

**DYING IN DETENTION: ARE LIFE WITHOUT
PAROLE SENTENCES FOR JUVENILE NON-
HOMICIDE OFFENDERS ALWAYS
UNCONSTITUTIONALLY CRUEL AND UNUSUAL
UNDER THE EIGHTH AMENDMENT?**

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I. INTRODUCTION

Ian Manuel was thirteen when he approached a woman as she passed by on the street and asked if she had change for a twenty dollar bill.² When she replied that she did not have the change, he yelled at her to “give it up,” pulled out a gun, and shot her in the face.³ Miraculously, his victim survived the shooting with only a scar on her cheek.⁴ Manuel was convicted of robbery with a firearm, attempted robbery with a firearm, and attempted first-degree murder and was sentenced to life imprisonment without the

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² Meg Laughlin, *Sentenced to Life as a Teen, Prisoner Learning to Swap Solitary for Society*, TAMPA BAY TIMES, May 16, 2010, <http://www.tampabay.com/features/humaninterest/sentenced-to-life-as-a-teen-prisoner-learning-to-swap-solitary-for-society/1094912>.

³ *Id.*

⁴ *Id.*

possibility of parole.⁵

Just having turned fourteen, Kuntrell Jackson was walking with his friends through the housing project where they lived when his friends began discussing robbing a nearby video store.⁶ Despite learning that one of the friends was carrying a gun in his coat sleeve, Jackson joined them at the store.⁷ Jackson stood by the entrance to the store while his friend pointed the gun at the clerk and demanded she hand over the store's money.⁸ When the clerk refused to relinquish the money, Jackson's friend shot her in the face as Jackson looked on.⁹ Jackson did not kill.¹⁰ He did not have a weapon.¹¹ He was not the shooter, and his involvement in the robbery was minimal.¹² Jackson was convicted of capital murder and aggravated robbery.¹³ The capital murder charge was premised on the felony murder rule¹⁴—because Jackson's accomplice caused a death during the commission of a felony robbery, Jackson was charged with murder.¹⁵ Jackson was given a mandatory life without parole sentence.¹⁶

Under current juvenile sentencing jurisprudence, so long as an offender has not reached the age of eighteen before committing a non-homicide crime, a life without parole sentence is unavailable to the sentencing court, regardless of the gravity of the crime or other aggravating circumstances.¹⁷ However, the day an offender turns eighteen, a life without parole (“LWOP”) sentence becomes available and, in some cases, is mandatory without consideration of any individual mitigating factors.¹⁸ Currently, juvenile non-homicide offenders cannot be sentenced to LWOP because the Supreme Court of the United States has held that such a

⁵ *Manuel v. State*, 48 So. 3d 94, 95–96 (Fla. Dist. Ct. App. 2010). His sentence was recently overturned because, although he intended to take her life, his victim later recovered. *Id.* at 97.

⁶ *Jackson v. State*, 194 S.W.3d 757, 758 (Ark. 2004).

⁷ *Id.*

⁸ *Id.* at 758–59.

⁹ *Id.* at 759.

¹⁰ *Jackson v. Norris*, 2011 Ark. 49, at 10, 378 S.W.3d 103, 109 (Danielson, J., dissenting), *rev'd and remanded sub nom.*, *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

¹¹ *Id.* at 10, 378 S.W.3d at 109.

¹² *Id.* at 10, 378 S.W.3d at 109.

¹³ *Id.* at 1, 378 S.W.3d at 103 (majority opinion).

¹⁴ Under the felony-murder doctrine, a defendant can be held criminally culpable for a killing that occurs during the perpetration of another felony in which the defendant participates. *Tison v. Arizona*, 481 U.S. 137, 141 (1987). Each participant in the underlying felony can be held legally responsible for the actions of his accomplices, regardless of his own minimal involvement in the underlying crime. *Id.*

¹⁵ *Jackson*, 2011 Ark. 49, at 8, 378 S.W.3d at 108 (Danielson, J., dissenting).

¹⁶ *Id.* at 1, 378 S.W.3d at 103 (majority opinion). Jackson's sentence was later reversed because it was imposed under a statute that made his sentence mandatory. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

¹⁷ *Graham v. Florida*, 560 U.S. 48, 82 (2010).

¹⁸ *Id.* at 74–75; *e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 961, 994–996 (1991) (upholding as constitutional a mandatory sentence of LWOP without consideration of mitigating circumstances for a non-homicide, non-violent drug offense); *State v. Uzzelle*, No. COA10-600, 2011 WL 705152, at *1–2, *7 (N.C. Ct. App. Mar. 1, 2011) (affirming the mandatory LWOP sentence of an eighteen year old defendant convicted of felony murder, despite testimony that the defendant had the developmental age of a young juvenile).

sentence violates the Eighth Amendment's prohibition of cruel and unusual punishment.¹⁹ The Court's "categorical prohibition" of LWOP for juvenile non-homicide offenders draws two artificial distinctions that are unsupported by the scientific evidence on which the Supreme Court purports to rely and that represent a distinct break from the Court's prior jurisprudence.²⁰ The categorical prohibition classifies juvenile offenders' culpability on the basis of two arbitrary factors—the offender's chronological age and whether a death was a consequence of the crime.²¹ The Supreme Court has thus imposed a categorical prohibition that inadequately addresses the culpability of individual offenders and fails to set forth a workable standard for imposing punishments on juvenile offenders.

Further, many courts are narrowly construing the Supreme Court's prohibition of LWOP sentences for juvenile non-homicide cases.²² Sentences so long that they will necessarily exceed the juvenile non-homicide offender's natural life continue to be imposed because they do not expressly eliminate the possibility of parole.²³ Because courts can circumvent the Supreme Court's mandate by imposing "term" sentences so lengthy that they effectively preclude any possibility of the offender ever being released, the prohibition fails to redress the concerns that led the Court to impose it.²⁴

Section II of this Comment surveys the two standards the Supreme Court has developed for determining whether a term of imprisonment is cruel and unusual under the Eighth Amendment and explains the circumstances under which the Court has historically used each test. Section II also introduces the current state of the law for sentencing juvenile non-homicide offenders, as set forth in *Graham v. Florida*.²⁵ Included in the description of the current status of juvenile sentencing is a detailed examination of the Court's rationale for using a categorical prohibition against LWOP for juvenile non-homicide offenders.

Section III analyzes whether the Supreme Court's categorical

¹⁹ *Graham*, 560 U.S. at 74.

²⁰ *Id.* at 100 n.1 (Thomas, J., dissenting) ("The Court radically departs from the framework [that existing noncapital proportionality] precedents establish by applying to a noncapital sentence the categorical proportionality review its prior decisions have reserved for death penalty cases alone.").

²¹ *Id.* at 69 (majority opinion).

²² *See, e.g.*, *People v. Ramirez*, 123 Cal. Rptr. 3d 155, 165 (Cal. Ct. App. 2011), *rev'd*, 298 P.3d 69 (Cal. 2012); *Guzman v. State*, 110 So. 3d 480, 481, 483 (Fla. Dist. Ct. App. 2013); *State v. Kasic*, 265 P.3d 410, 415–16 (Ariz. Ct. App. 2011), *review denied*, 228 Ariz. 228 (Apr. 24, 2012); *Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1996 (2013); *Diamond v. State*, Nos. 09-11-00478-CR and 09-11-00479-CR, 2012 WL 1431232, at *5 (Tex. App. Apr. 25, 2012).

²³ *See id.*; *Henry v. State*, 82 So. 3d 1084, 1086, 1088 (Fla. Dist. Ct. App. 2012) (affirming an aggregate ninety-year sentence despite evidence that it exceeded the juvenile non-homicide offender's statistical life expectancy), *review granted*, 107 So. 3d 405 (Fla. 2012).

²⁴ *Graham*, 560 U.S. at 113 n.11 (Thomas, J., dissenting) ("[T]he Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment).").

²⁵ 560 U.S. 48 (2010).

prohibition is the most appropriate approach to addressing the constitutionality of LWOP sentences for juveniles. It also evaluates whether thresholds for applying the Court's chosen categorical prohibition are appropriately positioned. Section IV will describe and explain recommendations for juvenile sentencing that better address the Court's concerns regarding LWOP for young offenders who commit violent yet non-homicide crimes.

II. BACKGROUND

The Eighth Amendment prohibits cruel and unusual punishments.²⁶ When deciding whether a particular punishment violates a convicted criminal's Eighth Amendment protections, the U.S. Supreme Court has developed two distinct tests for courts to use—a case-by-case proportionality test and a categorical prohibition test.²⁷

First, the case-by-case proportionality test is traditionally used to evaluate the constitutionality of term-of-years sentences.²⁸ Application of this test requires a court to compare the culpability of an individual offender with the gravity of the specific offense for which the offender was convicted.²⁹ The greater the court judges the offender's culpability and the graver the offense, the more likely it is that a more severe punishment will survive constitutional scrutiny.³⁰ The court then compares the circumstances of the case at hand to other sentences from other courts within the same jurisdiction and from courts of other jurisdictions.³¹ The question the court must ask is whether similar crimes committed by similar offenders are punished with reasonably similar sentences—both within the state and in other states.³² If the jurisdictional comparison confirms that the sentence is “grossly disproportionate” to the culpability of the offender and gravity of the offense, the sentence is cruel and unusual under the Eighth Amendment.³³

Alternatively, the categorical prohibition test is used when the court must determine whether a sentence is cruel and unusual as applied to an entire class of offenses or offenders.³⁴ Until recently, use of this test was

²⁶ U.S. CONST. amend. VIII. The Eighth Amendment applies to the states. *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

²⁷ *Graham*, 560 U.S. at 59–60.

