No. 2022-2023

IN THE

Supreme Court of the United States

WILLIAM DENOLF, JR.

Petitioner

v.

STATE OF OLYMPUS

Respondent

On Writ of Certiorari to the
Supreme Court of the
State of Olympus

BRIEF FOR RESPONDENT

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 Petitioner's sentence of life in prison with the possibility of parole after fifty years for the crime of attempted murder violates the Eighth Amendment to the United States Constitution?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns challenges to Petitioner's 2019 conviction of and sentencing for attempted murder in the second degree. Petitioner challenges his conviction on the grounds that the warrantless use of a drone with optical sensors to surveil his conduct violates the Fourth Amendment to the U.S. Constitution. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . U.S. Const. amend. IV.

Federal Aviation Administration regulations "permit [drones] to fly at or below 400 feet [above ground level] in uncontrolled airspace, such as the airspace in the entire vicinity of the Comerford Property." *Record* at 4 n.2. Olympus state law prohibits civilians from flying drones over private land, but places no similar restrictions on the operation of drones over public airspace, as is concerned here. *Id.* at 17.

Petitioner further challenges his prison sentence on the grounds that it violates the Eighth Amendment to the U.S. Constitution. The Eighth Amendment states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. amend. VIII.

Petitioner was sentenced under a penological scheme established by Olympus Proposition 417. Proposition 417 sets out in relevant part:

> Non-adults who are convicted of second-degree murder or attempted murder can be punished in the State of Olympus to life with the possibility of parole after a minimum of

fifty years is served if a judge concludes that the offender is incorrigible. If the defendant is not incorrigible, the sentence shall be determined by the judge in accordance with applicable state sentencing guidelines provided that it not exceed 50 years and be no less than 15 years. *Id.* at 19.

STATEMENT OF THE CASE

I Task Force investigation

In early 2019, a task force composed of several Olympus law enforcement agencies began investigating Chester Comerford and Bobby Bronner on suspicion of drug trafficking. *Record* at 2. During its investigation, the Task Force learned that Comerford owned a "heavily-wooded property. . . in a rural area on the outskirts of the Knerr city limits." *Id.* Parked on the property was a large recreational vehicle. *Id.* While the RV's tires were flat, it "otherwise appeared in working order" and "could have been readily driven off the property" once the tires were inflated.

After learning from utility records that the Comerford Property's electricity usage was "abnormally high," the Task Force "began to concentrate on the Comerford Property as the possible site of the drug growing operation." *Id.* For nearly three months, the Task Force periodically observed the property from an immediately adjacent public highway. *Id.*

During this time, the Task Force noted frequent visits by Comerford and Bronner to the property via pickup truck. *Id.* at 3. On several occasions, law enforcement observed Comerford and/or Bronner spend the night at the property. *Id.* Petitioner William DeNolf, Jr., Comerford's 15-year-old stepson, later claimed that he liked to visit the RV to be "left alone." *Id.* Despite his assertion, the record does not note any visits by DeNolf to the property during law enforcement's three-month-long observation of the property prior to the day of his arrest.

II The attempted murder

As the investigation progressed, "the Task Force learned that Comerford had applied for a new vehicle registration and license plate for the RV." *Id.* Worried that Comerford and Bronner were preparing to imminently "move their operation," the Task Force liaised with the Olympus Drug

Enforcement Agency for a drone—the STEALTH EAGLE 2020—and a drone operator—Agent Courtney Reanier. *Id.*

On the morning of March 17, 2019, Agent Reanier launched the drone over state-owned land adjacent to the Comerford Property to examine the property for signs of drug trafficking. *Id.* at 4. Both parties stipulate that at all times, the drone remained above public land (where any member of the public could lawfully pilot a drone) and complied with "all applicable federal and state aviation laws and regulations." *Id.*

Using the drone's camera, Agent Reanier observed DeNolf and 15-year-old Jane Doe engaged in an animated argument inside the parked RV. *Id.* Shortly thereafter, a bloodied DeNolf was observed leaving the RV, "grabbing a heavy wooden stick," and re-entering the RV. *Id.* Agent Reanier "was able to observe the stick being used to hit the torso and legs" of Jane Doe. *Id.* To stop the assault, several members of law enforcement rushed onto the property, where they found DeNolf strangling Jane Doe, "who was bleeding profusely from her mouth and head" and had multiple broken limbs. *Id.* at 5. Police were able to subdue DeNolf and perform first aid on Doe. *Id.*

