sentence by juries in states that do allow the sentence and determined that it is very rarely used because juries tend to find the sentence disproportionate to the defendant's culpability.<sup>66</sup> The Court emphasized that, for the purposes of imposing the death penalty, a defendant's "criminal culpability must be limited to his participation in the [felony], and his punishment must be tailored to his personal responsibility and moral guilt."<sup>67</sup>

## 2. *Tison v. Arizona*

Five years later, the Supreme Court overruled *Enmund* and established a new standard for determining whether a felony murder accomplice could be sentenced to death.<sup>68</sup> In *Tison v. Arizona*, three men broke their father and his cellmate—both convicted murderers—out of prison.<sup>69</sup> The three sons amassed a small arsenal of weapons, which they took into the prison in an ice chest on the day they broke their father out.<sup>70</sup> No shots were fired in the prison; however, the escape did not go according to plan.<sup>71</sup> During their escape, the group blew a tire and did not have a spare, so four of them hid while one flagged down a passing motorist.<sup>72</sup> A family of four stopped to help.<sup>73</sup> The men then emerged from hiding and forced the family into the back of their car and drove them off to a deserted area.<sup>74</sup> While moving their

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<sup>64</sup> *Id.* at 797.

<sup>65</sup> *Id.* at 789-93.

<sup>66</sup> *Id.* at 794-95.

<sup>67</sup> *Id.* at 801.

<sup>68</sup> *Tison v. Arizona*, 481 U.S. 137 (1987).

<sup>69</sup> *Id.* at 139.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 139-40.

<sup>73</sup> *Id.* at 140.

<sup>74</sup> *Id.*

possessions into the family's car, the family saw the weapons, triggering the escaped prisoners to kill all four members of the family, which the sons claimed they did not know was going to happen.<sup>75</sup> At trial, the sons were sentenced to death under Arizona's capital felony murder statute.<sup>76</sup>

On appeal to the United States Supreme Court, the sons argued that their involvement in the felonies did not merit capital punishment under the *Enmund* standard.<sup>77</sup> The Supreme Court decided to read the "intent" requirement in the statute very broadly so that it included foreseeability of death as intent to kill.<sup>78</sup> The Court also found that the defendants' involvement in the crime was not minor, and this was the type of case that the criminal justice system intended to punish most severely.<sup>79</sup> In making this determination, the Court overruled the higher culpability requirement established in *Enmund* and created the current standard used by courts. This standard states that if an accomplice is a major participant in the underlying felony and shows a reckless indifference to human life, then they are eligible to be sentenced to death.<sup>80</sup>

## II. WHY LWOP FOR JUVENILE PERIPHERAL ACCOMPLICES VIOLATES THE EIGHTH AMENDMENT

Juveniles are different, and juveniles are so different that the criminal justice system treats them accordingly and has reduced the severity of punishments available to them.<sup>81</sup> Understanding how juveniles are different is crucial to understanding why courts should treat juvenile LWOP with the same protections and cautions that they treat capital punishment for adult offenders. These differences are explained and supported by foundational

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<sup>75</sup> *Id.* at 140-41.

<sup>76</sup> *Id.* at 143.

<sup>77</sup> *Id.* at 150.

<sup>78</sup> *Id.* at 163.

<sup>79</sup> *Id.* at 151.

<sup>80</sup> *Id.* at 157-58.

<sup>81</sup> *See generally* *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

principles in the physical sciences—neuroscience to be exact.<sup>82</sup> Because of the differences between juvenile offenders and their adult counterparts, they should be entitled to the same procedural safeguards when being sentenced to the harshest punishments available.

In order to understand why the standard established in *Tison* should be applied in determining whether a juvenile should be sentenced to LWOP, it is necessary to understand the connection between capital punishment for adult offenders and LWOP for juvenile offenders. This connection between juvenile LWOP and capital punishment is grounded in several theories of jurisprudence and Supreme Court precedent. The underlying connection between capital punishment and juvenile LWOP is that they are the most severe punishments available to their respective class of offenders. Capital punishment is the most extreme punishment available to an adult offender, and the Supreme Court has recognized that it should be reserved for only the worst offenders committing the most severe offenses.<sup>83</sup> Likewise, LWOP is the most severe punishment available to courts sentencing juvenile offenders. Because LWOP is the most severe juvenile punishment, courts have similarly reserved it for only the most heinous offenses and have limited the ability to use it to only certain categories of offenses.<sup>84</sup>

#### *A. The Twice-Diminished Culpability of Juvenile Peripheral Accomplices*

Using neuroscience, along with Supreme Court jurisprudence, it appears that juveniles are indeed different than adults. The Court has adopted this “juveniles are different” maxim when narrowing the applicability of punishments to juvenile

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<sup>82</sup> See, e.g., Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729 (2007).

<sup>83</sup> See *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (establishing that capital punishment is not a constitutional punishment for the offense of rape, as capital punishment must be reserved for the worst offenses and the worst offenders, and rape does not include the death of the victim so it is not inherently equal in severity as murder).

<sup>84</sup> See *Graham*, 130 S. Ct. at 2034 (holding that juvenile LWOP was only for the worst offenses involving homicide).

offenders.<sup>85</sup> The Court has recognized the diminished culpability of juveniles by eliminating capital punishment as a sentence available to juveniles.<sup>86</sup> It has further recognized different forms of diminished culpability within juvenile offenders when reducing the applicability of LWOP.<sup>87</sup>

In *Tison*, the Court recognized that individuals in felony murder situations might differ in their levels of culpability.<sup>88</sup> The Court separated individuals based on their involvement and culpability, and punished them accordingly.<sup>89</sup> The recognition that individuals might vary in culpability applies directly to juvenile neurological development, as well. As explained below, a juvenile's brain develops throughout their adolescence.<sup>90</sup> However, there is no way to put an age on when *all* juveniles reach a heightened level of culpability.

Recognizing that juveniles can vary in their culpability, even while they all possess an inherent level of diminished culpability, it is important that the Court separate those juveniles who are more culpable from those who are less culpable. In order to effectively punish more severely those more culpable juveniles, all the Court must do is require courts to perform a *Tison* analysis in felony murder situations. By determining whether a juvenile accomplice meets the *Tison* threshold, the Court is ensuring that only those juveniles who are most culpable are punished most severely. This analysis ensures that those juveniles who have not developed enough culpability are not punished as severely as those juveniles who are developed enough to have sufficient culpability.

### 1. The Diminished Culpability of Juveniles

The Supreme Court, through a series of juvenile-sentencing cases, has established that juvenile offenders are inherently less culpable than their adult counterparts. Based on this recognition, the Court has drastically reduced the severity of punishments

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<sup>85</sup> *Roper*, 543 U.S. at 569.

<sup>86</sup> *Id.* at 571.

<sup>87</sup> *Graham*, 130 S. Ct. at 2026-27.