²⁸ *Id.* A term-of-years sentence provides a definite length of the sentence, either in terms of a defined time or range of times for which the offender will be imprisoned. In contrast, a LWOP sentence is defined by the remainder of the defendant's natural life, however long that may be.

²⁹ *Id.* at 60 (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 60–61.

limited to death penalty sentences.³⁵ Under this test, the death penalty is categorically cruel and unusual unless it is used to punish a homicide offense.³⁶ The Court has also used this approach to exclude entire classes of offenders—juveniles and mentally handicapped offenders—from consideration for the death penalty.³⁷ However, the Supreme Court recently expanded the use of this test to prohibit the imposition of LWOP sentences on juvenile non-homicide offenders as a class.³⁸

The categorical prohibition test first looks to “objective indicia of national consensus.”³⁹ Essentially, the court must determine whether there is any consensus among the states in authorizing or prohibiting the punishment for the offense or class of offenders in question.⁴⁰ This is usually accomplished by looking to state criminal statutes, which presumably represent the “clearest and most reliable objective evidence of contemporary values.”⁴¹ Where a majority of states are in agreement in allowing for a particular sentence, application of the sentence can hardly be considered “unusual.”⁴²

Although consensus among the states is accorded “great weight” in the analysis, the court must then exercise its own independent judgment as to “the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.”⁴³ When determining whether a categorical prohibition of a sentence to an entire class of offenders committing a particular offense is appropriate, the court weighs the gravity of the offense, the culpability of the class of offenders, and the severity of the punishment at issue.⁴⁴ This analysis also requires the court to consider whether any “legitimate penological goals” are served by continued application of the sentence to the class.⁴⁵ This allows the Supreme Court to interpose its own subjective determination as to whether a certain class of offenders committing a certain class of crimes deserves a punishment of a given severity.⁴⁶

The Supreme Court recently expanded the use of the categorical

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 61.

³⁸ *Id.* at 82.

³⁹ *Id.* at 62.

⁴⁰ *Id.* at 61–62.

⁴¹ *Id.* at 62 (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)) (internal quotation marks omitted).

⁴² *Id.* at 107 (Thomas, J., dissenting).

⁴³ *Id.* at 67 (majority opinion).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 102 (Thomas, J., dissenting) (“The Court thus openly claims the power not only to approve or disapprove of the democratic choices in penal policy based on evidence of how society’s standards *have* evolved, but also on the bases of the Court’s ‘independent’ perception of how those standards *should* evolve, which depends on what the Court concedes is ‘necessarily . . . a moral judgment’ regarding the propriety of a given punishment in today’s society.”).

prohibition test beyond the death penalty context in *Graham v. Florida*.⁴⁷ Terrance Graham was sentenced to LWOP for a series of burglaries and home invasion robberies he committed at age sixteen.⁴⁸ The Supreme Court had previously only applied the categorical prohibition test to death penalty cases.⁴⁹ The strict proportionality test had been limited to blatantly extreme punishments for relatively minor offenses and rarely resulted in reversals of individual sentences.⁵⁰ Prior to *Graham*, the Court treated LWOP sentences as term-of-years sentences and applied the strict proportionality test to attacks on their constitutionality.⁵¹ Faced with near certain defeat under a strict proportionality analysis, the defendant in *Graham* asked the Court to expand its use of the categorical prohibition test and apply it for the first time outside of the death penalty context.⁵² He asked the Supreme Court to apply the categorical prohibition test to LWOP, the second most severe punishment in the American justice system.⁵³ According to the defendant in *Graham*, as applied to the entire class of juvenile offenders, LWOP was cruel and unusual and thus merited a categorical prohibition.⁵⁴ The Court applied the categorical prohibition test, but offered no explanation for why it did not consider the proportionality test.⁵⁵

The Court began its analysis with a discussion of objective indicia of a national consensus of the appropriateness of LWOP for juvenile non-homicide offenders.⁵⁶ When determining whether there is a national consensus, the Court had previously relied almost exclusively on the legislation of the states.⁵⁷ As of 2010, when the Court decided *Graham*, only six states completely prohibited LWOP for juvenile offenders regardless of their offense.⁵⁸ Another seven states allowed LWOP but

⁴⁷ *Id.* at 82 (majority opinion).

⁴⁸ *Id.* at 53–57.

⁴⁹ *Id.* at 60–61; *see, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 568, 578–79 (2005) (holding that the death penalty is cruel and unusual for juvenile offenders); *Coker v. Georgia*, 433 U.S. 584, 597–98 (1977) (prohibiting the death penalty for rape of an adult); *Enmund v. Florida*, 458 U.S. 782, 800–01 (1982) (holding that the death penalty may not be imposed for felony-murder where the defendant did not kill, attempt to kill, or contemplate that life would be taken); *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (upholding the constitutionality of the death penalty for “mentally retarded” defendants); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (categorically prohibiting the death penalty for “mentally retarded” offenders).

⁵⁰ *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (“[S]uccessful challenges to the proportionality of particular sentences’ should be ‘exceedingly rare.’” (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980))); *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (affirming a sentence of twenty-five years to life imprisonment under California’s “three strikes law”); *Lockyer v. Andrade* 538 U.S. 63, 77 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 962–63 (1991).

⁵¹ *Graham*, 560 U.S. at 59–60.

⁵² *Graham*, 560 U.S. at 61–62.

⁵³ *Id.*

⁵⁴ *Id.* at 61–62.

⁵⁵ *Id.*

⁵⁶ *Id.* at 62.

⁵⁷ *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (“[T]he ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))).

⁵⁸ *Graham*, 560 U.S. at 62.

restricted its use to homicide offenses.⁵⁹ Thirty-seven states, the District of Columbia, and the applicable federal statute authorized the imposition of LWOP for juvenile non-homicide offenders.⁶⁰ However, the Court found these statistics “incomplete and unavailing,” and explained that other measures of consensus, including actual sentencing practices, are also important to the inquiry.⁶¹ The Court then emphasized that 123 juveniles nationwide were serving LWOP sentences for non-homicide crimes, and that those offenders were from only eleven states.⁶² Thus, the Court concluded that, although some states allowed for LWOP, the fact that a juvenile could theoretically be eligible for the sentence did not support a conclusion that states intended the sentence to be applied to juvenile non-homicide offenders.⁶³ Rather, the Court found the infrequency at which LWOP was imposed to be a better indicator of a state’s view that the sentence is inappropriate for juveniles.⁶⁴ The Court concluded that, because sentencing courts have relatively rarely imposed LWOP on juvenile non-homicide offenders, a national consensus had developed against the use of LWOP for juvenile non-homicide offenders.⁶⁵

⁵⁹ *Id.*

⁶⁰ *Id.* Further, all fifty states and the federal system allowed for children over a certain age to be processed in adult court when charged with certain crimes. *Id.* at 106 (Thomas, J., dissenting). Forty-five states, the federal government, and the District of Columbia all allowed for children processed in adult court to face the same punishments as adults charged with the same crimes. *Id.* at 106–07. Only five states prohibited juvenile offenders from being sentenced to LWOP when the sentence could be imposed on adults convicted of the same crime. *Id.* at 107.

⁶¹ *Id.* at 62 (majority opinion). Historically, the Supreme Court had largely deferred to the state legislatures to express society’s approval of punishments. *Atkins*, 536 U.S. at 312. However, in *Graham*, the Court disregarded the fact that a strong majority of states had statutes authorizing the imposition of LWOP for juvenile non-homicide offenders. *Graham*, 560 U.S. at 62. Rather, the Court looked at the frequency with which state courts were actually imposing LWOP sentences on juvenile non-homicide offenders. *Id.* at 62–63. Although beyond the scope of this Comment, this inquiry could potentially raise a separation of powers issue—the judiciary can effectively overrule legislative approval of certain punishments merely by refusing to consistently impose the punishment. Further, the Court’s reliance on sentencing practices as being reflective of societal approval of a punishment loses its practical support once applied beyond the death penalty context. When sentences of death are imposed, a jury of laypersons typically makes a recommendation that the particular offender be sentenced to die. However, with most other non-death penalty sentences, it is typically the judge alone who makes the sentencing determination. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953 n. 1 (2003) (“Only five states – Arkansas, Missouri, Oklahoma, Texas, and Virginia – permit juries to make the sentencing decision.”). Thus, when reliance on rates of the imposition of a particular sentence as indicators of social approval of a punishment is expanded beyond the death penalty context, the jury as the “voice” of the social consensus is essentially replaced by the judge as the sole “voice.” The Court’s deference to state statutes as the best indicator of social consensus of punishment is premised on the role of legislatures as elected representatives of the public. Now, not only does the Court give statutes a cursory review, it also disposes of consistent approval of the sentence by the legislative branch and bases the inquiry almost entirely on whether the judiciary “approves” of the punishment’s use.

⁶² *Graham*, 560 U.S. at 64.

⁶³ *Id.* at 67; see John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENT’G REP. 87, 87–91 (2010), for a discussion of the Supreme Court’s evolution away from the proportionality test and argument that “[a]lthough the Court gives lip service to the idea that there must be a societal consensus against the punishments it strikes down, it no longer uses the test as a true ground for its decisions.”

⁶⁴ *Graham*, 560 U.S. at 67.

