No. 2022-2023

IN THE

Supreme Court of the United States

WILLIAM DENOLF, JR.

Petitioner

v.

THE STATE OF OLYMPUS

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OLYMPUS

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the warrantless use of a drone equipped with optical sensors violated the Fourth Amendment to the United States Constitution?
2. Whether the sentence of life in prison with the possibility of parole only after the first fifty years for a non-homicide offense imposed on Petitioner violates the Eighth Amendment to the United States Constitution?

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

The following facts have been stipulated by both parties. On March 17, 2019, William DeNolf, Jr. was arrested after law enforcement used an advanced stealth drone to observe him beating his ex-girlfriend inside a motor home. *Record*, at 2-5. The motor home was owned by DeNolf, Jr.'s stepfather, Chester Comerford and was stationed in a clearing approximately 150 yards from nearest road. *Id.* at 2. Surrounding the motor home was a dense forest of tall pine trees that completely obscured it from view from the road and adjacent properties. *Id.* at 3. At the time of DeNolf, Jr.'s arrest, the home had been parked for nearly four years without moving. *Id*. It had four flat tires, and it lacked current registration and insurance. *Id*.

Police officers were surveilling the home because they suspected Comerford was using it to grow marijuana. *Id.* at 2. For the three months leading up to DeNolf, Jr.'s arrest, officers watched the property from a two-lane highway adjacent to the lot. *Id*. During that time, they observed Comerford and his friend Bobby Bronner visit the property. *Id.* at 3. The officers also believed that Comerford and Bronner had stayed the night at the property on several occasions. *Id.* At no point during the investigation did Comerford or Bronner attempt to repair the deflated tires on the motor home. However, shortly before DeNolf, Jr.'s arrest, officers learned that Comerford had applied for a new vehicle registration and license plate for the motor home. *Id*. It is unknown whether Comerford ever received either of those items.

After learning that Comerford had applied for new registration, the officers decided to rapidly complete their investigation. They obtained a drone called the STEALTH EAGLE 2020 as well as an operator, Agent Courtney Reanier, from the Olympus Drug Enforcement Agency. *Id*. The STEALTH EAGLE 2020 is based on technology developed by NASA and the United States Department of Defense and is considered the quietest drone ever made. *Id*. It is primarily

used by military units and law enforcement and costs $24,995. *Id*. at 4. The operator, Agent Reanier, is an expert in drone surveillance and was part of an armed forces special operations group in Iraq. *Id.* at 3.

On March 17, 2019, Agent Reanier piloted the STEALTH EAGLE 2020 to an altitude of 375 feet above ground level, allowing her to peer over the forest of trees surrounding the motor home. *Id.* at 4. She then used the drone's powerful optical zoom to look into the windows of the structure. *Id.* While doing so, she observed movement within the home and saw DeNolf, Jr. hitting another person with a stick. *Id.* At that point, she and two police officers ran to the motor home and arrested DeNolf, Jr. who was found strangling his ex-girlfriend. *Id.* at 5. While his ex-girlfriend, identified as Jane Doe, sustained serious injuries, she has since recovered. *Id.*

DeNolf, Jr. was convicted of attempted murder in the second degree and sentenced to life in prison with the possibility of parole only after a minimum of 50 years served. *Id*. At the time of his crime, DeNolf, Jr. was 15 years old. *Id*. at 1. Despite that, DeNolf, Jr. received a sentence more extreme than would have been issued in just about any other state. *Id.* at 8. The average life expectancy in the United States is 77-78 years. *Id.* at 6. However, life expectancy sharply declines once someone is incarcerated. *Id.* Here, both parties agree that while DeNolf, Jr. will be eligible for parole at age 65, he is expected to die before eligibility. *Id*. Thus, he is expected to die in prison without any opportunity for release.

DeNolf, Jr. has appealed his conviction and sentencing on the grounds that his Fourth and Eighth Amendment rights were violated. *Id.* at 9. Specifically, he challenges the warrantless use of a drone equipped with optical sensors to obtain evidence used in trial and his sentence of life in prison with the possibility of parole only after a minimum of 50 years served.

SUMMARY OF ARGUMENTS

The State of Olympus violated William DeNolf, Jr.'s Fourth Amendment rights by using an advanced stealth drone to spy on him inside his motor home. The state also violated Mr. DeNolf, Jr.'s Eighth Amendment rights by sentencing him to life with parole only after fifty years, a sentence that places parole eligibility outside of his life expectancy.