<sup>88</sup> *Tison v. Arizona*, 481 U.S. 137, 156 (1987).

<sup>89</sup> *Id.* at 157.

<sup>90</sup> *See infra* Part II.A.1.b.

available to courts sentencing juveniles who have committed serious offenses. The Court in *Roper* identified several major differences between adults and juveniles that explain why juveniles are less culpable than adult offenders.<sup>91</sup> One of the primary differences is that juveniles are more susceptible to immature and impulsive behavior, and thus their “irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’”<sup>92</sup> The Court continued to acknowledge this diminished culpability of juveniles by adding to the list of reasons why juveniles possess diminished culpability.<sup>93</sup> Throughout its holdings, the Court also relied on breakthroughs in neuroscience to support this notion.

*a. The Supreme Court’s View in Roper, Graham, and Miller*

Throughout the Supreme Court’s rulings in *Roper*, *Graham*, and *Miller*, the Court relied on developments in neuroscience and neuroimaging to establish a foundation as to why juvenile offenders are different than their adult counterparts.<sup>94</sup> The focus revolved around the notion that neurological underdevelopment causes juveniles to lack many of the traits associated with culpability, meaning that juveniles are inherently less culpable than adults. Developments in neuroscience and neuroimaging allowed the Court to evaluate how a juvenile’s brain develops and how the process impacts their culpability and decision-making processes.

For the first time, in *Roper*, the Court laid out three factors to support the conclusion that juveniles should be treated differently than adult offenders.<sup>95</sup> The first factor, as mentioned above, is that juveniles are more susceptible to immature and impulsive behaviors and decision-making.<sup>96</sup> Second, juveniles are more vulnerable to negative influences and outside pressures than

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<sup>91</sup> *Roper*, 543 U.S. at 569-70.

<sup>92</sup> *Id.* at 553.

<sup>93</sup> See *Graham*, 130 S. Ct. at 2026-27; *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012).

<sup>94</sup> *Roper*, 543 U.S. at 617-18 (Scalia, J., dissenting); *Graham*, 130 S. Ct. at 2026-27; *Miller*, 132 S. Ct. at 2464-65.

<sup>95</sup> *Roper*, 543 U.S. at 569.

<sup>96</sup> *Id.*

adults.<sup>97</sup> Third, a juvenile's character is less formed than an adult's, so punishing them with such severity fails to account for maturation that will inevitably occur.<sup>98</sup> Taking these three factors into account, the Court determined that juveniles could not be grouped in the worst class of offenders due to reasons outside of their control.<sup>99</sup>

In *Graham*, the Court confirmed the differences between juveniles and adults from *Roper* and explained that those differences are even further supported by developments in neuroscience and juvenile psychology.<sup>100</sup> It reasoned that while “[a] juvenile is not absolved of responsibility for his actions,” he or she is not as condemnable as if an adult had committed the crimes.<sup>101</sup> Following in suit with *Roper*, the Court relied on these differences to further reduce the severity of punishments available to juveniles.<sup>102</sup>

Most recently, in *Miller*, the Court reaffirmed its conclusion and advanced additional support. The Court established that an offender's age must be taken into account when examining issues relating to the Eighth Amendment.<sup>103</sup> It further reasoned that criminal procedure that failed to take into account a juvenile's “youthfulness” was fundamentally flawed.<sup>104</sup> Following this reasoning, the Court established that mandatory punishing schemes, especially of the most severe nature, indeed failed to account for a juvenile's youthfulness and were thus a violation of the Eighth Amendment.<sup>105</sup>

#### *b. The Neuroscience Supports the Court*

Before understanding why, from a neurological standpoint, juveniles are less culpable than adults, it is critical to understand the relevant aspects of the brain that are involved in juvenile neurological development. Only once a foundation of neurological

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 570.

<sup>99</sup> *Id.*

<sup>100</sup> *Graham*, 130 S. Ct. at 2026.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 2027.

<sup>103</sup> *Miller*, 132 S. Ct. at 2465-66.

<sup>104</sup> *Id.* at 2466.

<sup>105</sup> *Id.* at 2467-68.

information is laid can one can understand the role these regions of the brain play in establishing the concept of culpability.

The human brain is separated into several different regions, each of which play a separate role in an individual's life, ranging from managing one's coordination and balance in the cerebellum to higher-level cognitive thought processes in the pre-frontal cortex.<sup>106</sup> The region associated with culpability is the pre-frontal cortex, which manages decision-making functions and high-level cognitive processes.<sup>107</sup>

Within the brain, there are different types of tissue that perform different functions unique to that type of tissue.<sup>108</sup> One of the most important types of tissues to higher-level cognition is known as "gray matter."<sup>109</sup> Gray-matter tissue is responsible for the "thinking" processes that take place within the several regions of the brain, ranging from muscle movements and sensory perceptions to emotions and decision making.<sup>110</sup> The other tissue important to the theory of culpability and juvenile brain development is known as "white matter."<sup>111</sup> White matter is tissue that develops through a process known as myelination and is essentially the fatty insulating tissue surrounding the brain's circuitry.<sup>112</sup> As white matter develops, it allows the brain to function quicker and more efficiently.<sup>113</sup> These two types of tissue are important to the concept of juvenile culpability, as they both undergo important developmental processes during adolescent neurodevelopment.<sup>114</sup>

Over the course of adolescence, beginning when a juvenile is about ten years old, the brain goes through a short period of vast

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<sup>106</sup> Adam Ortiz, *Cruel and Unusual Punishment: The Juvenile Death Penalty: Adolescence, Brain Development and Legal Culpability*, A.B.A. JUVENILE JUSTICE CENTER, 1 (Jan. 2004), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_news\\_letter/crimjust\\_juvjus\\_Adolescence.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_news_letter/crimjust_juvjus_Adolescence.authcheckdam.pdf).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 2.

<sup>110</sup> *Brain Explorer*, LUNDBECK INSTITUTE, <http://www.brainexplorer.org> (last visited Apr. 5, 2013).

<sup>111</sup> Ortiz, *supra* note 94, at 2.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1.

overproduction of gray matter, which can lead to increases in impulsive behavior and decision-making.<sup>115</sup> However, immediately following the overproduction period of gray matter, the brain begins to rapidly eliminate the excess gray matter in a process known as “pruning.”<sup>116</sup> This pruning is similar to what takes place with rose bushes, as it stimulates healthy regrowth of stronger and more efficient gray matter.<sup>117</sup> At the same time this pruning is taking place, myelination takes place and replaces the discarded gray matter with newly produced white matter, which aids in the efficient operation of brain functions.<sup>118</sup> The combined effect of the pruning and myelination results in more functional gray matter and increased levels of white matter, both of which are used in important functions, such as controlling inhibitions and increasing memory function.<sup>119</sup>

Possibly the most important aspect of the pruning and myelination processes, as they relate to juvenile culpability, is the order in which they occur. As briefly noted above, the pre-frontal cortex is the region of the brain often considered the “CEO,” as it is responsible for making high-level executive decisions.<sup>120</sup> This region of the brain is geographically the uppermost and forward most region of the brain.<sup>121</sup> Through long-term studies of the same juvenile subjects, researchers have discovered that the pruning and myelination begins in the back of the brain and works its way forward, with the pre-frontal cortex being the last region to undergo this developmental process. This last part often does not occur until as late as an individual’s early twenties.<sup>122</sup> As a result, researchers have concluded that a juvenile’s brain is

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<sup>115</sup> *Id.* at 2.