⁶⁵ *Id.*

Next, the Supreme Court turned to controlling precedent and the Court's own independent judgment of the appropriateness of imposing LWOP on juvenile non-homicide offenders.⁶⁶ The Court relied on *Roper v. Simmons*, controlling precedent on juvenile sentencing, to reiterate that juveniles as a class are less culpable and thus less deserving of the most severe punishments.⁶⁷ The Court then held that non-homicide offenses are not as grave as homicide crimes.⁶⁸ Although serious non-homicide crimes can be devastating, the Court reasoned, they are less grave than murders because "life is over for the victim of the murderer."⁶⁹ According to the Court, crimes perpetrated by those "who do not kill, intend to kill, or foresee that life will be taken" are less grave than murders.⁷⁰ Thus, the Court found that juvenile non-homicide offenders have "a twice diminished moral culpability" than an adult murderer because they are less culpable than their adult counterparts and because their crimes are less grave than those that cause death.⁷¹

The Supreme Court then compared the "twice diminished moral culpability" of juvenile non-homicide offenders with the severity of a LWOP sentence. Although less severe than the death penalty, LWOP is "the second most severe penalty permitted by law."⁷² The Court explained that, when applied to juveniles, the penalty is even harsher because a juvenile offender will generally serve a longer sentence than an adult with the same sentence.⁷³ An offender sentenced to die in jail as a teenager will, on average, spend more time behind bars prior to death than a middle-aged or elderly adult offender serving the same LWOP sentence. Further, the Court compared LWOP to the death sentence in that, although the state does not execute the offender, the sentence irrevocably forfeits the offender's life and liberty without any hope of restoration.⁷⁴

To further support its subjective determination that LWOP sentences are inappropriately severe for juvenile non-homicide offenders, the *Graham* Court rejected any penological justification—retribution, deterrence, incapacitation, or rehabilitation—for maintaining LWOP for juvenile non-homicide offenders.⁷⁵ By definition, a sentence that lacks a legitimate penological justification is cruel and unusual.⁷⁶ The Court deemed retribution an illegitimate justification for sentencing juvenile non-

⁶⁶ *Id.* at 67–68.

⁶⁷ *Id.* at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569–70, 573 (2005) (determining that juveniles as a class are less culpable than their adult criminal counterparts)).

⁶⁸ *Id.* at 69.

⁶⁹ *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 598 (1977)).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)).

⁷³ *Id.* at 70.

⁷⁴ *Id.*

⁷⁵ *Id.* at 71.

⁷⁶ *Id.*

homicide offenders to LWOP because the rationale requires that the sentence be directly related to the culpability of the offender.⁷⁷ The Court found deterrence to be an insufficient penological justification because juveniles lack the insight necessary to consider and understand potential punishment for their actions.⁷⁸ Thus, they are less likely to be susceptible to general deterrence⁷⁹ based on a punishment only rarely imposed upon their peers.⁸⁰ Further, a LWOP sentence eliminates consideration of specific deterrence,⁸¹ as the offender will never have the opportunity to reoffend.⁸² The Court also rejected incapacitation as a legitimate justification because it is premised on the assumption that a juvenile offender will always be a danger to others.⁸³ If based on the intention of incapacitating the juvenile offender, a LWOP sentence requires that a determination be made at the time of sentencing that the individual juvenile offender will never be fit to reenter society.⁸⁴ This is a determination that the Court found cannot be made accurately with acceptable consistency.⁸⁵ The Court explained that, given the transiency of juvenile psychosocial development, a determination that a juvenile offender's criminal activity will never cease cannot be accurately made while the offender's development is incomplete.⁸⁶ Finally, the Court rejected rehabilitation as a sufficient penological justification because LWOP sentences, by definition, preclude the offender from ever returning to society.⁸⁷ Additionally, those offenders with LWOP sentences are often denied access to rehabilitative services, such as vocational training.⁸⁸ In light of the national consensus, juvenile offenders' "twice diminished culpability," and the lack of a legitimate penological justification, the Court held that LWOP sentences for non-homicide juvenile offenders are cruel and unusual under the Eighth Amendment.⁸⁹

The *Graham* Court then drew an arbitrary line at an offender's eighteenth birthday for purposes of assigning culpability to offenders.⁹⁰ The Court classified offenders younger than eighteen at the time of their crimes

⁷⁷ *Id.* at 70–71 (citing *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

⁷⁸ *Id.* at 72.

⁷⁹ General deterrence is premised on the concept that when an individual is punished for a particular action, that punishment will also prevent the offender's peers from committing the same, or a similar transgression, despite not themselves being punished.

⁸⁰ *Graham*, 560 U.S. at 72.

⁸¹ Specific deterrence is the theory that once punished for a transgression, an offender will be less likely to repeat the offense, or similar offenses, again after the punishment has been imposed.

⁸² It should be noted that violent non-homicide offenders, when released from incarceration, have a higher rate of reoffending than do homicide offenders. STATE OF FLA. DEP'T OF CORR., 2009 FLORIDA PRISON RECIDIVISM STUDY: RELEASES FROM 2001 TO 2008, 9–10 (2010).

⁸³ *Graham*, 560 U.S. at 72–73.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 74.

⁸⁸ *Id.*

⁸⁹ *Id.* at 75.

⁹⁰ *Id.*

as juveniles because “the age of 18 is the point where society draws the line for many purposes between childhood and adulthood.”⁹¹ Further, the Court concluded that offenders under the age of eighteen have such lessened culpability that no member of that class can constitutionally be sentenced to LWOP so long as a death does not result from the offender’s (or his accomplice’s) actions.⁹² In contrast, offenders who have surpassed their eighteenth birthday are now deemed to have equal culpability as their adult “peers” and can be sentenced not only to LWOP but also to mandatory LWOP.⁹³

The categorical prohibition against LWOP for juvenile non-homicide offenders, as set forth in *Graham*, also fails to articulate what exactly constitutes a LWOP sentence.⁹⁴ The Court explained that states need not guarantee that juvenile non-homicides offenders will eventually be released.⁹⁵ Under *Graham*, a state is only required to give non-homicide juvenile offenders “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”⁹⁶ Sentencing courts cannot make the determination as to whether the juvenile will ever be released at the time of sentencing.⁹⁷ Some offenders “who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives.”⁹⁸ The questions of what constitutes a “meaningful opportunity to obtain release” and what equates to a LWOP sentence were left largely unanswered by the Court.⁹⁹ The *Graham* Court’s use of an arbitrary point of distinction between levels of culpability based on chronological age and its failure to define a LWOP sentence has allowed sentencing courts to circumvent *Graham*’s prohibition, leaving unresolved the issues the Supreme Court was trying to remedy.

III. ANALYSIS

Society generally does not judge youthful indiscretions with the same level of condemnation as similar acts by adults.¹⁰⁰ Advances in psychology and brain science have shown fundamental differences between the average juvenile and adult minds.¹⁰¹ Developments in these fields have provided a better understanding of how the human brain develops as well as

⁹¹ *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 574 (2005)).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ *Id.* at 68.

¹⁰¹ *Id.*

some of the structural differences between groups of people.¹⁰² The Court has recently shown a willingness to consult these advances in social science and neurobiology when making determinations of relative culpability between juvenile and adult offenders.¹⁰³ However, although developments in the social and behavioral sciences have shown that juvenile brains are, in general, structurally different than adult brains, they are unable to connect any structural differences to a societal assignment of culpability or blameworthiness.¹⁰⁴ Additionally, structures similar to those found in juvenile brains are also found in the brains of adult criminals; yet, despite such scientific support, adult criminals are not afforded a lessened perception of culpability.¹⁰⁵ Moreover, in addition to identifying structural differences between the brains of youths and the brains of adults, the sciences have also found dramatic structural differences between juvenile brains at various stages of development.¹⁰⁶ The Court's overreliance on incomplete research has left sentencing courts with a legal standard that misallocates culpability, is unsupported by the very science on which the Court relied, and simultaneously calls into question the soundness of adult sentencing practices.

A. Do Developmental Differences Determine Culpability and Blameworthiness?

The social and neurological sciences cannot conclusively determine how biological and structural differences between juvenile and adult brains affect culpability and moral fault.¹⁰⁷ Although brain scans can demonstrate

¹⁰² See Abigail A. Baird, *Adolescent Moral Reasoning: The Integration of Emotion and Cognition*, in 3 MORAL PSYCHOLOGY 323, 327–29 (Walter Sinnott-Armstrong ed., 2008).

¹⁰³ See *Graham*, 560 U.S. at 68; *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

¹⁰⁴ Walter Glannon, *What Neuroscience Can (and Cannot) Tell Us about Criminal Responsibility*, in 13 LAW AND NEUROSCIENCE 13, 21 (Michael Freeman ed., 2011). “Just because brain scans confirm that adolescents are comparatively less mature in their reasoning and decision-making than adults does not imply that they cannot be responsible to any degree for their actions.” *Id.* “To claim that neuroimaging alone can tell us that a person lacked the necessary cognitive control to be criminally responsible . . . is to fall prey to . . . an oversimplified view of the relation between the brain and the mind, and between the brain and behaviour.” *Id.* at 27–28.

[T]hose who appeal to neuroimaging to claim that brain dysfunction can excuse one from responsibility for criminal actions tend to focus on a specific region of the brain that mediates cognitive functions associated with reasoning and decision-making. Yet these functions are not usually located in a single region of the brain but are distributed across complex interacting neural networks.

Id. at 18.

¹⁰⁵ Richard E. Reading, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 57 (Oct. 2006).

¹⁰⁶ Baird, *supra* note 102, at 326 (stating that throughout adolescence, “the individual undergoes major changes in physiological, social, emotional, and cognitive functioning . . .”). “Normal brains follow a unique developmental path bounded roughly by the general trajectory; while all humans will pass through the same basic stages . . . of life, the precise timing and manner in which they do so will vary.” Terry A. Maroney, *Adolescent Brain Science and Juvenile Justice*, in 13 LAW AND NEUROSCIENCE 255, 270 (Michael Freeman ed., 2011).

¹⁰⁷ Glannon, *supra* note 104, at 19.