Under the Fourth Amendment, citizens are protected against unreasonable searches and seizures. In *Katz v. United States*, the Court clarified that this protection only exists when an individual has both a subjective and an objective expectation of privacy. Here, DeNolf, Jr. exhibited a subjective expectation of privacy by entering a motor home where he routinely went to get away from it all. This motor home was in the middle of a clearing, surrounded by a dense forest of trees, which completely obscured it from view of the nearest road and neighboring properties. Together, these facts show that DeNolf, Jr. intended to keep his actions private and had a subjective expectation of privacy.

DeNolf, Jr. also had an objective expectation of privacy because his motor home was just that: a home. Traditionally, homes receive heightened Fourth Amendment protections. The only question is whether DeNolf, Jr.'s RV should be treated as a home or a vehicle. Under *California v. Carney*, an RV's Fourth Amendment protections hinge on its use. The Court asks whether it is being used as a destination or a means of transportation. Here, DeNolf, Jr.'s RV was a destination. At the time of the search, the RV had been stationary for four years. It had four flat tires, and its registration and insurance were expired. Police officers knew that the owners stayed overnight at the RV. Unlike the RV in *Carney*, it was not parked on a public lot, and it was not mobile at the turn of an ignition key. Instead, it was tucked away on a private property and had

not moved since June 2015. These facts show that the RV was used as a home and that DeNolf, Jr. therefore had an objective expectation of privacy.

Given DeNolf, Jr.'s Fourth Amendment protections, the next question is whether the police conducted a search. In *Kyllo v. United States*, the Court ruled that observation using sense enhancing technology not in general public use constitutes a search. Here, the police's actions fall under *Kyllo* because the STEALTH EAGLE 2020 is a sense enhancing piece of technology that is not in general use. The STEALTH EAGLE 2020 enhances human sight with its 10x optical zoom camera with 4K streaming. It is also outside of general use, as its primary users are law enforcement, hunters, and paparazzi. It is not used by the average citizen. Unlike planes and helicopters, which were used in *California v. Ciraolo* and *Florida v. Riley*, drones like the STEALTH EAGLE 2020 are not used with sufficient regularity to constitute simple observation. They are not devices that the average citizen expects to find hovering around his property. Thus, the police's actions constitute a search in violation of the Fourth Amendment.

Under the Eighth Amendment, citizens are protected from cruel and unusual punishment. The Court determines the constitutionality of a sentence by consulting various categorical rules. These rules provide heightened protection to juveniles and those who commit non-homicide crimes. Juveniles receive enhanced protection because they tend to be immature, are susceptible to negative influences, and are more capable of reform than their adult counterparts. Non-homicide offenders enjoy greater protections because causing another's death is a uniquely severe and irrevocable act. Robbers and rapists differ from the murderer in a moral sense. Here, the appropriate rule is from *Graham v. Florida*.

Graham holds that juveniles who commit non-homicide crimes must be given a meaningful opportunity for release and cannot be sentenced to life without parole. Because of

their twice diminished moral culpability when compared to adult murderers, they must be given a chance to show that they have matured and rehabilitated. *Graham* applies to this case because DeNolf, Jr. was fifteen years old at the time of his offense and did not cause the death of another.

Under *Graham*, his sentence is unconstitutional because it places parole eligibility outside of his life expectancy. In *Graham*, the Court requires not just a remote chance of release. Juvenile, non-homicide offenders must receive a meaningful or realistic opportunity to show they have changed. A sentence that places parole eligibility outside of life expectancy denies juveniles that opportunity. As the California Supreme Court ruled in *People v. Caballero*, those sentences are the functional equivalent of life without parole. Like life without parole, sentences like DeNolf, Jr.'s irrevocably deprive juveniles of their basic liberties and deny them the hope of restoration.

Here, DeNolf, Jr.'s sentence is functionally life without parole because it denies him parole eligibility for the first fifty years served. This is problematic because statistics from the United States Sentencing Commission give him a life expectancy of thirty-nine years after incarceration. DeNolf, Jr. would have to live over a decade longer than expected to receive a chance for release. Thus, while DeNolf, Jr.'s sentence is not explicitly designated as life without parole, it serves the same function and is unconstitutional under *Graham*.

DeNolf, Jr.'s sentence is also unconstitutional because it pronounces him incorrigible. This violates the Court's ruling in *Graham* that incorrigibility is inconsistent with youth. While some juveniles may end up being incorrigible, the Court recognized the difficulty in identifying those juveniles, given that juveniles tend to reform. Thus, the Court prohibited states from declaring juveniles beyond rehabilitation. However, despite that, the trial court here has pronounced DeNolf, Jr. to be irredeemable. This finding poisons the well for any future parole

hearings DeNolf, Jr. may receive and shows that the state has already decided he is beyond redemption. Given the ruling from *Graham*, this finding is unconstitutional and further erodes DeNolf, Jr.'s ability to demonstrate reform.