<sup>116</sup> *Id.*

<sup>117</sup> Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695, 738 (2005).

<sup>118</sup> *Id.* at 739.

<sup>119</sup> *Id.*

<sup>120</sup> Ortiz, *supra* note 94, at 1.

<sup>121</sup> Elizabeth R. Sowell, et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819 (2001), available at <http://www.jneurosci.org/content/21/22/8819.full.pdf+html>; see also A.L. Reiss, et al., *Brain Development, Gender and IQ in Children, a Volumetric Imaging Study*, BRAIN, Oct. 1996, at 1763.

<sup>122</sup> Sowell, *supra* note 109, at 8819.

developmentally not as capable of making important decisions and controlling impulses as the brain of an adult, whose brain has already undergone development and these stages of pruning and myelination.<sup>123</sup>

## 2. The Diminished Culpability of Peripheral Accomplices

Felony murder accomplices often possess a diminished culpability in comparison to the party who actually kills.<sup>124</sup> Inherent in the concept of felony murder is a diminished level of culpability, as well.<sup>125</sup> Felony murder, by definition, means that causing death was not the primary purpose of the offense.<sup>126</sup> It punishes parties to the felony for the death based on the theory of strict liability.<sup>127</sup> It does not require that the parties—both the party causing the death and the accomplice to the underlying felony—possess the mental state required for some form of a homicide charge; rather, it simply requires the party to be culpable for the underlying felony.<sup>128</sup>

Since there appears to be two separate classes of offenders in felony murder situations—parties causing the death and accomplices to the felony—there are inherently two separate degrees of culpability. Those parties causing death often possess a more culpable state of mind, exhibiting, at a minimum, some form of reckless disregard.<sup>129</sup> Accomplices to the underlying crime, on the other hand, are often less culpable; and as a result, the Supreme Court has treated them so.<sup>130</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1400 (2011) (recognizing that courts treat accomplices differently than primary offenders depending on their culpability).

<sup>125</sup> MODEL PENAL CODE § 210.2(1)(b) (2011).

<sup>126</sup> *Id.*

<sup>127</sup> *State v. Pantusco*, 750 A.2d. 107, 116 (N.J. Super. Ct. App. Div. 2000).

<sup>128</sup> *Supra* note 114 and accompanying text.

<sup>129</sup> Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 436 (2011) (discussing how courts should, and often do, treat primary offenders and accomplices differently based on their different individual culpability levels).

<sup>130</sup> *Id.*

In *Tison v. Arizona*, the Supreme Court acknowledged that within the accomplice class of offenders, culpability would vary.<sup>131</sup> Confronted with the question of whether capital punishment was constitutional for felony murder accomplices, the Court established a categorical rule that separated accomplices into two categories based on their culpability.<sup>132</sup> The first category includes those who play a major role in the underlying felony and exhibit reckless indifference towards human life.<sup>133</sup> This first category of accomplices is thus eligible for capital punishment, or in the case of juveniles, LWOP.<sup>134</sup> The second category of accomplices do not meet that threshold and could be referred to as “peripheral accomplices.” The Court felt these peripheral accomplices lack the culpability necessary to be sentenced to death.<sup>135</sup>

Focusing on the class of peripheral accomplices, these parties possess a diminished level of culpability compared to the primary offender who caused the death. Further, they also possess a diminished level of culpability compared to accomplices that fit into the more culpable class established by *Tison*. Public opinion supports the idea that accomplices in felony-murder situations should face less severe punishments than the “triggerman.”<sup>136</sup> Logic would thus dictate that public opinion most likely supports the notion that these peripheral accomplices are deserving of even less severe punishment than an accomplice that falls above the culpability threshold in *Tison*.

Given that peripheral accomplices possess a diminished culpability compared to other accomplices or primary offenders in felony murder offenses, a juvenile-peripheral accomplice is even less culpable. Juvenile-peripheral accomplices possess what the

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<sup>131</sup> *Tison v. Arizona*, 481 U.S. 137, 157 (1987) (establishing the relevant standard implicitly acknowledges that there are accomplices that vary in culpability and must be sentenced according to this variance).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 158.

<sup>135</sup> Triglio, *supra* note 112, at 1384.

<sup>136</sup> Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 969 (May, 2008) (discussing public opinion of sentencing parameters for different parties involved in felony murder offenses).

Court has referred to as “twice diminished moral culpability.”<sup>137</sup> This concept of “twice diminished culpability” is the combined effect of the diminished culpability that all juveniles inherently possess, coupled with the further diminished culpability peripheral offenders possess.<sup>138</sup> This notion has been central to the Court’s decisions in its recent juvenile-sentencing cases.<sup>139</sup> The Court, in *Graham*, explained that a juvenile accomplice who does not meet the *Tison* threshold possesses twice-diminished culpability compared to an adult murderer.<sup>140</sup> It explained further that this twice-diminished culpability must be taken into consideration when evaluating the constitutionality of sentencing.<sup>141</sup>

### 3. Juvenile Peripheral Accomplices Are “Two Steps” Down from Culpability Warranting the Death Penalty

Supreme Court jurisprudence separates highly culpable felony murder accomplices from peripheral accomplices and sentences them differently.<sup>142</sup> Shifting from adult accomplices to juvenile accomplices, it seems logical that there should be a separation in sentencing practices between the two classes of juvenile accomplices. In one group exists a highly culpable juvenile accomplice whose culpability exceeds the *Tison* threshold. This juvenile accomplice is considered the most dangerous and deserving of punishment. Because this highly culpable accomplice is in the class of accomplices the Court feels is most deserving of punishment, his or her sentence must reflect it. While he is deserving of the most severe punishment, he possesses the diminished culpability of a juvenile, which is why he is one step down from the most severe punishment in our criminal justice

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<sup>137</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2016 (2010) (reasoning that defendant in the present case possessed twice-diminished culpability compared to an adult counterpart, as he was a juvenile with minor involvement in the crime).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*; see also *Miller v. Alabama*, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring) (discussing the notion that if a juvenile did intend to kill or killed, then he lacks this twice-diminished culpability, furthering the notion that even within the class of juvenile accomplices there are varying culpability levels).

<sup>140</sup> *Graham*, 130 S. Ct. at 2027.

<sup>141</sup> *Miller*, 132 S. Ct. at 2476-77 (Breyer, J., concurring).