[B]rain dysfunction and mental impairment come in degrees. There is no empirical measure that could establish a threshold at or over which one is responsible and

scientifically that there are structural differences between adult and juvenile brains,¹⁰⁸ the studies are unable to establish a causal relationship between these differences and culpability.¹⁰⁹ In fact, the authors of such studies often concede that the structural differences between adolescent and adult brains may have no bearing on decision-making or risk aversion.¹¹⁰ Scientists are still unable to explain what effect these differences in brain structure have on any individual's susceptibility to peer pressure, ability to recognize the illegality of a chosen course of conduct, or ability to recognize the risks and potential benefits of a contemplated course of conduct.¹¹¹ In contrast, it is

under which one is not responsible. . . . Empirical considerations regarding information about the brain cannot be isolated from normative considerations regarding the behavioural and legal significance of that information.

Id. “Just because a decision is irrational does not mean that it was coerced or compelled by a dysfunctional brain and that the individual making the decision had no control of the motivational states that led to it.” *Id.* at 17. “Just because brain scans confirm that adolescents are comparatively less mature in their reasoning and decision-making than adults does not imply that they cannot be responsible to any degree for their actions.” *Id.* at 21. “A functional brain scan showing an underactive prefrontal cortex or overactive amygdala by itself will not be diagnostic of a loss of impulse control or cognitive control of one's behaviour.” *Id.* Rather, “[n]europlasticity, the ability of nerve cells to modify their activity in response to change, might enable other regions of the brain to take over the tasks associated with regions that have become dysfunctional.” *Id.* at 19. “[A]dolescents might tend to employ different brain processes than adults when carrying out identical tasks.” Maroney, *supra* note 106, at 257.

¹⁰⁸ Baird, *supra* note 102, at 326–27. Adults and adolescents use different parts of the brain in performing certain tasks. June Carbone, *Neuroscience and Ideology: Why Science Can Never Supply a Complete Answer for Adolescent Immaturity*, in 13 LAW AND NEUROSCIENCE 231, 234 (Michael Freeman ed., 2011).

¹⁰⁹ Glannon, *supra* note 104, at 18 (“[B]rain scans may establish correlations between neurobiological abnormalities and criminal behaviour. But correlation is not causation.”). “Neuroscientists still know too little to suggest that the activation of a particular region in an MRI necessarily means that the development of that part of the brain *per se* causes a particular behavior.” Carbone, *supra* note 108, at 236 (citing Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 AKRON L. REV. 917, 917 (2009)). “[N]o one can yet prove that particular brain signals cause particular acts. At best, they suggest that particular behaviour is more likely.” *Id.* at 239. “[T]he brain's emotional circuitry is highly complex. Teens . . . may well have distinctive neural patterns of emotional activation and of emotion-cognition interaction, and those patterns may well be linked to maturation processes, but to date we know little about these phenomena or their behavioral implications.” Maroney, *supra* note 106, at 277.

¹¹⁰ Maroney, *supra* note 106, at 255–58. “[N]ormal teens show a marked increase in risk-taking behaviour, though they often display adult-level cognitive understanding of risk . . .” *Id.* at 256. Some studies even show that adolescents “display *greater* frontal-lobe activity than adults . . . [and that] aggression and violence sometimes correlate with *low* levels of amygdala activation.” Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 163 (2009) (emphasis added). Although adolescents may show lessened activation in the areas of the brain used by adults when deciding whether to engage in risk-taking behavior, adolescents and adults make similar numbers of risky choices and are equally as successful in avoiding the risk. See Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1273–74, 1278 (2007).

¹¹¹ Carbone, *supra* note 108, at 237 (“Less mature teens have the ability to distinguish right from wrong; they even have the capacity to engage in reasoned deliberation. They are just less likely than adults to do so . . .”). Although teens are more likely than adults to engage in greater risk taking when risk and reward are small, there are no developmental differences when potential penalties are *sufficiently severe*. James M. Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment by Risky Rewards*, 27 J. NEUROSCIENCE 4839, 4848 (2007). Assertions that adolescents are entirely unable to

make good decisions under stress, control their emotions, suppress violent impulses, foresee consequences, or defy antisocial peers . . . conflict with everyday observations . . . that most teenagers make good choices most of the time and that

well-accepted in the scientific community that, regardless of any diminished ability to avoid peer pressure or appreciate the consequences of actions, juveniles as a group, when deciding whether to participate in a criminal act, are consistently able to recognize the conduct's illegality.¹¹² Thus, the neurological research on which the *Graham* Court relied is insufficient to establish a causal relationship between brain development and culpability.

B. Are Juvenile Offenders Sufficiently Distinct from Adult Offenders to Support a Categorical Prohibition on LWOP?

Despite the differences in structural development between the average juvenile and average adult brain, neuroscientists have not identified any structural differences between juvenile *criminal* brains and adult *criminal* brains. Rather, scans of adult criminal and sociopathic brains reveal nearly identical brain structure and developmental deficiencies as scans of adolescent brains.¹¹³ If brain scans and the structural differences in brain composition they reveal are to be accepted as measures of a group's level of culpability for sentencing purposes, the same studies used to relieve juveniles from the harshest of punishments may also necessitate reconsideration of the culpability of adult offenders.¹¹⁴ The Supreme Court's reliance on differences in brain structure as evidence of moral culpability may require the Court to later determine whether the same brain structure, when found in adults, can relieve classes of adult offenders from

offenders, too, make socially beneficial, self-protective, or strategic choices, sometimes within the context of the offense behaviour itself.

Maroney, *supra* note 106, at 272.

¹¹² See Eshel, *supra* note 110, at 1273–74.

¹¹³ Adrian Raine et. al., *Reduced Prefrontal Gray Matter Volume and Reduced Autonomic Activity in Antisocial Personality Disorder*, 57 ARCH. GEN. PSYCHIATRY 119, 126 (2000). “[T]hose who are antisocial have . . . meaningful and significant reductions in prefrontal gray matter volume . . .” *Id.* These “findings of structural deficits in antisocial subjects are consistent with prior research showing prefrontal functional deficits in violent individuals.” *Id.* Recent brain scans of psychopaths have documented “not only reduction in the grey matter but prefrontal and temporal cerebral cortex dysfunction as well as dysfunction of the amygdala, hippocampal complex, and corpus callosum.” George B. Palermo, *Psychopathy: Early and Recent Clinical Observations and the Law*, 55 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 3, 3 (2011).

¹¹⁴ Richard E. Reading, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 57 (2006). If brain scans can reliably demonstrate lessened culpability, then similar brain scans of a different class should also demonstrate lessened culpability:

[N]europsychological studies show that the prevalence rate of brain dysfunction among criminal populations is extremely high, with prevalence rates of ninety-four percent among homicide offenders, sixty-one percent among habitually aggressive adults, forty-nine to seventy-eight percent among sex offenders, and seventy-six percent among juvenile offenders (by comparison, the prevalence rate in the general population is only three percent). Clinical evaluations of death row inmates, for example, reveal that many have a history of head injury and serious neuropsychological deficits.

Id. However, courts have refused to apply *Graham*'s reliance on brain scan studies or its resulting rationale to the sentencing of mentally ill or mentally handicapped offenders. See, e.g., *People v. Gay*, 960 N.E.2d 1272, 1279 (Ill. App. Ct. 2011); *United States v. Moore*, 643 F.3d 451, 457 (6th Cir. 2011).

the harshest of punishments on the basis of lessened culpability.¹¹⁵ The Court's overreliance on a currently underdeveloped scientific field could call the sentencing of adult criminals into question.¹¹⁶ If the same structural brain underdevelopment is present in two classes of offenders, there appears to be no logical basis for deeming one group to be less culpable unless some other distinguishing characteristic can be identified. Chronological age does not support such a distinction. The similarities between the average juvenile brain and the average adult criminal brain undermine the Court's reliance on neuroscience to conclude that the two groups must be categorically assigned different levels of culpability.

C. Are all Juvenile Offenders Sufficiently Similar to be Treated as one Distinct Class?

The social tenet that youthful transgressions are treated with less moral condemnation is not universally applicable. Even among juveniles, society assigns incrementally greater condemnation to infractions committed by increasingly older juveniles.¹¹⁷ A crime committed by a seventeen-year-old is generally treated with greater condemnation than the same offense committed by a twelve-year-old. Brain scans provide scientific support for assigning progressively more culpability to juvenile offenders as they grow older.¹¹⁸ As youths mature, they become better able to recognize the wrongfulness of their actions and the effects their actions have on others.¹¹⁹ The juvenile brain becomes structurally more similar to an adult brain as it matures.¹²⁰ However, the rate at which these structural developments occur varies dramatically even between individuals.¹²¹ The variation in the rate of development among juvenile offenders—defined by the Supreme Court in

¹¹⁵ Adult women have a lower ratio of white brain matter to gray matter than do men, and the white-to-gray matter ratio in teen girls increases more slowly than in teen boys. Carbone, *supra* note 108, at 237. As of yet, there has been no argument that teen boys are more culpable than teen girls. *Id.* Also, due to a decline in brain maturation that tends to begin at approximately age forty-five, the brains of the elderly exhibit deficiencies similar to those of adolescents. Maroney, *supra* note 106, at 273.

¹¹⁶ Glannon, *supra* note 104, at 13 (“[T]he interpretation of brain images and their legal significance are fraught with uncertainty.”); Carbone, *supra* note 108, at 236 (citing Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 AKRON L. REV. 917, 917, 924 (2009)) (“The neuroscience studies themselves, which are at a relatively early stage in the development of the science, are small-scale studies, with subjects who are not randomly chosen.”). “[B]rain-based arguments too frequently risk inaccuracy and overstatement.” Maroney, *supra* note 106, at 256. “[T]he courts’ response to adolescent brain science reflects a frequent disconnect between the questions asked by law and those answered by science.” *Id.* at 262.

¹¹⁷ See *Graham v. Florida*, 560 U.S. 48, 66–67 (2010).