We ask this Court to reverse the ruling of the Supreme Court of Olympus and to find DeNolf, Jr.'s conviction and sentencing unconstitutional.

ARGUMENT

I. THE WARRANTLESS USE OF THE STEALTH EAGLE 2020 TO OBSERVE MR. DENOLF, JR. IN A RECREATIONAL VEHICLE CONSTITUTES A SEARCH IN VIOLATION OF THE FOURTH AMENDMENT

The Constitution has long upheld police searches for the purposes of gathering evidence, so long as they have a warrant issued by a magistrate, based upon probable cause. Warrantless searches are presumably unreasonable. The Olympus police conducted such a warrantless search with a $24,000 drone, equipped with 10x optical zoom and 4k streaming resolution. *Record*, at 18. The Supreme Court of Olympus upheld this search as Constitution. The Petitioner asks the Supreme Court of the United States to reverse that decision and hold that the warrantless use of a drone to look into the windows of a recreational vehicle violates the Fourth Amendment. To this end, the Petitioner presents two arguments: first, in the RV, Mr. DeNolf Jr. had a subjective expectation of privacy that society is prepared to recognize as reasonable; second, the police use of the STEALTH EAGLE 2020 violated this court's standards for permissible observation under *Kyllo v. United States, 533 U.S. 27* (2001).

A. Mr. DeNolf, Jr. had a reasonable expectation of privacy in the RV.

In *Katz v. United States*, Justice Harlan's concurrence provided the connection between the "reasonableness" criterion of searches in the Fourth Amendment with questions of privacy that lay in blurry lines. The reasonableness that the drafters of the Constitution were concerned with was not confined to areas of property exclusively; rather, the reasonableness meant that there was some sort of expectation involved. The common meaning of the term "reasonable" is simply that which one would expect to occur. In regard to the Fourth Amendment, then, if a

search aligns with the expectations of normalcy, society would define such a search as "reasonable." The question becomes one of expectation, which Justice Harlan pinpointed.

There are two equally important expectations at play in questions of reasonableness under the Fourth Amendment. The first is the expectation of the person claiming the privacy right. If they do not hold an expectation privacy in their actions, how can they claim such an expectation is guaranteed to them by the Constitution? Yet even if they believed their actions were protected under the Constitution, there must be some sort of objective check against the wildly overinclusive assertions of privacy that any criminal could claim. This is where Justice Harlan specified that an expectation of privacy must be one that society is prepared to recognize as reasonable. Both the subjective and objective expectations of privacy are equally as important in establishing the reasonableness of a claim to the Fourth Amendment's protection.

1. Mr. DeNolf, Jr. had a reasonable subjective expectation of privacy in the RV since he saw it as private.

Starting with the former, the subjective expectation of privacy has roots far back in English common law. The idea that a man's home is his castle, the place where he has the right to be left alone, has long been protected by the Constitutions and the precedent upon which it was built. "At the Amendment's 'very core' stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" *Silverman v. United States, 365 U.S. 505, 511 (1961), in Florida v. Jardines, 569 U.S. 1, 6 (2013)*. Although the Fourth Amendment is not exclusive to homes (for example, Mr. Katz had a reasonable expectation of privacy in a public phonebooth), this court does recognize that there are heightened expectations of privacy inside a home, see *California v. Carney, 471 U.S. 386 (1985)*. These are the

expectations which the Petitioner claims. This means that the court must determine if the recreational vehicle qualifies as a home for DeNolf Jr.