<sup>142</sup> See generally *Tison v. Arizona*, 481 U.S. 137 (1987).

system—capital punishment. This one step down in terms of culpability requires that a court sentence him to LWOP, the second-most-severe punishment in the system, and the most severe for a juvenile offender.

In the other group exists a juvenile-peripheral accomplice, who does not meet the *Tison* threshold because he did not play a major role in the underlying felony and did not exhibit any sort of reckless indifference towards human life. This juvenile peripheral accomplice should not be treated the same as the more culpable juvenile in the first group. He not only possesses the same diminished culpability all juveniles possess but also a second form of diminished culpability stemming from his lack of involvement or intent in the felony murder.<sup>143</sup> These two forms of diminished culpability combine to create the twice-diminished culpability within the juvenile. Because of the two levels of the juvenile's diminished culpability, the punishment should be two steps down from the most severe punishment. In turn, the maximum punishment he should face should be life with opportunity for parole.

Were these two accomplices adults, they would be treated differently, as governed by *Tison*. Therefore, we should recognize the twice-diminished culpability of the peripheral-juvenile accomplice and impose a lesser sentence. The first juvenile accomplice may very well be deserving of LWOP; however, there is little justification for sentencing the peripheral juvenile accomplice to the same LWOP sentence when his culpability is so attenuated.

### III. RESERVING THE MOST SEVERE SENTENCES FOR THE WORST OFFENDERS

Throughout its jurisprudence, the Court has established a maxim that the most severe punishments should be reserved for the most heinous offenses or the most extreme and culpable offenders. The Court has established this maxim through a variety of lines of precedent, many of which involved the notion that

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<sup>143</sup> *Miller*, 132 S. Ct. at 2476 (2012) (Breyer, J., concurring) (this is the type of juvenile that would not meet the *Tison* threshold and would thus not be sentenced to LWOP under the application of *Tison* to juvenile sentences).

punishment should be gradual and proportional to the offense or offender.<sup>144</sup> The Court has established procedural safeguards for both juvenile and adult offenders alike, ensuring that only the most extreme offenses and most culpable offenders are sentenced to the most severe punishments. The Eighth Amendment requires the Court to evaluate the severity of punishments in situations where the offense or offender appears to be being punished too severely.<sup>145</sup> Accordingly, the Court has continuously held that only the most extreme offenses and culpable offenders are deserving of the most severe punishments.

*A. LWOP Is the Most Severe Punishment for Juveniles—Just as Death Is for Adults—and Should Not Extend to Mere Peripheral Accomplices*

Examining punishments in the context of proportionality and culpability leads to the obvious conclusion that our criminal justice system reserves the most severe punishments for the worst offenders. The Supreme Court has a well-established line of precedent that limits the application of capital punishment. *Coker v. Georgia*, a case in which the Court prohibited the use of capital punishment for the offense of rape, established that capital punishment must be reserved for the most outrageous and serious offenses.<sup>146</sup> *Coker* signaled the beginning of the Court narrowing the application of its most serious offense to only the most serious crimes or most culpable offenders.

The Court continued with narrowing the application to the most serious offenses with its ruling in *Tison*. As explained above, *Tison* limits a court's ability to sentence "nontriggerpersons" to capital punishment when their involvement is not major in the crime.<sup>147</sup> The Court established this standard to prevent the application of capital punishment to cases where the offense was not of the most serious nature that capital punishment is directed towards. Generally, the Court has prohibited the imposition of capital punishments for offenses that do not result in death,

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<sup>144</sup> Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783 (2008).

<sup>145</sup> U.S. CONST. amend. VIII.

<sup>146</sup> *Coker v. Georgia*, 433 U.S. 584, 584-85 (1977).

<sup>147</sup> *Tison*, 481 U.S. at 137-38.

furthering the notion that capital punishment is reserved for only the most severe offenses.<sup>148</sup>

The Supreme Court has also established categorical exclusions for particular classes of *offenders*. In establishing these exclusions for classes of offenders, the Court recognizes that capital punishment should be reserved for only the most heinous and culpable offenders. Beginning in 1988, in *Thompson v. Oklahoma*, the Court prohibited the use of capital punishment for juveniles under the age of sixteen, even if they committed homicide-related offenses.<sup>149</sup> The Court established this exclusion based on the belief that juveniles under the age of sixteen are inherently less culpable and the death penalty is reserved for only the most culpable offenders.<sup>150</sup> The Court continued lessening the culpability of juveniles when it established that capital punishment was unconstitutional for *all juveniles* in *Roper v. Simmons*.<sup>151</sup> Another class of offenders that have been designated as less culpable, and thus not deserving of the most serious punishment in our criminal justice system, is mentally retarded individuals. In *Atkins v. Virginia*, the Court ruled that these individuals are less culpable and thus should not be susceptible to the most serious punishment available.<sup>152</sup>

*B. Juvenile LWOP Should Be Reserved for Only the Most Severe Offenders*

Recognizing that the Court has limited the application of its most severe punishment to the most culpable or severe adult offenders, it is reasonable to believe that it intends to limit the application of the most severe punishment available to juvenile offenders as well. LWOP is currently the worst punishment

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<sup>148</sup> See generally *Coker*, 433 U.S. 584 (prohibiting the use of capital punishment for the offense of rape where the victim does not die); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting the use of capital punishment for the rape of a child where the crime did not result in, nor intended to result in, the death of the victim).

<sup>149</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 816-17 (1988).

<sup>150</sup> *Id.* at 853 (O'Connor, J., concurring).

<sup>151</sup> 543 U.S. 551, 578 (2005).

<sup>152</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (noting that many state legislatures had addressed this issue and had voted with overwhelming support in favor of prohibiting the most severe punishments for this group of offenders).

available to juvenile offenders.<sup>153</sup> The Court acknowledged that LWOP for juveniles is very similar to death for adults in both *Graham* and *Miller*. In *Graham*, the Court reasoned that death and LWOP both deprive the convict of “the most basic liberties without giving hope of restoration.”<sup>154</sup> It also explained that LWOP, like death, “means [a] denial of hope” and that good behavior and character growth are immaterial.<sup>155</sup> *Miller* reaffirmed all of the links between juvenile LWOP and death. The Court relied on its holding in *Woodson v. North Carolina*, that mandatory death penalty sentences were unconstitutional, to hold that mandatory LWOP sentences for juveniles are constitutional.<sup>156</sup>

Both *Graham* and *Miller* signal the Court beginning to narrow the application of the most severe juvenile punishment, just as it has with capital punishment and adult offenders. *Graham* was the first time the Court limited the application of juvenile LWOP in a manner similar to how it has limited capital punishment. By not allowing LWOP as a punishment for juveniles who commit nonhomicide crimes, the Court recognized that only the most severe offenses should be punished with the most severe punishment.<sup>157</sup> Likewise, in *Miller*, the Court’s holding that *mandatory* LWOP was unconstitutional for juvenile offenders relied on the notion that a juvenile’s youthful attributes must be considered on an individual basis.<sup>158</sup> Mandatory sentencing provisions do not allow courts to perform this individual evaluation, and as a result, the practice is unconstitutional.<sup>159</sup> This recognizes that mandatory LWOP punishes all juvenile offenders indiscriminately, rather than punishing only the most culpable offenders, which is what the Court believes the punishment should be used for.