¹¹⁸ Maroney, *supra* note 106, at 273. Some studies suggest that “most adolescents achieve intellectual and cognitive maturity, though not psychosocial maturity, by the mid-teenage years. There is, therefore, some law-relevant decisional maturation before eighteen . . .” *Id.* (citing L. Steinberg, *Risk Taking in Adolescence: What Changes, and Why?*, 1021 ANNALS N.Y. ACAD. SCI. 51, 54 (2004)).

¹¹⁹ *Id.*

¹²⁰ Baird, *supra* note 102, at 326–27.

¹²¹ Maroney, *supra* note 106, at 270. Brain scan studies that show group similarities in structural brain maturity also show that not all individuals within the group follow the trend. *Id.* Developmental neuroscience is not yet able to generate reliable predictions or findings about any given individual’s behavioral maturity based on structural brain development. *Id.*

Graham as anyone under the age of eighteen—precludes the conclusion that all juveniles have the same level of lessened culpability.¹²² A categorical assignment of lessened culpability to all juvenile offenders necessarily fails to account for variations in individual culpability within the class and undermines the Court’s rationale for its categorical prohibition.

D. Defining a “Non-Homicide” Offense

The “did a death result” standard for differentiating between homicide and non-homicide crimes misallocates culpability and fails to take into account juveniles’ diminished capacity to foresee the consequences of their actions. The Supreme Court has consistently held that the gravity of an offense is greater when a victim dies as a result of the offender’s conduct.¹²³ Violent but non-homicide crimes “may be devastating in their harm . . . but ‘in terms of moral depravity and of the injury to the person and to the public,’ . . . they cannot be compared to murder in their ‘severity and irrevocability.’”¹²⁴ “[L]ife is over for the victim of the murderer, but for the victim of even a very serious non[-]homicide crime, life . . . is not over and normally is not beyond repair.”¹²⁵ However, it is not only the fact that a victim’s life is ultimately ended as a result of the crime that causes homicides to be of greater gravity. Rather, it is the judgment that the killer is more culpable than those offenders who do not cause death.¹²⁶ Essentially, it is the culpability of the offender—that he himself killed, intended to kill, or attempted to kill—that causes society to consider a homicide crime more morally blameworthy than all other crimes.¹²⁷ The Eighth Amendment prevents a court from imposing the death penalty on an adult offender convicted of felony-murder but who did not himself kill, intend to kill, or attempt to kill the victim.¹²⁸ Because such offenders are considered less culpable, imposing the harshest punishment permitted by law is considered cruel and unusual despite their actions having ultimately

¹²² Full adult brain maturity may not occur until well beyond age eighteen. Carbone, *supra* note 108, at 231. Structural brain maturation may not be complete until the mid-twenties. Maroney, *supra* note 106, at 273.

Taking neuroscience as a proper benchmark . . . would suggest that the criminal justice system should recognize the brain deficiencies of both young adults and the elderly. Not only would such a position be politically untenable, particularly because young men between eighteen and twenty-four have a high criminal offence rate, it would dilute any argument that there is something so developmentally special about age eighteen as to justify juvenile treatment for all below that age.

Id.

¹²³ *E.g.*, *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Graham v. Florida*, 560 U.S. 48, 69 (2010).

¹²⁴ *Graham*, 560 U.S. at 69 (citations omitted).

¹²⁵ *Id.* (citation and internal quotation marks omitted).

¹²⁶ *Enmund*, 458 U.S. at 798.

¹²⁷ *Id.* at 796.

¹²⁸ *Id.* at 796–97.

caused the death of another.¹²⁹

Defining homicide and non-homicide offenses in the context of juvenile offenders should take into consideration the offender's individual participation and intent. The current prohibition of LWOP sentences for juvenile non-homicide offenders represents a sharp turn in allocating gravity to crimes in which death results.¹³⁰ Under *Graham*, a juvenile offender whose crime results in the death of another is not protected by the categorical ban of a LWOP sentence.¹³¹ If no victim dies, LWOP is strictly forbidden.¹³² If a victim dies, LWOP can be imposed.¹³³ However, *Graham* does not require the juvenile offender to have killed, intended to kill, or attempted to kill in order to be sentenced to LWOP.¹³⁴ Rather, regardless of the juvenile's own participation in the crime—as principal, accomplice, or accomplice to an underlying felony—the juvenile's crime will be classified as a homicide offense for LWOP sentencing purposes whenever a death results.¹³⁵

This approach to defining a homicide offense is in stark contrast to the definition used in the death penalty context.¹³⁶ An adult offender convicted of felony-murder premised on participation in an underlying felony but who did not himself kill, intend to kill, or attempt to kill cannot receive a death sentence, the most severe punishment for adult offenders.¹³⁷ However, a juvenile offender participating in the same capacity in an underlying felony is considered a homicide offender and can be sentenced to LWOP, the harshest punishment available for juvenile offenders.¹³⁸

Consideration of the offender's intent and the extent of their participation when defining homicide crimes is of particular importance in the context of juvenile offenders. Holding juveniles who participate in felonies that result in the death of another to a strict "did a death result" standard fails to take into account the diminished ability of juveniles to foresee the potential consequences of the crime, to weigh the likelihood of recognized consequences, and to appreciate the extent of the potential harm.

¹²⁹ *Id.*

¹³⁰ Compare *Graham*, 560 U.S. at 82 (basing defendant's culpability on whether the crime resulted in a homicide), with *Enmund*, 458 U.S. at 801 (finding the defendant less culpable in a robbery that resulted in homicide due to his limited participation).

¹³¹ *Graham*, 560 U.S. at 82.

¹³² *Id.*

¹³³ *Id.* The U.S. Supreme Court recently held that mandatory LWOP sentences for juvenile homicide offenders are also cruel and unusual under the Eighth Amendment. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

¹³⁴ *Graham*, 560 U.S. at 82.

¹³⁵ *Id.*

¹³⁶ Compare *Graham*, 560 U.S. at 82 (defining a homicide offense based on whether the victim died), with *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (defining a homicide offense based on the defendant's participation in the crime).

¹³⁷ *Enmund*, 458 U.S. at 801.

¹³⁸ *Graham*, 560 U.S. at 82.

Graham itself stands for the proposition that juveniles who commit serious, violent felonies deserve harsh sentences, but not the harshest of sentences.¹³⁹ Imposing LWOP sentences upon juveniles who, according to the Supreme Court, are less able to recognize the potentially deadly consequences of their actions, is arbitrary and in stark contrast to the standard used for adult offenders.

Failure to account for an offender's participation in the crime and the offender's intent to cause death eliminates any deterrent value of drawing a distinction in punishment between homicide and non-homicide offenses.¹⁴⁰ The deterrent value of differentiating between those crimes for which an offender will face LWOP and those for which they will not depends on the offender's ability to predict with some degree of certainty the crime in which he is participating.¹⁴¹ In the context of felony-murder, that ability may be completely absent; the offender may agree to participate in the underlying felony while unaware that another conspirator has deadly intentions. Assuming that juveniles are able to appreciate and conform to such a differential between sentences for homicide and non-homicide offenses (an assumption the Court itself questions), a juvenile offender will largely be unable to determine whether participating in any given robbery will or will not result in a death at the hands of a co-robber. Thus, even if the juvenile offender is aware of the sentencing differential and is able to conform his behavior accordingly (by merely participating in a non-homicide felony to avoid LWOP), the juvenile offender's sentence may still be based entirely on the actions of his peers. Ultimately, the current categorical rule prohibiting LWOP for juvenile non-homicide offenders defines a homicide offense in such a way that it fails to address the gravity of the offense in terms of the culpability of the offender, resulting in the destruction of any deterrent value the differential is designed to maintain.

E. Where does the Categorical Prohibition of LWOP for Juvenile Non-Homicide Offenders Leave Juvenile Sentencing?

The Supreme Court's omission of any indication of what amounts to a LWOP sentence and what a "meaningful opportunity for release" entails has allowed state courts to circumvent the purpose of *Graham* and has led to disparate treatment of juvenile offenders. Sentencing courts are now imposing "constructive" LWOP sentences—terms of imprisonment greatly

¹³⁹ *Id.* at 124 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.")

¹⁴⁰ Limiting the availability of the most severe punishment to only the most serious of offenses is designed to deter offenders from carrying their less serious crimes over into more serious crimes. Thus, assuming rational contemplation, an offender will avoid committing a more serious crime to avoid becoming subject to a greater punishment. When a more blameworthy crime subjects an offender to the same severity of punishment as a lesser offense, the offender is less likely to avoid committing the greater offense.