First, to address a few primary concerns that the court may have, Mr. DeNolf Jr.'s status as a minor does not inhibit his privacy rights. *Bumper v. North Carolina, 391 U.S. 543 (1968), in Minnesota v. Carter, 525 U.S. 83 (1998)* held that a grandson had an equal right to privacy in his grandmother's house as she, the owner of the house, would have herself. This ruling indicates that minors can claim the protections of the homes of their adult family members, even though their names are not on the deeds of the houses. Naturally, this would make sense, as the opposite ruling would prohibit minors from ever having Fourth Amendment home protections. Such a key part of the Fourth Amendment being inaccessible to a substantial portion of the population of American citizens would be an affront to the intent of the Amendment and considered unreasonable by those delegates at the Constitutional convention (some of whom, like Alexander Hamilton, had already begun leading the nation as a youth himself). Even if the court found this ruling unextendible to Mr. DeNolf Jr.'s situation, Mr. DeNolf Jr. can still claim the expectation of privacy in the recreational vehicle just as Mr. Katz claimed privacy in a public phone booth – although he did not own the structure into which he retreated, he nonetheless considered himself the temporary occupant of the safety within its walls. This is precisely what Mr. DeNolf Jr. did as well. Both the *Bumper* and the *Katz* rulings demonstrate that, for Fourth Amendment purposes, what matters is not the ownership of the structure, but the expectation that one can reasonably claim when entering into its sanctuary.

The court was clear in *Katz* that a subjective expectation of privacy is demonstrated in that which someone seeks to preserve as private, rather than what they knowingly expose to the public. Mr. DeNolf Jr. sought to preserve his activities in the recreational vehicle as private. In

retreating to the RV, he testified that he liked to go there to "be left alone." *Record*, at 3. He assumed that he would be left alone due to the nature of the area in which the RV rested. The Commerford Property consisted of twenty-five heavily wooded acres. *Id*. The trees completely obscured the RV from view from the nearest road and the neighboring properties. *Id*. The RV rested more than a football field's length away from the nearest road. *Record*, at 2. These factors gave Mr. DeNolf Jr. the expectation that he would not be disturbed by another human being in such a densely wooded, secluded area. Mr. DeNolf Jr. subjectively viewed this RV as a place where he could go to be left alone. It was a place where he expected privacy. With this first prong of the *Katz* test satisfied, the second prong may now be considered: his subjective expectation of privacy is one that society is prepared to recognize as reasonable.

2. Society is prepared to recognize Mr. DeNolf, Jr.'s expectation of privacy as reasonable because Mr. DeNolf, Jr. used the RV as a destination, affording it the privacy expectations of a home and removing it from the vehicle exception.

The primary objection raised by the Respondent is that the recreational vehicle, being in name a vehicle, is not a home but falls under the vehicle exception. A recreational vehicle is a type of mobile home: a transportable temporary living space used for travel and camping. In *California v. Carney*, the court dealt with this question of whether a mobile home qualifies as a home or a vehicle for Fourth Amendment purposes, since it displays qualities of both. In coming to its conclusion, the court asked whether the mobile home was a destination or a means of transportation. Homes or offices, the court held, are destinations, while vehicles like cars or trucks are means of transportation of passengers and cargo. The analysis turned on the use of the vehicle in question. The court would ask questions such as, "would an objective observer conclude that the mobile home was being used as a residence or as a vehicle?"

When analyzing the application of the vehicle exception, the court considered the purpose of the vehicle exception from *Carroll v. United States, 267 U.S. 132 (1925)* in the first place: to allow police officers to search a vehicle for evidence that could be quickly moved or destroyed due to the mobile nature of a vehicle. Justice Stewart in his dissent in that case noted that the purpose of that exception was invoked in situations not present here, citing a similar ruling in *Coolidge v. New Hampshire, 403 U.S. 443 (1971)*. There, the plurality denied the automobile exception's applicability for a vehicle seized while parked in a the driveway of a house, towed to a police compound, and searched later:

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States* – no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized vehicle. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant' and the 'automobile exception' despite its label, is simply irrelevant." (Id., at 461-462 (opinion of Stewart, J., joined by Douglas, Brennan, and Marshall, JJ.)

As Justice Stewart observed, the court's rulings are clear that inherent mobility alone does not create enough exigency to justify a warrantless search. The dissent cites several examples to this rule: *United States v. Chadwick, 433 U.S. 1 (1977), Coolidge v. New Hampshire, 403 U.S. 443 (1971), United States v. Montgomery, 620 F.2d 753, 760 (CA10) ("camper"),* cert. denied, *449 U.S. 882 (1980); United States v. Clark, 559 F.2d 420, 423-425 (CA5)* ("camper pick-up truck"), cert. denied, *434 U.S. 969 (1977); United States v. Lovenguth,*

514 F.2d 96, 97 (CA9 1975) ("pick up with . . . camper top"); *United States v. Cusanelli, 472 F.2d 1204, 1206 (CA6)* (per curiam) (two camper trucks), cert. denied, 412 U.S. 953 (1973); *United States v. Miller, 460 F.2d 582, 585-586 (CA10 1972)* ("motor home"); *United States v. Rodgers, 442 F.2d 902, 904 (CA5 1971)* ("camper truck"); *State v. Million, 120 Ariz. 10, 15-16, 583 P. 2d 897, 902-903 (1978)* ("motor home"); *State v. Sardo, 112 Ariz. 509, 513-514, 543 P. 2d 1138, 1142 (1975)* ("motor home").