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<sup>153</sup> *Roper*, 543 U.S. at 569-71 (2005) (prohibiting the use of the death penalty, thus implicitly making LWOP the most severe punishment, as capital punishment is the only punishment more severe than LWOP).

<sup>154</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

<sup>155</sup> *Id.*

<sup>156</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012).

<sup>157</sup> *Graham*, 130 S. Ct. at 2027.

<sup>158</sup> *Miller*, 132 S. Ct. at 2467-68.

<sup>159</sup> *Id.* at 2468.

As established by both capital punishment and juvenile LWOP jurisprudence, the most extreme punishments in our criminal justice system must be reserved for the most heinous offenses and the most culpable offenders. In the felony murder context, the Court has established that not all parties involved in felony murder offenses are deserving of the most severe punishment.<sup>160</sup> The Court has created a standard to separate the most culpable offenders from the less culpable.<sup>161</sup> Using that standard, the Court has held that only those accomplices that fall into the most-culpable classification are potentially deserving of capital punishment. The Court has done this because it recognizes that involvement can vary in magnitude, and only those most involved and most culpable should be susceptible to the most severe punishment.

Following with the already-established felony murder jurisprudence, the Court should apply the *Tison* standard used for determining involvement to juveniles in an LWOP context. The Court has already established that it only intends LWOP to be used in the most severe contexts, similar to as it has in capital punishment cases. The Court also recognizes that not all juveniles possess the same culpability, which is why it felt mandatory sentencing for the most-severe punishment was unconstitutional. Following this line of reasoning, it appears that the Court should apply the *Tison* standard to juvenile-felony-murder situations in order to determine whether an accomplice is culpable enough to deserve the most-severe punishment available. Should the Court take this approach, which would follow in line with precedent, the Court would effectively be reserving juvenile LWOP, the most severe juvenile punishment, for only the most severe juvenile offenders. It would protect peripheral accomplices from disproportionate sentences and would ensure that those peripheral accomplices be guaranteed an opportunity to rehabilitate and mature.

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<sup>160</sup> *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987).

<sup>161</sup> *Id.*

## IV. PROPORTIONALITY AND THE EIGHTH AMENDMENT

A. *The Court's Categorical Analysis*

According to the Supreme Court, the concept of proportionality in sentencing is “central to the Eighth Amendment.”<sup>162</sup> This concept is well established in Supreme Court precedent, dating back to 1910.<sup>163</sup> While this concept has been applied in several contexts, including many capital punishment cases, it is most relevantly mentioned throughout the Supreme Court’s recent line of juvenile-sentencing cases. The issue of proportionality that arises with juvenile accomplices and LWOP sentences is that, in many cases, LWOP could be considered a disproportionate sentence in the context of the juvenile’s involvement in the crime.<sup>164</sup>

The original embodiment of this maxim of proportionality is found in *Weems v. United States*.<sup>165</sup> In *Weems*, the Court established that the concept of proportionality of sentencing, embodied in the Eighth Amendment prohibiting cruel and unusual punishment, is the “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”<sup>166</sup> This precept has evolved since it was first acknowledged and has created two lines of precedent.<sup>167</sup> The first deals with the concept of challenges to term-of-years sentences given the circumstances of a particular case.<sup>168</sup> The second line of cases addressing the issue of proportionality involves cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.<sup>169</sup> This

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<sup>162</sup> *Graham*, 130 S. Ct. at 2021.

<sup>163</sup> *Weems v. United States*, 217 U.S. 349, 367 (1910).

<sup>164</sup> *Graham*, 130 S. Ct. at 2021-22 (discussing the tenets of law that require punishments to be proportional to the offense committed).

<sup>165</sup> *Weems*, 217 U.S. at 367.

<sup>166</sup> *Id.*

<sup>167</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (establishing the proportionality standard for term-of-years sentences); see also *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (establishing the relevant standard for determining whether capital punishment is disproportionate and ultimately concluding that it is disproportionate for nonhomicide offenses).

<sup>168</sup> *Harmelin*, 501 U.S. at 959 (1991) (noting that the standard for term of years forbids “extreme sentences that are grossly disproportionate to the crime”).

<sup>169</sup> *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976).

second line of proportionality cases is what must be focused upon in applying the *Tison* standard to juvenile accomplices being sentenced to LWOP, since LWOP for juveniles is highly similar to capital punishment for adult offenders.<sup>170</sup>

In *Graham*, the Court discussed the issue of whether they were to follow the standard of evaluating proportionality of a juvenile LWOP sentence using the term-of-years approach or the categorical approach used in capital punishment situations.<sup>171</sup> The term-of-years approach required the sentence to be “grossly disproportionate,” meaning it would be highly unlikely that a juvenile LWOP sentence could be found unconstitutionally disproportionate. Ultimately, the Court stated this was a hybrid situation because LWOP was a term-of-years sentence, but precedent dictated it created a categorical rule as it did with capital punishment cases.<sup>172</sup> As a result, the Court used the categorical approach used in capital punishment cases because it felt that LWOP for juveniles was similar to capital punishment and likewise required a categorical standard.<sup>173</sup> Utilizing this approach was the first time the Court expanded its use of the categorical proportionality standards beyond capital punishment cases.<sup>174</sup> It opened the door for the Court to use the approach in similar situations, most likely in juvenile contexts, as it relied heavily upon the fact that the defendant at issue was a juvenile at the time the crime was committed.<sup>175</sup>

The categorical approach, used only in capital punishment cases prior to *Graham*, requires a lower level of disproportionality because of the extremely severe nature of the punishment.<sup>176</sup> This

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<sup>170</sup> The Court in *Graham* applied this capital-punishment standard when evaluating whether juvenile LWOP was constitutional in nonhomicide offenses. *Graham v. Florida*, 130 S. Ct. 2011, 2022-23 (2010).

<sup>171</sup> *Id.* at 2021-23.

<sup>172</sup> *Id.* at 2023.

<sup>173</sup> *Id.* at 2030-33.

<sup>174</sup> Alison Siegler & Barry Sullivan, “*Death is Different’ No Longer*”: *Graham v. Florida and the Future of Eighth Amendment Challenges to Noncapital Cases*, 2010 SUP. CT. REV. 327, 355 (2010) (discussing how the Court applied the capital-punishment standard to a juvenile non-capital-punishment situation for the first time in its jurisprudence).