¹⁴¹ See *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

exceeding any potential remainder of the offender's natural life.¹⁴² The Court's vague requirement that juvenile non-homicide offenders be afforded a "meaningful opportunity" for parole merely transfers from the judiciary to the executive the determination of whether a juvenile offender will be released.¹⁴³ The *Graham* decision, although designed to protect juvenile offenders from the full wrath of adult criminal sanctions, is failing to prevent the imposition of natural life terms on juveniles.¹⁴⁴ Further, it transfers the decision as to whether to release an offender from the judiciary to the executive,¹⁴⁵ and leaves many young, but non-"juvenile," adults facing full criminal sanctions without consideration of individual mitigating factors.¹⁴⁶

¹⁴² See, e.g., *People v. Ramirez*, 123 Cal. Rptr. 3d 155, 165 (Cal. Ct. App. 2011), *rev'd*, 298 P.3d 69 (Cal. 2012); *People v. Caballero*, 119 Cal. Rptr. 3d 920, 926 (Cal. App. Ct. 2011), *rev'd*, 282 P.3d 291 (Cal. 2012); *Guzman v. State*, 110 So. 3d 480, 481, 483 (Fla. Dist. Ct. App. 2013) (affirming a sixty-year sentence imposed on offender who committed the offense at age fourteen); *Gridine v. State*, 89 So. 3d 909, 911 (Fla. Dist. Ct. App. 2011) (affirming a seventy-year sentence for a fourteen-year-old non-homicide offender while acknowledging that a term-of-years sentence, if too extreme, could become an impermissible constructive LWOP sentence), *review granted*, 130 So. 3d 139 (Fla. 2012); *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012) (affirming an aggregate ninety-year sentence despite evidence that juvenile offender's sentence exceeded his statistical life expectancy), *review granted*, 107 So. 3d 405 (Fla. 2012); *Walle v. State*, 99 So. 3d 967, 969–71 (Fla. Dist. Ct. App. 2012) (affirming sixty-five-year and twenty-seven-year concurrent sentences imposed on a thirteen-year-old non-homicide offender after holding that *Graham* applies "solely to a single sentence of life without parole"); *State v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011) (affirming an aggregate 139.75-year sentence for multiple non-homicide offenses); *Bunch v. Smith*, 685 F.3d 546, 547, 550 (6th Cir. 2012) (rejecting argument that the holding of *Graham* encompasses consecutive, term-of-years sentences that result in a constructive LWOP sentence and denying the habeas corpus petition of a sixteen-year-old non-homicide offender serving an eighty-nine-year sentence), *cert. denied* 133 S. Ct. 1996 (2013); *Diamond v. State*, Nos. 09-11-00478-CR and 09-11-00479-CR, 2012 WL 1431232, at *4–5 (Tex. Ct. App. Apr. 25, 2012) (affirming imposition of ninety-nine-year sentence on a seventeen-year-old for robbery committed at age fifteen); *Goins v. Smith*, No. 4:09-CV-1551, 2012 WL 3023306, at *7 (N.D. Ohio July 24, 2012) (denying the petition for a writ of habeas corpus of a juvenile non-homicide offender sentenced to eighty-four years of imprisonment because, in the Sixth Circuit, "long, even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham*'s holding unless the sentence is technically a life sentence without the possibility of parole."), *aff'd*, No. 12-4040, 2014 WL 594047 (6th Cir. Feb. 18, 2014).

¹⁴³ *Graham*, 560 U.S. at 75, 123–24 (Thomas, J., dissenting).

¹⁴⁴ E.g., *Miller v. State*, 63 So. 3d 676, 687–91 (Ala. 2010) (affirming LWOP sentence for fourteen-year-old convicted of murder), *rev'd* 132 S. Ct. 2455 (2012) (holding that a *mandatory* LWOP sentence for a minor is unconstitutionally cruel and unusual); *Smith v. State*, 258 P.3d 913, 920 (Alaska Ct. App. 2011) (affirming trial court's rejection of evidence of juvenile's relative immaturity and upholding a term-of-years sentence under adult sentencing guidelines); *People v. Ruiz*, No. B220619, 2011 WL 2120123, at *11–12 (Cal. Ct. App. May 31, 2011) (rejecting defendant's argument that, as a sixteen-year-old, he was less culpable than most teenagers in upholding his sentence of eighty-two years to life for murder); *People v. Padilla*, No. B222067, 2011 WL 3612159, at *12–14 (Cal. Ct. App. Aug. 17, 2011) (affirming a 250-year to life sentence for fifteen-year-old convicted of murder and other enhancements); *Twyman v. State*, 26 A.3d 215, 215 (Del. 2011) (distinguishing *Graham* in denial of motion for postconviction relief from two mandatory LWOP sentences imposed on fifteen-year-old convicted of murder and attempted murder); *State v. Windom*, 253 P.3d 310, 316–18 (Idaho 2011) (affirming the LWOP sentence for a mentally-ill sixteen-year-old convicted of second degree murder despite expert testimony that he could be rehabilitated); *State v. Andrews*, 329 S.W.3d 369, 377–78 (Mo. 2010) (upholding LWOP for juveniles convicted of murder).

¹⁴⁵ *Graham*, 560 U.S. at 66–67.

¹⁴⁶ E.g., *State v. Uzzelle*, No. COA10-600, 2011 WL 705152, at *7 (N.C. Ct. App. Mar. 1, 2011) (upholding mandatory life without parole for eighteen-year-old offender despite testimony that he had the developmental age of a young juvenile); *Silas v. Pennsylvania*, No. 08-0659, 2011 WL 4359973, at *2

Courts have reached inconsistent, and sometimes conflicting, conclusions regarding the constitutionality of lengthy prison sentences for non-homicide offenders who committed their offenses as juveniles.¹⁴⁷ Some sentencing courts have resisted the prohibition, leading to the imposition of “constructive” or *de facto* LWOP sentences for juvenile non-homicide offenders.¹⁴⁸ These courts have narrowly construed the decision in *Graham*, concluding that it prohibits only sentences actually labeled “life without the possibility of parole.” Consequently, these courts have circumvented the *Graham* ruling by imposing term-of-years sentences so lengthy that they vastly exceed the defendant’s life expectancy.¹⁴⁹ Appellate courts faced with deciding whether to uphold constructive LWOP sentences have come to different conclusions as to their constitutionality in light of *Graham*.¹⁵⁰

Some courts have affirmed constructive LWOP sentences imposed on juvenile non-homicide offenders.¹⁵¹ Many of these courts rely on

(E.D. Penn. Sept. 19, 2011); *see also* *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230–31, 1263 (C.D. Utah 2004) (reluctantly sentencing a twenty-four-year-old non-violent first time drug offender to a mandatory fifty-five-year sentence).

¹⁴⁷ Some states have seen splits among their intermediate appellate courts in resolving the issue of whether *Graham* applies to constructive LWOP sentences for juvenile non-homicide offenders. *Compare Caballero*, 119 Cal. Rptr. 3d at 926 (holding *Graham* is expressly limited to juvenile LWOP sentences for a nonhomicide offense), *with* *People v. Mendez*, 114 Cal. Rptr. 3d 870, 882–83 (Cal. Ct. App. 2010) (holding that the principles set forth in *Graham* guide the evaluation of a lengthy term-of-years sentence), *and* *Guzman*, 110 So. 3d at 481, 483 (limiting application of *Graham* to actual LWOP sentences), *with* *Floyd v. State*, 87 So. 3d 45, 45, 47 (Fla. Dist. Ct. App. 2012) (applying *Graham* to lengthy term-of-years sentence, which was the functional equivalent of a LWOP sentence). Courts have also come to different conclusions on the issue of whether offenders sentenced to LWOP for non-homicide offenses committed as juveniles are entitled to new sentencing hearings, including reconsideration, if appropriate, of aggravating and mitigating circumstances, or merely revision to their prison files to reflecting eligibility for parole. *Compare* *State v. Burge*, No. 2012 KA 0761, 2012 WL 6681831, at *2–3 (La. Ct. App. Dec. 21, 2012) (holding the appropriate remedy is to delete the restriction on parole), *cert. denied*, 109 So. 3d 367 (2013), *and* *State v. Dyer*, 77 So. 3d 928, 930–31 (La. 2011) (amending sentence to delete restriction on parole eligibility), *and* *State v. Skipper*, 79 So. 3d 1011, 1012 (La. 2012) (reversing lower court’s order of resentencing, and amending defendant’s sentence to allow parole eligibility), *with* *Manuel v. State*, 48 So. 3d 94, 98 (Fla. Dist. Ct. App. 2010) (vacating LWOP sentence and remanding for resentencing), *and* *People v. Caballero* 282 P.3d 291, 296 (Cal. 2012) (remanding for resentencing).

¹⁴⁸ *E.g.*, *People v. Ramirez*, 123 Cal. Rptr. 3d 155, 165 (Cal. Ct. App. 2011), *rev’d*, 298 P.3d 69 (Cal. 2012); *Caballero*, 119 Cal. Rptr. 3d at 926.

¹⁴⁹ *Ramirez*, 123 Cal. Rptr. at 165; *Caballero*, 119 Cal. Rptr. 3d at 925–27.

¹⁵⁰ *Compare Caballero*, 119 Cal. Rptr. 3d at 926 (relying on statement that juveniles who commit truly horrifying crimes may be irredeemable and affirming lengthy term-of-years sentence), *with* *People v. Mendez*, 114 Cal. Rptr. 3d 870, 882–83 (Cal. Ct. App. 2010) (relying on statement that *Graham* was limited to juveniles actually sentenced to LWOP), *and* *Guzman*, 110 So. 3d at 481, 483 (relying on statement that *Graham* only applies to LWOP sentences), *with* *Floyd v. State*, 87 So. 3d 45, 45, 47 (Fla. Dist. Ct. App. 2012) (relying on statement that states need to “explore the means and mechanisms for compliance” with *Graham* and relying on *Graham*’s guidance to include coverage for sentences which are the functional equivalent of LWOP).

¹⁵¹ *See, e.g., Ramirez*, 123 Cal. Rptr. 3d at 165; *Caballero*, 119 Cal. Rptr. 3d at 926; *Guzman*, 110 So. 3d at 481, 483 (affirming a sixty-year sentence imposed on offender who committed the offense at age fourteen); *Gridine v. State*, 89 So. 3d 909, 911 (Fla. Dist. Ct. App. 2011) (affirming a seventy-year sentence for a fourteen-year-old non-homicide offender while acknowledging that a term-of-years sentence, if too extreme, could become an impermissible constructive LWOP sentence), *review granted*, 130 So. 3d 139 (Fla. 2012); *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012) (affirming an aggregate ninety-year sentence despite evidence that juvenile offender’s sentence exceeded his statistical life expectancy), *review granted*, 107 So. 3d 405 (Fla. 2012); *Walle v. State*, 99 So. 3d 967, 969–71 (Fla.

language from Justice Kennedy's opinion for the majority, limiting the applicability of the holding—"[t]he instant case concerns only those juvenile offenders sentenced to life without parole solely for a non[-]homicide offense."¹⁵² Others emphasize language from Justice Alito's dissenting opinion—that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."¹⁵³ Regardless of the language on which these courts rely, the result of their decisions is to affirm sentences that are either designed to or will likely have the effect of incarcerating the juvenile non-homicide offenders on whom they are imposed for the remainder of their lives without any meaningful opportunity for parole.