The court was clear in *Carney, at 395* that, when the vehicle exception has been applied, it turned not on the uses to which a vehicle *might* be put, but to the ready mobility of the vehicle in a setting which objectively indicates that it is being used for transportation. When a vehicle is being used on highways, or is capable of such but is parked in a place not usually used for even temporary residential purposes, only then does the vehicle even become a possibility. In that case, the court considered a mobile home parked in a public parking lot. The public nature of the parking lot allowed the court to even consider the vehicle exception. At that point, the court asked whether "the vehicle is obviously readily mobile *by the turn of an ignition key*, if not actually moving (emphasis added)." The analysis turns on the *use* of the vehicle in question, *not* its worthiness to drive on public roads.

Here, the RV was being used as a destination, not a means of transportation. It had not been moved since June 2015, all four tires were flat, lacked current registration and insurance. *Record*, at 3. There was no indication in the record that the RV would be moved from that location where the owners sought to be left alone. The RV was being used as a secondary home, not a means of transportation. This satisfies the *Katz* test for a reasonable, objective expectation of privacy.

B. Police use of the STEALTH EAGLE 2020 constitutes a search.

Knowing that there is an expectation of privacy in the RV, the court must now consider whether the observations conducted with the STEALTH EAGLE 2020 constituted a search. As a general rule, *Kyllo* categorically prohibits the police from using sense-enhancing technology to observe a home, gathering information that could not or would not commonly be observed with the naked eye by the general public. The cases in the record have never upheld sense-enhancing technology, even when the sense that is enhanced is sight. Even something as simple as binoculars have never been protected by the court. Binoculars are only mentioned in *Florida v. Jardines,* and each mention uses them in a hypothetical scenario of an unconstitutional search, both in footnote 3 of the majority opinion and in Justice Kagan's concurrence. The Respondent analogizes this to aerial observation cases in which the court allowed police officers to suspend themselves over the curtilage of a home in an aircraft and look down with their naked eyes. It would take a substantial connection to liken naked eye observation with the 10x optical zoom and 4k streaming quality used here, yet even if the Court found the zoom feature to be a nonissue, the differences between the aerial observation cases in the record and the facts here are enough to prohibit the rulings from the former to be applied here.

Drones are significantly different from planes in the expectations of society. In *Florida v. Riley*, *488 U.S. 445 (1989)*, Justice O'Connor's concurrence used the phrases of "sufficient regularity" contrasted with an occurrence that is "sufficiently rare" to differentiate expectations of privacy from aerial searches. This is the distinction the Petitioner asks the court to adopt. In *California v. Ciraolo, 476 U.S. 207 (1986)* and *Florida v. Riley*, this court upheld the observations of police officers from airplanes and helicopters, respectively. The court noted these two aircrafts were "routine" forms of transportation. They were in public use often enough that

society would not expect a passenger to shield their eyes when they flew over someone's backyard. But such a ruling must not extend to a drone. As the Michigan Court of Appeals, which ruled last year on a case of drone observations much like the one at issue here, "unlike fixed wing aircraft and helicopters which "routinely fly over a person's property," drones are equipped with "high power cameras" and do not operate at the same altitudes as airplanes and helicopters" *Long Lake Twp. v. Maxon, 336 Mich. App. 521, 970 N.W.2d 893, 526 (2021)*. The drone here utilized its 10x optical zoom, looked through an unobstructed window, and still "could not see with perfect clarity." *Record*, at 4. It could only make out what "looked like" the tops of plants under lamps, and two individuals' torsos. Those observations were made with tenfold zoom and 4k streaming clarity from 375 feet in the air; it is improbable at best that a police officer in a helicopter hovering above the trees could have seen anything at all with his naked eye. *Record*, at 18. The enhanced capability allows the police to see details that otherwise could not have been known, an ability that is strictly and expressly prohibited in *Kyllo*.