<sup>175</sup> *Id.* at 368-69 (predicting future uses for the capital-punishment categorical approach in terms of juvenile-sentencing cases).

<sup>176</sup> *Id.* at 333-34.

approach utilizes a two-step categorical test to determine whether capital punishment is disproportionate to the crime committed.<sup>177</sup> The first step requires the Court to determine whether “objective indicia of society’s standards” evinces a rejection of the death penalty in the given situation.<sup>178</sup> The second step requires the Court to make a subjective, independent judgment of whether capital punishment for the specific type of crime or class of offender is a violation of the Eighth Amendment.<sup>179</sup>

As *Graham* established, this capital-punishment proportionality test can be applied when evaluating the proportionality of LWOP sentences involving juvenile offenders.<sup>180</sup> Not only is it permissible under *Graham*, but also it is appropriate given the severity of the sentence imposed on juveniles. The categorical approach has been applied beyond its initial use in *Graham*, when the Supreme Court in *Miller*, the most recent juvenile-sentencing case, used it.<sup>181</sup> The Court in *Miller* used the categorical standard to determine that the mandatory aspect of LWOP sentences for juveniles convicted of homicide-related offenses was unconstitutional. The use in *Miller* rejects many scholars’ claims that the use of the categorical standard in *Graham* was a one-time exception, and the Court would not likely continue to use it in non-capital-punishment contexts.<sup>182</sup>

The Court has not hesitated in applying the capital-punishment proportionality standard to juvenile LWOP sentences for a variety of reasons. The first recognized reason is that LWOP for juveniles and adults is truly only similar in form, rather than substance. A fourteen year old will most likely spend a much greater proportion of his life in prison than a forty-year old sentenced to the same LWOP.<sup>183</sup> In practice, LWOP is a much more severe punishment for juveniles, as they are a unique class of offenders and will likely serve a longer sentence than would an

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<sup>177</sup> *Id.* at 334.

<sup>178</sup> *Roper v. Simmons*, 543 U.S. 551, 563 (2005).

<sup>179</sup> *Siegler*, *supra* note 161, at 335.

<sup>180</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

<sup>181</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2463-69 (2012).

<sup>182</sup> *See, e.g.*, Mary Berkheiser, *Death Is Not so Different After All: Graham v. Florida and the Court’s “Kids Are Different” Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 37-38 (2011).

<sup>183</sup> *Graham*, 130 S. Ct. at 2028.

adult offender.<sup>184</sup> By recognizing that juveniles are a separate class of offenders, and this punishment is much more disproportionate for them, the Court is able to make the subjective, independent judgment that LWOP is a violation of the Eighth Amendment for this class of offenders.<sup>185</sup>

The second reason the Court has been so quick to continue using this standard in juvenile LWOP contexts is their recognition that the categorical approach gives juvenile offenders an opportunity to demonstrate maturity and reform.<sup>186</sup> Depending on the penological justification for sentencing a juvenile to LWOP, it is difficult to rationalize why a court would be unwilling to give a child an opportunity to demonstrate growth and maturity at some point in their life. It is well established that juveniles are not as culpable as adults due to neurological development; however, at some time after the juvenile's incarceration, they will become fully developed and will be more aware of the consequences of their prior actions.<sup>187</sup> With a LWOP sentence, the court rejects the possibility that a juvenile will mature and have the potential to positively contribute to society. It is essentially a "denial of hope" for the child.<sup>188</sup>

Should the Court take a categorical approach toward determining whether LWOP is a proportionate sentence for juvenile felony murder accomplices, it would not be asked to completely ban the practice, as it was in *Graham*. Rather, the Court would be asked to establish a bright-line, categorical rule, as done in *Enmund* and *Tison*. Determining which juvenile accomplices are truly deserving of LWOP is the goal of establishing a categorical rule for this situation. There are inevitably some juvenile accomplices who play such a major role in the felony and exhibit reckless indifference toward human life. These individuals would meet the culpability requirements of *Tison*, and as a result, an LWOP sentence would not be disproportionate. While there are individuals that would fit into

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 2022.

<sup>186</sup> Berkheiser, *supra* note 169, at 10 (discussing the Court's recognition that juveniles continue to mature after their offense and can demonstrate growth and rehabilitation).

<sup>187</sup> *Supra* notes 83-100 and accompanying text.

<sup>188</sup> *Graham*, 130 S. Ct. at 2027.

this category, there are also many who do not and do not play a major role in the felony or exhibit reckless behavior toward human life. These peripheral accomplices play such a minor role in the underlying felony that a sentence of LWOP would be highly disproportionate to their culpability and involvement.

### *B. Evolving Standards of Decency*

Performing the categorical standard's two-step evaluation would lead the Court to the proper conclusion that a categorical rule would establish that LWOP sentences for many juvenile accomplices are unconstitutionally disproportionate to their culpability and involvement in the crime. The first stage of the evaluation requires a finding of objective indicia of national consensus against the use of the punishment in this context.<sup>189</sup> *Graham* and *Miller* emphasized that the evaluation should not be based on the number of states authorizing the punishment, but rather on the actual practice of sentencing juvenile offenders to LWOP.<sup>190</sup>

The data for juvenile accomplices not meeting the *Tison* standard is not readily available, but a look into the use of LWOP in *all juvenile homicide* offenses can be enlightening. Of the approximately 42,000 homicides committed by juveniles in the last twenty-five years, less than five percent of those individuals are serving LWOP sentences.<sup>191</sup> Even more relevant is the fact that of the forty-four jurisdictions permitting the sentence, twenty-eight have less than ten individuals serving LWOP sentences for homicides committed as juveniles.<sup>192</sup> Only seven of

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<sup>189</sup> Siegler, *supra* note 161, at 334.

<sup>190</sup> *Graham*, 130 S. Ct. at 2023-24 (discussing that, while thirty-eight jurisdictions then allowed the punishment, there were only 109 individuals serving LWOP for nonhomicide crimes committed as juveniles, which is why examining the practice is more important than examining the statutory allowance); *Miller v. Alabama*, 132 S. Ct. 2455, 2471-72 (2012) (reestablishing the standard that practice of the sentence is more important than number of states allowing the punishment, but just looking at the number allowing the punishment, it is ten less than in *Graham*, so they were within their precedent to declare the use unconstitutional, claiming they were "breaking no new ground").

<sup>191</sup> Siegler, *supra* note 161, at 372 (of the 42,000 homicides, only 2445 are serving LWOP sentences for the homicides committed while they were juveniles).

<sup>192</sup> *Id.* These states include Georgia, Minnesota, New Jersey, New York, amongst others.

the forty-four states have more than 100 juveniles serving this sentence.<sup>193</sup> Clearly, the use is rare, and the data shows objective indicia of consensus against the practice. It could be fairly assumed that of these approximately 2400 individuals serving LWOP sentences, a very small number of them are serving sentences for involvement in felony murder situations as peripheral juvenile accomplices.