For example, a California appellate court recently upheld a 110-year sentence, without the possibility of parole, for a juvenile convicted of three counts of willful, deliberate, and premeditated attempted murder with a semiautomatic weapon.¹⁵⁴ Although no victims were killed, making the defendant a non-homicide offender, the court pointed to Justice Alito's dissenting opinion in *Graham*—"nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."¹⁵⁵ In upholding the sentence, the court narrowly construed the holding of *Graham* to include only sentences that by their own terms preclude an opportunity for parole.¹⁵⁶ A LWOP sentence, by definition, eliminates any opportunity for parole.¹⁵⁷ A term-of-years sentence does not by its own terms preclude an opportunity for parole;¹⁵⁸ however, the defendant may need to live several decades beyond any possible life

Dist. Ct. App. 2012) (affirming sixty-five-year and twenty-seven-year concurrent sentences imposed on a thirteen-year-old non-homicide offender after holding that *Graham* applies "solely to a single sentence of life without parole"); *Kasic*, 265 P.3d at 415 (affirming an aggregate 139.75-year sentence for multiple non-homicide offenses); *Bunch v. Smith*, 685 F.3d 546, 547, 550 (6th Cir. 2012) (rejecting argument that the holding of *Graham* encompasses consecutive, term-of-years sentences that result in a constructive LWOP sentence and denying the habeas corpus petition of a sixteen-year-old non-homicide offender serving an eighty-nine-year sentence), *cert. denied*, 133 S. Ct. 1996 (2013); *Diamond v. State*, Nos. 09-11-00478-CR and 09-11-00479-CR, 2012 WL 1431232, at *4-5 (Tex. Ct. App. Apr. 25, 2012) (affirming imposition of ninety-nine-year sentence on a seventeen-year-old for robbery offense committed at age fifteen); *Goins v. Smith*, No. 4:09-CV-1551, 2012 WL 3023306, at *7 (N.D. Ohio July 24, 2012) (denying the habeas corpus petition of a juvenile non-homicide offender serving an eighty-four-year sentence because, in the Sixth Circuit, "long, even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham's* holding unless the sentence is technically a life sentence without the possibility of parole."), *aff'd*, No. 12-4040, 2014 WL 594047 (6th Cir. Feb. 18, 2014).

¹⁵² *Graham v. Florida*, 560 U.S. 48, 63 (2010); *see, e.g., Guzman*, 110 So. 3d at 483 ("[W]e are compelled to apply *Graham* as it is expressly worded, which applies only to actual life sentences without parole."); *Thomas v. State*, 78 So. 3d 644, 646-47 (Fla. Dist. Ct. App. 2011); *Walle*, 99 So. 3d at 973; *Kasic*, 265 P.3d at 414 ("The Court made clear that '[*Graham*] concerns only those juvenile offenders sentenced to life without parole for a non[-]homicide offense."); *Goins*, 2012 WL 3023306, at *6; *Bunch*, 685 F.3d at 550-51.

¹⁵³ *Caballero*, 119 Cal. Rptr. 3d at 925 (quoting *Graham*, 560 U.S. at 124 (Alito, J., dissenting)).

¹⁵⁴ *Id.* at 925-27.

¹⁵⁵ *Id.* at 925 (quoting *Graham*, 560 U.S. at 124 (Alito, J., dissenting)).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

expectancy to see it. Under this rationale, nothing, *Graham* included, would prevent a sentencing court from imposing sentences that are expressly and unashamedly intended to serve as “constructive” LWOP sentences, effectively undercutting the rationale behind the prohibition of juvenile LWOP in non-homicide cases.

The Arizona Supreme Court recently affirmed a sentence of 139.75 years imposed on a juvenile non-homicide offender convicted of thirty-two felonies arising out of six arsons and one attempted arson.¹⁵⁹ The court emphasized that “[t]he [Supreme] Court made clear that ‘[*Graham*] concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.’”¹⁶⁰ The court distinguished *Graham* by explaining that, unlike the LWOP sentence for a single burglary conviction in *Graham*, the juvenile arsonist was convicted of thirty-two dangerous felonies.¹⁶¹ Thus, the Arizona Supreme Court relied on its own prior precedent and held that so long as a sentence for an individual offense is not disproportionate, it does not become disproportionate merely because it is imposed consecutively to another sentence for a separate offense or because the total sentence is long in the aggregate.¹⁶² The court concluded that, because the longest prison sentence the offender received on any single offense was 15.75 years, the aggregate sentence did not violate the prohibition against LWOP as set forth in *Graham*.¹⁶³ Thus, the court concluded that *Graham*’s categorical prohibition did not apply to cases involving convictions on multiple counts and upheld the 139.75-year sentence of a juvenile non-homicide offender.¹⁶⁴ Under this rationale, a prosecutor need only attain convictions on multiple counts arising out of one or a series of criminal acts to eviscerate the protection of *Graham*’s categorical prohibition of LWOP sentences on juvenile non-homicide offenders. Upon conviction on more than one felony count, a juvenile non-homicide offender could be sentenced to a constructive LWOP sentence if the prison terms for each count are ordered to be served consecutively, and the purpose of *Graham* can again be circumvented.¹⁶⁵

In contrast, some state appellate courts faced with reviewing “constructive” LWOP sentences imposed on juvenile non-homicide offenders have given *Graham* a much broader reading and require that

¹⁵⁹ State v. Kasic, 265 P.3d 410, 411, 415–416 (Ariz. Ct. App. 2011).

¹⁶⁰ *Id.* at 414.

¹⁶¹ *Id.* at 415.

¹⁶² *Id.* (“[I]f a sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate. This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences.” (quoting State v. Berger, 134 P.3d 378, 384 (Ariz. 2006))).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 415–16.

¹⁶⁵ See *Graham v. Florida*, 560 U.S. 48, 82 (2010).

sentences provide “a meaningful opportunity to obtain release.”¹⁶⁶ A California state court reversed a sentence of eighty-four years without parole for a sixteen-year-old non-homicide offender because parole would not have been available during the defendant’s anticipated life span.¹⁶⁷ This rationale begs the question—at what point must an opportunity for parole be made available for it to be “meaningful?” This court concluded that scheduling the first opportunity to seek parole beyond the defendant’s estimated life span was insufficient.¹⁶⁸ Need a court look to a defendant’s estimated remaining years of life (accounting for current age, race, family history, and the physical and psychological toll of lengthy prison terms) and count backwards?¹⁶⁹ And, if so, how many years must the court deduct to leave a remaining estimated time of release that is “meaningful” if the defendant is actually approved for release?¹⁷⁰ Our juvenile sentencing scheme should not operate by counting years off of an offender’s expected remaining life span

¹⁶⁶ *E.g.*, *Floyd v. State*, 87 So. 3d 45, 45–47 (Fla. Dist. Ct. App. 2012) (reversing an eighty-year sentence imposed on a seventeen-year-old offender because it constituted “the functional equivalent” of LWOP and did not offer “some meaningful opportunity to obtain release”); *People v. Mendez*, 114 Cal. Rptr. 3d 870, 882–83 (Cal. Ct. App. 2010) (reversing an eighty-four-year sentence imposed on juvenile offender after finding that it did not offer a meaningful opportunity for release because it exceeded the expected remainder of his life); *People v. J.I.A.*, 127 Cal. Rptr. 3d 141, 144, 149 (Cal. Ct. App. 2011) (finding juvenile non-homicide offender’s 56.5-year sentence unconstitutional because the offender was ineligible for parole until nearly his expected time of death), *vacated and transferred for reconsideration*, 287 P.3d 70 (Cal. 2012); *People v. Nunez*, 125 Cal. Rptr. 3d 616, 621–24 (Cal. Ct. App. 2011) (holding unconstitutional a sentence imposed on a juvenile non-homicide offender which precluded consideration for parole for 175 years); *United States v. Mathurin*, No. 09-21075-Cr, 2011 WL 2580775, at *3, *6 (S.D. Fla. June 29, 2011) (finding unconstitutional a 307-year aggregate sentence, resentencing the offender to forty-one years, and making him eligible for release at age fifty-three), *rev’d on other grounds*, 690 F.3d 1236 (11th Cir. 2012); *People v. Caballero*, 282 P.3d 291, 295–96 (Cal. 2012); *Adams v. State*, No. 1D11-3225, 2012 WL 3193932, at *1–2 (Fla. Dist. Ct. App. Aug. 8, 2012) (reversing a sixty-year sentence imposed on a sixteen-year and ten-month-old offender after relying on vital statistics data to find that offender’s earliest possible release date, at nearly seventy-six years of age, was beyond his life expectancy).

¹⁶⁷ *Mendez*, 114 Cal. Rptr. 3d at 873.

¹⁶⁸ *Id.* at 883.

¹⁶⁹ *Henry v. Florida*, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012) (“At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? . . . Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria?”), *review granted*, 107 So. 3d 405 (Fla. 2012). Some courts have entertained this type of sentencing analysis by relying on estimated life spans published by the Center for Disease Control. *Adams*, 2011 WL 3193932, at *2 (relying on vital statistics data to find that offender’s earliest possible release date, at nearly seventy-six years of age, was beyond his life expectancy); *Floyd*, 87 So. 3d at 45–47 (reversing an eighty-year sentence imposed on a seventeen-year-old offender because it was “the functional equivalent” of LWOP and did not offer “some meaningful opportunity to obtain release”); *People v. Bryant*, No. C068481, 2012 WL 2389450, at *7 (Cal. Ct. App. June 26, 2012) (affirming juvenile non-homicide offender’s sentence after finding that his eligibility for parole fifteen years prior to the estimated end of his life was a “meaningful opportunity” to be released); *Mendez*, 114 Cal. Rptr. 3d at 882–83 (reversing an eighty-four-year sentence imposed on juvenile offender after finding that it did not offer a meaningful opportunity for release because it exceeded the expected remainder of his life); *J.I.A.*, 127 Cal. Rptr. 3d at 144, 149 (finding juvenile non-homicide offender’s 56.5 year sentence unconstitutional because the offender was ineligible for parole until nearly his expected time of death).