The court in *Kyllo* found that the heat sensors were not in general public use, so the public could not reasonably expect the heat radiating from their home to be detected. Likewise, the court ruled in *Jardines* that a drug sniffing dog was not a regular part of public life. On the other hand, the court allowed the police to use helicopters and airplanes since they were routine forms of transportation. Here, the drone is not a regular part of public life, is virtually unavailable to the public due to its cost, and is only used by "some commercial enterprises engaged in the surveillance and property protection industries and by hunters, wildlife enthusiasts, and some paparazzi." *Record*, at 4. It is, in Justice O'Connor's words, "sufficiently rare" that society would not expect to be observed by it. This places the use of the drone in the

category of technology that requires a warrant to be issued by a magistrate before it may be constitutionally utilized.

Mr. DeNolf Jr. had a reasonable expectation of privacy in his family's RV because he used it as a destination, not a means of transportation. This protects his actions within it as a home, not a vehicle. Without a warrant, the police used a drone with optical enhancement to view what Mr. DeNolf Jr. expected to be private. In doing so, the police officers violated the *Kyllo* standard and fell outside of the rulings of *Ciraolo* and *Riley*. Their observations constituted a search under the Fourth Amendment. To uphold the Constitution, the police needed a warrant for conducting their search with the STEALTH EAGLE 2020. Since they did not obtain a warrant, this court ought to reverse the decision of the Olympus Supreme Court.

II. SENTENCING PETITIONER TO LIFE WITH PAROLE ONLY AFTER FIFTY YEARS IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

The Eighth Amendment of the United States Constitution prohibits the government from imposing "cruel and unusual punishment." This guarantee prohibits certain types of barbaric punishment. *Solem v. Helm*, 463 U.S. 277, 284 (1983). However, it also protects citizens from punishments that are grossly disproportionate. *Id.* Here, Petitioner's sentence is unconstitutional under the proportionality component of the Eighth Amendment.

A sentence of life in prison without the possibility of parole for the first fifty years served violates the Eighth Amendment because it denies Petitioner a meaningful opportunity of release. In *Graham v. Florida*, 560 U.S. 48, 82 (2010), the Court ruled: "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it

must provide him or her with some realistic opportunity to obtain release before the end of that term."

The *Graham* rule applies because DeNolf, Jr. is a juvenile who committed a non-homicide offense. His sentence is unconstitutional under *Graham* because it denies him an opportunity for parole within life expectancy. His sentence is also unconstitutional because it pronounces him incorrigible.

A. The categorical rule from *Graham* controls because Petitioner is a juvenile, non-homicide offender.

In Eighth Amendment cases, the Court must first determine the appropriate categorical rule. While the Court used a case-by-case approach in early Eighth Amendment cases like *Solem v. Helm*, 463 U.S. 277 (1983) and *Harmelin v. Michigan*, 501 U.S. 957 (1991), it has shifted to a categorical approach in recent decades. Under this approach, juveniles are treated differently than adults, and non-homicide offenders are treated differently than those who have caused the death of another.

The Court treats juveniles differently than adults because juveniles have three distinct characteristics. First, they tend to demonstrate a lack of maturity and an underdeveloped sense of responsibility that is understandable given their age. *Roper v. Simmons*, 543 U.S. 551, 569 (2005), citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982). This leads them to make poor decisions that they will not make as adults. Second, juveniles are more susceptible to negative influences and outside pressures. *Id*. Thus, their actions reflect their current situations more than their personal characters. And third, juveniles' characteristics are less fixed and can change. *Roper* 543 U.S., at 570. This means that juveniles have greater prospects of rehabilitation than their adult counterparts.

Together, these "differences render suspect any conclusion that a juvenile falls among the worst offenders," *Roper* 543 U.S., at 570, and mean that "their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.* citing *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). Given this diminished culpability, juveniles are protected from the most severe punishments. See *Roper v. Simmons*, 543 U.S. 551 (2005) (ruling that juveniles cannot be sentenced to the death penalty); *Graham v. Florida*, 560 U.S. 48 (2010) (ruling that juveniles who have not committed homicide must receive a meaningful opportunity for release); and *Miller v. Alabama*, 567 U.S. 460 (2012) (ruling that juveniles who have committed homicide cannot receive a mandatory life without parole sentence).

Non-homicide offenders also receive enhanced Eighth Amendment protections when compared to those who have caused another's death. In *Graham*, the Court ruled that while serious non-homicide crimes "may be devastating in their harm," they are distinct from murder in their "severity and irrevocability." Citing *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion). There is something unique about taking another's life that warrants harsher punishment than any non-homicide crime. The rapist and robber are different from the murderer in a "moral sense." *Graham*, 560 U.S., at 69, citing *Enmund v. Florida*, 458 U.S. 782, 797 (1982). Therefore, the Court gives categorical protections to non-homicide offenders. See *Coker v. Georgia*, 433 U.S. 584 (1977) as cited in *Graham* (ruling that rapists cannot be sentenced to death if they have not taken a human life); *Kennedy v. Louisiana*, 554 U.S. 407 (2008), as cited in *Graham* (ruling that *Coker* applies even in cases involving the rape of a child).