### *C. Juvenile LWOP and Theories of Punishment*

In both *Graham* and *Miller*, the Court used a two-stage process for determining whether a punishment was constitutionally disproportionate to the offense or offender. First, the Court makes a subjective, independent judgment that the sentence is unconstitutionally disproportionate.<sup>194</sup> In order to accurately make this judgment, the Court traditionally turns to penological justifications to determine whether the sentence serves practical penological goals.<sup>195</sup> In doing so, the Court must take into consideration the culpability of the class of offenders. For this evaluation, precedent speaks volumes to the Court's belief that LWOP sentences for juveniles are not often proportionate to their crimes. This was the approach used in *Roper*, *Graham*, and *Miller*.<sup>196</sup> In all three situations, the Court determined that the sentences were not proportionate to the juvenile class of offenders. In performing this analysis, the Court must determine what penological justification applies to the LWOP sentence.<sup>197</sup> It must then determine whether a juvenile accomplice who falls short of the *Tison* standard's culpability requirement satisfies the penological justification of a LWOP sentence. In order to make this evaluation, the Court must evaluate the theories of

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<sup>193</sup> *Id.* These states are California, Florida, Illinois, Louisiana, Michigan, Missouri, and Pennsylvania.

<sup>194</sup> Siegler, *supra* note 161, at 335.

<sup>195</sup> See *Graham*, 130 S. Ct. at 2028 (“The penological justifications for the sentencing practice are also relevant to the analysis. . . . A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”).

<sup>196</sup> *Roper v. Simmons*, 543 U.S. 551, 569-71 (2005); *Graham*, 130 S. Ct. at 2023; *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

<sup>197</sup> See *Graham*, 130 S. Ct. at 2028-30 (performing the penological analysis required by the second step of the standard and ultimately determining that none of the penological theories satisfied the punishment).

punishment and take into consideration the juvenile factor of the offender in evaluating penological justifications.

There are four major theories of punishment that must be evaluated to determine whether an LWOP sentence is justifiably proportionate for these juvenile accomplices.<sup>198</sup> The three primary theories of punishment for severe sentences are retribution, deterrence, and incapacitation.<sup>199</sup> A fourth, rehabilitation, is primarily utilized in the juvenile context, or in sentences offering parole, and does not satisfy a juvenile accomplice's LWOP sentence.<sup>200</sup> In order for LWOP to be found proportionate for juvenile-peripheral accomplices, one of the theories of punishment must be satisfied.

The first theory of punishment that may satisfy a juvenile accomplice's LWOP sentence is retribution. While retribution is a legitimate reason to punish an individual, it cannot support a LWOP sentence for a juvenile accomplice. At the core of a retributive sentence is the notion that the sentence must be directly related to the culpability of the offender.<sup>201</sup> In this situation, the offender possesses twice-diminished moral culpability, making him far less culpable than the average offender. This twice-diminished culpability, coupled with the severity of LWOP, would lead a court to conclude that it does not support a punishment of LWOP for juvenile accomplices.

The second theory of punishment that may satisfy an LWOP sentence for juvenile accomplices is incapacitation. While sentencing a juvenile literally accomplishes incapacitation, the theory of incapacitation is based on the desire to prevent the offender from reoffending. Recidivism among juvenile offenders is a very legitimate concern; however, "the need to incapacitate a particular individual ends once he or she has been rehabilitated."<sup>202</sup> Given that science has proven juveniles are more susceptible to rehabilitation efforts, combined with the notion that the juvenile is not yet fully developed, incapacitation of a juvenile

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<sup>198</sup> 32 MASS. PRAC., CRIMINAL LAW §§ 7-4 (3d ed. 2007).

<sup>199</sup> Berkheiser, *supra* note 169, at 11-12.

<sup>200</sup> *Id.*

<sup>201</sup> *Graham*, 130 S. Ct. at 2028.

<sup>202</sup> Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 492 (2011).

asserts that the offender is incorrigible, a belief inconsistent with traits of most youth.<sup>203</sup> Because incapacitation does not end at the appropriate time in juvenile accomplice LWOP sentences, they are not satisfied by this theory of punishment.

The third primary theory of punishment that may satisfy a juvenile accomplice LWOP sentence is deterrence. Punishment based on the theory of deterrence aims to discourage criminal behavior through the use of fear of punishment. While deterrence has been described as “the king pin of the criminal law,” it does not satisfy a juvenile accomplice LWOP sentence.<sup>204</sup> *Roper* reasoned “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.”<sup>205</sup> Because juveniles generally lack maturity and a developed sense of responsibility, they often engage in impulsive and less thought-out decision making.<sup>206</sup> As evident, the immaturity of juvenile accomplices does not justify basing an LWOP sentence on the theory of deterrence.

Finally, and possibly most importantly, is the theory of rehabilitation. Rehabilitation is a penological theory that is the basis of many parole systems, as well as many of the juvenile criminal justice system in this country.<sup>207</sup> Scientific evidence points to the fact that juveniles are more susceptible to rehabilitative efforts.<sup>208</sup> The belief is that juveniles, not yet fully developed, still have time to grow and mature into responsible adults during the developmental stage from youth to adulthood.<sup>209</sup> LWOP is in no way justified under a rehabilitative theory of punishment. Our nation has accepted that rehabilitation generally does not work with adult offenders; however, it has begun to recognize that it does have strong potential with juveniles. By sentencing a juvenile accomplice to a sentence without parole, it

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<sup>203</sup> *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968).

<sup>204</sup> 32 MASS. PRAC., CRIMINAL LAW §§ 7-4 (3d ed. 2007).

<sup>205</sup> *Roper v. Simmons*, 543 U.S. 570, 571 (2005).

<sup>206</sup> *Johnson v. Texas*, 509 U.S. 350, 367 (1993).

<sup>207</sup> *The Parole System*, 120 U. Pa. L. Rev. 282, 288-89 (1971).

<sup>208</sup> Robert O. Dawson, *The Juvenile Offender: An Empirical Study of Juvenile Determinate Sentencing Proceedings as an Alternative to Criminal Prosecution*, 21 TEX. TECH L. REV. 1897, 1897-98 (1990); Tamara L. Reno, *The Rebuttable Presumption for Serious Juvenile Crimes: An Alternative to Determinate Sentencing in Texas*, 26 TEX. TECH L. REV. 1421, 1425 (1995).

<sup>209</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2054 (2011).

cannot be justified by rehabilitation, as only sentences offering potential for parole (i.e., potential for rehabilitation) are satisfied by this penological theory.<sup>210</sup>

As apparent, none of the four primary purposes of punishment satisfy sentencing a juvenile accomplice to LWOP. While they are all legitimate punishments in the criminal justice system, juveniles present a different situation, as they are inherently less culpable than adults and are thus not as affected by these penological theories. The factors that support the notion that juveniles are less culpable are the same that reject the primary theories of such severe punishments for juveniles. In order to justify LWOP as a proportionate sentence to the juvenile-peripheral accomplice's involvement in the crime, it must be satisfied by one of the theories of punishment, which it fails to do. As a result, should the Court be faced with the question of constitutional proportionality in the context of LWOP sentences for juvenile accomplices, it must find that if the accomplice's role in the crime does not meet the *Tison* threshold, it is not satisfied by any of the theories of punishment.