¹⁷⁰ *See J.I.A.*, 127 Cal. Rptr. 3d at 149 (finding juvenile non-homicide offender’s 56.5-year sentence unconstitutional because the offender was “not eligible for parole until about the time he [was] expected to die.”) (emphasis in original).

to determine a constitutionally permissible length of sentence.¹⁷¹

Even when the prohibition of *Graham* is read to require that an offender be afforded an opportunity for parole, there is no requirement that a state ever actually approve parole for any offender, regardless of the offender's "demonstrated maturity and rehabilitation."¹⁷² In precluding the sentencing court from determining at the outset that a juvenile will never be fit to reenter society,¹⁷³ the *Graham* decision does nothing more than shift the responsibility for making the determination of an offender's fitness to the state's department of prisons, an executive agency. Thus, the determination of whether an individual offender will ever be released is now frequently within the sole discretion of the state's executive branch—the same branch that prosecuted the offender and previously would have sought a LWOP sentence.¹⁷⁴ Additionally, the *Graham* decision defers entirely to the states to determine whether an offender has made a sufficient showing of maturity and rehabilitation as to be approved for release.¹⁷⁵ Nothing prevents a state from setting the offender's burden of showing rehabilitation and fitness to reenter society impossibly high. Further, a state is free to decide at the time of sentencing that parole will never be granted regardless of how compelling the offender's later showing of rehabilitation and maturity may be.

The categorical prohibition leaves teenage non-homicide offenders facing starkly different sentencing based solely on a day, or even an hour, difference in birthdates.¹⁷⁶ If an offender commits a non-homicide crime moments before his eighteenth birthday, a sentence of LWOP is strictly prohibited.¹⁷⁷ Aggravating factors such as repeat offenses, lack of remorse, or particularly heinous acts, can only be considered to the extent that they maximize a sentence up to, but not including, a LWOP sentence.¹⁷⁸

¹⁷¹ See *Guzman v. State*, 110 So. 3d 480, 483 (Fla. Dist. Ct. App. 2013) ("We should not burden our trial courts by directing them to function as actuaries in determining each individual defendant's particularized life expectancy and thereupon craft a sentence which does not run afoul of *Graham*.").

We reject the notion that an individual's life expectancy should be used, or was intended by the Legislature to be used, to mark the longest term which a particular defendant should serve. Any sentence, no matter how short, may eventually extend beyond the life of a prisoner. Mortality and life expectancy are irrelevant to limitations on the terms of incarceration set by the Legislature for criminal misconduct.

.....

Although a sentence of 125 years imprisonment presumptively exceeds the life expectancy of the defendant, such a sentence should be considered, in essence, a life sentence.

Alvarez v. State, 358 So. 2d 10, 12 (Fla. 1978).

¹⁷² *Graham v. Florida*, 560 U.S. 48, 75 (2011).

¹⁷³ *Id.* at 82.

¹⁷⁴ Parole and prosecutorial authorities are both branches of the state executive branch.

¹⁷⁵ *Graham*, 560 U.S. at 74.

¹⁷⁶ *Id.* at 76–77.

¹⁷⁷ *Id.* at 74–75.

¹⁷⁸ See *id.* at 94–95 (Roberts, C.J., concurring).

However, if the same offender waits until the clock strikes twelve, marking the offender's eighteenth birthday, not only does a LWOP sentence become available, it can even be made mandatory.¹⁷⁹ The moment an offender turns eighteen years old, a mandatory LWOP sentence is permissible, precluding any consideration of individual mitigating factors.¹⁸⁰ Such minute differences in chronological age provide an insufficient basis for imposing such starkly different punishments.

The prohibition still leaves juvenile non-homicide offenders facing lengthy prison sentences beginning at a crucial stage of psychological, moral, and social development and continuing well into adulthood.¹⁸¹ As the Court explained in *Graham*, juveniles are more susceptible to peer pressure and negative influences.¹⁸² These offenders, who will serve lengthy term-of-years sentences in adult prisons, are unlikely to successfully develop into mature, rehabilitated adults.¹⁸³ Although these juvenile offenders may have access to rehabilitation programs while in prison, such as GED completion, drug treatment, job skills, and psychological services,¹⁸⁴ spending decades behind bars surrounded by career, violent offenders is not an environment amenable to rehabilitating violent juvenile offenders into responsible adults able to reintegrate into society. Further, should a juvenile non-homicide offender eventually attain release, a successful, crime-free reintegration into society is unlikely.¹⁸⁵ After a decades-long prison sentence beginning during adolescence, the offender's family ties will be strained at best. The offender's parents are likely to either be in ill-health due to advanced age or deceased, and relationships with siblings will likely be nonexistent. As a late-middle-aged, recently-released felon with no employment history, job prospects will be extremely limited. Even basic life skills will remain undeveloped. It is unreasonable to expect an offender continuously incarcerated from his teens until late in life to adjust, not only to the demands of independent adult life, but also to the additional hindrances and stigmas associated with having served an extended prison sentence. Worse yet, there is a strong likelihood that the difficulties these offenders will face upon reentering society will factor into the state parole board's decision as to whether to release an offender.

¹⁷⁹ *Id.* at 74–75 (majority opinion).

¹⁸⁰ *Id.*

¹⁸¹ Maroney, *supra* note 106, at 262. Imprisonment, especially with adult offenders, “can distort juveniles’ growth at a critical juncture in brain development.” *Id.* Throughout adolescence, “the individual undergoes major changes in physiological, social, emotional, and cognitive functioning” Baird, *supra* note 102, at 326.

¹⁸² *Graham*, 560 U.S. at 68.

¹⁸³ *See id.* at 74; *see also* Maroney, *supra* note 106, at 261–62.

¹⁸⁴ *See Graham*, 560 U.S. at 74, 79 (explaining that some prisons do not offer rehabilitation programs to offenders who are not eligible for parole).

¹⁸⁵ *See* STATE OF FLA. DEP’T OF CORR., *supra* note 82, at 11; John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 112 (2010) (concluding that harsh prison sentences may increase the likelihood of an offender committing another crime upon release).

Despite the Supreme Court's desire to protect juveniles from the harshest of sentences and to ensure them a "meaningful opportunity for release," the *Graham* decision still leaves juvenile non-homicide offenders vulnerable to imprisonment for the remainder of their natural lives without any chance of being released.¹⁸⁶

IV. CONCLUSION

The categorical prohibition of LWOP sentences for juvenile non-homicide offenders, as set forth in *Graham*, inaccurately and arbitrarily assigns offender culpability. Although the Supreme Court did not consider the potential applicability of a case-by-case proportionality analysis in the context of juvenile non-homicide sentencing, an individualized sentencing determination would better address the Court's concerns. A modified version of the Court's disproportionality analysis can integrate the generally lower culpability of juvenile offenders. It can also adjust the severity of the sentence imposed on any given offender according to the severity of the offense.

A sentencing court should retain its discretion when sentencing juvenile non-homicide offenders. The sentencing judge is able to interact with the offender, hear the testimony of victims and family members, and assess the credibility of any evidence of aggravating or mitigating factors. The sentencing judge should begin the sentencing determination in a case involving a juvenile non-homicide offender with a rebuttable presumption that LWOP should not be imposed. A general presumption against a LWOP sentence for juveniles will account for juveniles' generally lessened culpability. The younger the juvenile, the stronger the presumption should be. However, any individualized evidence of advanced or abnormal social, intellectual, analytical, or psychosocial development should be considered and applied in assigning a greater or lessened level of offender culpability.

The court should still take into account the presumptively lower gravity of the non-homicide offense. However, if the offender did intend to take a life but was merely unsuccessful in the attempt, the court should assign a greater culpability to the offender and factor the offender's intent into the rebuttal of the presumption.

Sentencing courts should be required to articulate aggravating factors to support imposition of LWOP on juvenile non-homicide offenders and, when imposed, these sentences should be subject to stricter scrutiny on appeal. To prevent sentencing courts from imposing LWOP without applying the presumption, a requirement of written findings of fact relevant to aggravating factors should apply. Repeated offenses within short periods

¹⁸⁶ See *Graham*, 560 U.S. at 82.

of time, multiple convictions for violent offenses, and commission of offenses while already subject to criminal sanctions should be considered when deciding whether the presumption has been rebutted. Evidence of escalating criminality, both in terms of frequency and gravity, should weigh in favor of a LWOP sentence. On appeal, a reviewing court should assess the sentencing court's factual findings of aggravating and mitigating factors under a *de novo* review. Appellate courts should ensure that sufficient evidence of aggravating factors supports a rebuttal of the presumption against LWOP. A case-by-case proportionality analysis will better incorporate the circumstances of individual crimes as well as the differing levels of culpability among juvenile offenders. A case-by-case proportionality analysis coupled with a strong presumption against LWOP for juvenile non-homicide offenders would better effectuate the Supreme Court's goal of preventing unnecessarily harsh punishments for juvenile non-homicide offenders. It would prohibit excessively harsh sentences for juveniles who generally are less culpable, but would also allow for sufficiently severe sentences in those cases where the offender's conduct is extremely grave and evidence of greater culpability is adequately developed.