In *Graham*, the Court found that special protections apply in cases when a defendant is *both* a juvenile *and* a non-homicide offender. It ruled that juvenile, non-homicide offenders have

a "twice diminished moral culpability" when compared to adults who commit murder. *Graham*, 560 U.S. at 69. Because of that, juveniles who commit a non-homicide offense must receive a meaningful opportunity for release. They must be given a chance to demonstrate rehabilitation and reform.

Here, *Graham* controls because DeNolf, Jr. is a juvenile, non-homicide offender. At the time of his offense, DeNolf, Jr. was fifteen years old. *Record*, at 1. That fact alone entitles him to protections as a juvenile. On top of that, no one died because of his actions. *Record*, at 5. Jane Doe has recovered from her injuries. That makes him a non-homicide offender. Thus, DeNolf, Jr. is protected under *Graham* and must receive a meaningful opportunity for release.

B. Petitioner's sentence violates the *Graham* rule because it denies him a meaningful opportunity for release.

DeNolf, Jr.'s sentence is unconstitutional under *Graham* because it places parole eligibility outside his life expectancy. Under his current sentence, DeNolf, Jr. will not receive a parole hearing for fifty years. However, United States Sentencing Commission data places his life expectancy at thirty-nine years after incarceration. *Record*, at 6. That means that DeNolf, Jr. is expected to die eleven years before he is eligible for parole.

This violates *Graham*'s categorical rule because it denies DeNolf, Jr. a *meaningful* opportunity for release. Under *Graham*, the mere possibility of release is not enough to make a sentence constitutional. In *Graham*, the Petitioner, Terrance Graham, was given the "remote possibility" of executive clemency. *Graham* 560 U.S., at 70. However, the Court found that was insufficient opportunity for release under the Eighth Amendment. To be constitutional, a sentence must give juvenile, non-homicide offenders a "meaningful" or "realistic" chance to demonstrate rehabilitation and to return to society. *Graham* 560 U.S., at 79, 82.

The Court has never drawn a hard line as to what constitutes a meaningful opportunity for release. *Graham* dealt with a sentence of life without the possibility of parole, which clearly denied a meaningful opportunity for release. Thus, the Court never considered whether sentences of life with parole would grant a meaningful opportunity. However, the Supreme Court of California considered the issue in *People v. Caballero*, 55 Cal. 4th 262 (Cal. 2012) and found that sentences that place parole eligibility outside of life expectancy are unconstitutional. While not binding, the reasoning from *Caballero* is persuasive and is the interpretation of *Graham* that the Court should take here.

In *People v. Caballero*, the California Supreme Court considered a 110-year-to-life sentence given to a juvenile convicted of attempted murder. There, the California Supreme Court noted that while a 110-year-to-life sentence was not an "explicitly designated life without parole sentence," it still failed to provide a meaningful opportunity to demonstrate growth and maturity. *Id.* Because the sentence placed parole eligibility outside of the juvenile's life expectancy, it was the "functional equivalent" of life without parole. *Id*. Thus, the California Supreme Court found that a 110-year-to-life sentence violated the spirit of *Graham*.

The Court should adopt the ruling from *Caballero* because it is the natural reading of *Graham* and because it best protects juveniles from excessively harsh sentences. First, requiring a parole hearing within life expectancy is the natural reading of *Graham*. In *Graham*, the Court requires that non-homicide offenders be given a chance to "demonstrate that the bad acts… committed as a teenager are not representative" of their true character. *Graham*, 560 U.S. at 79. Unless they are given a parole hearing within their life expectancy, juvenile, non-homicide offenders will not be able to prove that they have rehabilitated. In addition, *Graham* found that the problem with life without parole was that it denied juveniles any "hope of restoration" and

was an "irrevocable" forfeiture of their basic liberties. *Graham*, 560 U.S. at 69-70. Denying juveniles an opportunity for parole within their life expectancy has the same effect. Absent a statistical anomaly, a juvenile expected to die before parole eligibility will experience an irrevocable forfeiture of basic liberties. In addition, if juveniles are expected to die in prison, they have been denied hope of restoration. Thus, the life expectancy line from *Caballero* is the most natural reading of *Graham*.