#### V. DE FACTO LIFE SENTENCES AND OTHER SENTENCING ISSUES

By eliminating LWOP for juvenile-peripheral accomplices, the Court opens the door to sentences that, while not LWOP in name, are LWOP in substance. These de facto life sentences are a problem across the country, as states figure out how to navigate juvenile sentencing in *Graham's* aftermath. Because *Graham* made LWOP unconstitutional for juveniles convicted of nonhomicide crimes, lower courts around the country have begun to sentence juvenile offenders to term-of-years sentences that far exceed the expected lifetime of the juvenile. The need to address this problem looms on the horizon, as the Court continues to eliminate LWOP for various classes of juvenile offenders.

California was among the first states to address this problem by establishing a standard for evaluating the constitutionality of juvenile term-of-years sentences.<sup>211</sup> In *People v. Caballero*, the trial court sentenced sixteen-year-old Rodrigo Caballero to 110

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<sup>210</sup> *Id.* at 2029-30.

<sup>211</sup> *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012)

years for his involvement in a nonhomicide crime.<sup>212</sup> Caballero appealed this sentence on the grounds that it constituted cruel and unusual punishment.<sup>213</sup> The California Supreme Court agreed with Caballero by overturning his sentence.<sup>214</sup> The court established that a juvenile convicted of a crime not eligible for LWOP cannot receive a sentence so long that its parole eligibility date falls outside the natural life expectancy of the juvenile offender.<sup>215</sup> By establishing this rule, the court determined that juveniles not receiving LWOP must be given meaningful opportunity to demonstrate maturity and rehabilitation.

Florida has followed in suit with California by making these extremely long term-of-years sentences unconstitutional for juveniles not eligible for LWOP.<sup>216</sup> In *Adams v. State*, the juvenile offender was originally sentenced to a term of sixty years, with a mandatory minimum of fifty years.<sup>217</sup> While this sentence is significantly less than in *Caballero*, the Florida Supreme Court reached a conclusion similar to the California court's holding in *Caballero*.<sup>218</sup> The Florida court accurately described this lengthy sentence as a de facto life sentence and explained that a de facto life sentence is one that exceeds the defendant's life expectancy.<sup>219</sup> The court then held that these sentences that exceed the life expectancy of the juvenile offender constitute cruel and unusual punishment, prohibited under the Eighth Amendment.<sup>220</sup>

In Washington, the court of appeals was faced with a similar problem in *In re Diaz* when a sixteen year old was sentenced to a term of 1111 months (92.5 years) for a nonhomicide crime.<sup>221</sup> The juvenile appealed to the Court, arguing that *Graham* required courts to give juveniles ineligible for LWOP an opportunity for

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<sup>212</sup> *Id.* at 293.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 296.

<sup>215</sup> *Id.* at 295.

<sup>216</sup> *Adams v. State*, No. 1D11-3225, 2012 WL 3193932, at \*2 (Fla. Dist. Ct. App. Aug. 8, 2012).

<sup>217</sup> *Id.* at \*1.

<sup>218</sup> *Id.* at \*2.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *In re Diaz*, No. 42064-3-II, 2012 WL 5348865, at \*1 (Wash. Ct. App. Sept. 18, 2012).

parole, and de facto life sentences do not do so.<sup>222</sup> The court in that case took a more strict reading of *Graham* and explained that while this appeared to be a de facto life sentence, it was unsure as to what length constituted such a sentence and did not feel it was appropriate for it to establish such a standard.<sup>223</sup> In doing so, it discussed the notion that the Supreme Court, or another federal court on direct review, should create such a standard for determining whether a sentence was in fact a de facto life sentence.<sup>224</sup> Ultimately, the court remanded the sentence, not on Eighth Amendment grounds, but because of ineffective assistance of counsel.<sup>225</sup>

There clearly appears to be a split in opinion as to how courts are to address these de facto life sentences for juveniles not eligible for LWOP. States like Florida and California have read *Graham* more broadly to include a prohibition on de facto life sentences, while Washington has interpreted the holding in a very narrow sense, waiting on a higher court to establish a bright-line standard. Using the Supreme Court's trend of reducing the severity of juvenile sentences, it is likely that the Florida and California approach is more consistent with the Court's intent.

There are two primary issues that arise in determining the constitutionality of these de facto sentences. The first dilemma is whether or not these de facto sentences are inconsistent with the Court's restrictions on juvenile LWOP. In looking to the Court's intent in *Graham*, along with the overall trend of its recent juvenile-sentencing cases, it appears that the Court intends for these de facto life sentences to be unconstitutional. The Court appears to have established a requirement that offenders have a meaningful opportunity for release. By setting the first eligible release date outside their expected life span, the offender is denied this guarantee.

The second issue that arises in addressing this de facto life sentence problem is the question: What constitutes a de facto life sentence? While there has yet to be a uniform standard established for determining what constitutes such a sentence, the

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<sup>222</sup> *Id.* at \*2.

<sup>223</sup> *Id.* at \*7, n.6.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at \*7.

California and Florida standard appears to be on point. Both states rely on life expectancy statistics to determine whether the first date for parole falls within the offender's expected life span. The Washington Court of Appeals struggled with the length of the sentence as a categorical standard, asking whether 20 years, 30 years, 40 years, or longer constituted a de facto sentence. This number-of-years approach appears to be too rigid and fails to account for increases in life expectancy. By relying on current life-expectancy statistics, courts guarantee that they are using the most up-to-date and relevant standards to determine whether a sentence constitutes de facto life.

#### CONCLUSION

Looking to the Supreme Court's trend in juvenile-sentencing guidelines, it appears that the Court is going to continue reducing the severity of sentences available to juvenile offenders. By implementing the *Tison* standard to juvenile felony murder accomplice sentencing, it ensures courts continue to recognize the variance in culpability among juvenile offenders. The implementation of this standard would allow courts to address juvenile accomplices in a similar manner as they do adult accomplices and would lead to sentences more consistent with the Court's current juvenile-sentencing parameters. Considering the twice-diminished culpability of juvenile peripheral accomplices can lead to no other conclusion but that this category of offenders is deserving of less severe punishments than more involved accomplices or primary offenders. From a proportionality standpoint, were the Court faced with this issue it would likely reach the conclusion that LWOP is disproportionate for juvenile peripheral accomplices, in line with their recent trend of reducing juvenile sentences. For these reasons, it appears appropriate that the Court should require trial courts to utilize the *Tison* standard when evaluating the punishment that a juvenile accomplice deserves.

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