Second, drawing the line at life expectancy would best protect juveniles from excessively harsh punishments. *Roper*, *Graham*, and *Miller* all emphasize the importance of protecting youths from severe sentences, and in *Roper*, the Court ruled that it is better to err on the side of protecting juveniles. *Roper*, 543 U.S. at 572-573. The Court's priority has always been to protect juveniles, even if that means some juveniles receive less severe punishments than they deserve. Drawing a line at life expectancy would be consistent with that approach and ensure that no juvenile is unjustly imprisoned without an opportunity for release.

The Respondents may argue that adopting this rule would unconstitutionally infringe on state sentencing powers. After all, *Jones v. Mississippi*, 141 S. Ct. 1307, 1321 (2021) held that the "states, not the federal courts, make those broad moral and policy judgments" involved in criminal sentencing. However, requiring parole eligibility within life expectancy would not inhibit states' ability to keep criminals off their streets. As the Court noted in *Graham*, 560 U.S. 48, 75 (2010), guaranteeing juveniles a parole hearing is not the same as "[guaranteeing] eventual freedom." All it does is guarantee "some meaningful opportunity to obtain release *based on demonstrated maturity and rehabilitation*." *Id*. (emphasis added). A guaranteed parole hearing does not mean automatic release for DeNolf, Jr. at some point before the end of his life expectancy. If, at his parole hearing, DeNolf, Jr. cannot demonstrate that he has rehabilitated and

matured, the State of Olympus is not required to release him. All that a guaranteed parole hearing would require is that the state *reconsider* its initial sentence. Juveniles who "turn out to be irredeemable" may "remain behind bars for life." *Id*. at 74. States would only be barred from making that determination at the *outset* of a juvenile's sentence. Requiring a parole hearing within life expectancy would not improperly infringe on state sentencing powers.

Applying the life expectancy line here, the state has denied DeNolf, Jr. a meaningful opportunity for release. Neither party has challenged the United States Sentencing Commission data on the record, and that data shows that DeNolf, Jr. will not receive a parole hearing unless he lives over a decade past his life expectancy. *Record*, at 6. Under the life expectancy standard, DeNolf, Jr.'s sentence is eleven years away from being constitutional, which is why the Court should reverse the decision of the lower court.

C. Petitioner's sentence violates *Graham* because it comes with an unconstitutional finding of incorrigibility.

Even if DeNolf, Jr.'s sentence had provided parole eligibility within life expectancy, it is unconstitutional because it comes with a finding of incorrigibility attached to it. The record notes that Justice Fair in the trial court pronounced DeNolf, Jr. incorrigible as part of the sentencing hearing. *Record*, at 5. However, this finding is contrary to the Court's ruling in *Graham* and unconstitutionally erodes any opportunity for release.

In *Graham*, the Court found that "incorrigibility is inconsistent with youth." *Graham*, 560 U.S. at 73, citing *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. App. 1968). In doing so, the Court recognized what every parent already knows: that children tend to mature. That does not mean that every juvenile will reform. However, many do, and it is unconstitutional for a state to declare a juvenile to be incorrigible "at the outset." *Graham*, 560 at 73. As the

American Psychological Association noted in its *amicus* brief in *Miller* as cited in *State v. Sweet*, 879 N.W.2d 811, 829 (2016), determinations of incorrigibility are notoriously unreliable. Even trained professionals cannot predict which youths will mature. In one study, psychologists predicted future homicide offenders with a false positive rate of eighty-seven perfect, demonstrating the unreliability of incorrigibility findings. Thus, *Graham* barred states from declaring juveniles to be incorrigible.

Respondents may argue that findings of incorrigibility are permitted under *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). However, *Jones* is distinct because it dealt with juvenile murderers who demonstrated a greater depravity than the non-homicide offenders in *Graham* and here. In addition, *Jones* never endorsed those findings. To the contrary, *Jones* found that they are *not* required for life without parole sentences and that they are *inconsistent* with *Miller*. *Jones*, 593 U.S. at 1320. Thus, *Jones* did not allow states to declare juvenile, non-homicide offenders incorrigible. Those findings are still prohibited under *Graham*.

That finding matters because it poisons the well if DeNolf, Jr. ever receives a parole hearing. With a finding of incorrigibility on his record, DeNolf, Jr.'s chances of receiving parole are significantly diminished. The state has already made up its mind that DeNolf, Jr. is incapable of change. The Court should affirm its ruling from *Graham* by striking down this unreliable and unconstitutional finding of incorrigibility.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully Submitted,

Counsel for the Petitioner