Jane Doe's injuries "required immediate medical attention, emergency surgery, and hospitalization," and ultimately left her permanently disfigured. *Id.* But for the timely intervention of law enforcement, Jane Doe "very likely would have died." *Id.*

III Sentencing

For his attack on Jane Doe, DeNolf was convicted by a jury of attempted murder in the second degree. As required by relevant Olympus law, DeNolf received an individualized sentencing proceeding. *Id.* at 5, 19. During this proceeding, evidence regarding DeNolf's past conduct was introduced. These included more than a dozen instances of violent conduct against classmates and a felony conviction for animal cruelty. *Id.* at 2. While serving a short sentence in a juvenile

correctional facility for the latter offense, DeNolf was involved in multiple fights in which he was "using a weapon and, according to his own statements and the testimony of the guards, he was, or appeared to be, intent on 'killing' his victims." *Id.*

The trial court considered, among other factors, DeNolf's youth, extensive history of violence, and the uniquely brutal nature of his crime against Jane Doe. *Id.* at 5. Judge D.R. Fair sentenced DeNolf to a term of life with the possibility of parole after 50 years. *Id.* DeNolf's sentence offers an opportunity for parole at age 65 and is less severe than any sentence given to an adult convicted of attempted murder in Olympus. *Id.* at 19.

Petitioner appealed his conviction, alleging that the drone-assisted observation of his conduct on the Comerford Property violated the Fourth Amendment. *Id.* at 9. He further challenged the constitutionality of his sentence under the Eighth Amendment. *Id.* at 1. The Olympus Supreme Court affirmed.

SUMMARY OF ARGUMENT

Petitioner's Fourth Amendment rights were not violated when the Task Force visually observed his conduct from public airspace. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. To determine whether the Fourth Amendment requires a warrant in a particular situation, the Court looks to whether the aggrieved individual has exhibited an expectation of privacy that society would recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

In the decades since *Katz* was decided, the Court has provided specific guidance regarding when an expectation of privacy can be deemed "objectively reasonable" by society. This case lies at the intersection of two lines of Fourth Amendment precedent. The first line considers whether an individual has a legitimate expectation of privacy in a particular location, depending on the individual's connection the location and the privacy that reasonably attaches to it. The other considers whether the actions of law enforcement are sufficiently intrusive as to constitute a search, regardless of the particular location at issue.

DeNolf has no legitimate expectation of privacy in the RV parked at the Comerford Property. First, the Court has recognized an exception to the Fourth Amendment's warrant requirement for automobiles. *See South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) (no warrant is required to search vehicles because their ready mobility "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible"). This exception applies in equal force to recreational vehicles. *See California v. Carney*, 471 U.S. 386, 393–394 (1985). Because the RV was readily mobile and its setting does not "objectively indicate" it is being

used as a residence, the vehicle exception forecloses any Fourth Amendment claim by DeNolf. *Id.* at 394.

Second, even if the Court does not apply the vehicle exception, DeNolf has no legitimate expectation of privacy simply because he was incidentally on a third party's property when surveillance occurred. *Minnesota v. Carter*, 525 U.S. 83 (1998); *Rakas v. Illinois*, 439 U.S. 128 (1978). Petitioner did not live at the Comerford Property. He did not own it. He did not stay overnight on any occasion. He had no exclusive right to exclude others from the property. These factors are what the Court has looked to in the past, and DeNolf cannot establish any of them. He merely happened to be "legitimately on the premises" when his conduct was incidentally observed by the Task Force. *Carter*, 525 U.S. at 90 (describing the standard for bringing Fourth Amendment claims that was "expressly repudiated" in *Rakas*).

DeNolf's familial relation to the owner of the property is also immaterial. In determining an individual's privacy on a third party's property, the Court looks not to abstract notions of familial ties, but instead to the individual's own connection to the location, such as living there or being an overnight guest. *See Bumper v. North Carolina*, 391 U.S. 543 (1968) (finding that the defendant's rights were violated when his grandmother's home was searched because it was also "*his* home").

The other line of the Court's precedents look to the nature of law enforcement's actions to determine whether they constitute a search. In the context of modern technology, the Court set out a two-part test in *Kyllo v. United States*, 533 U.S. 27 (2001) to determine whether the warrantless use of "sense-enhancing" technology violates the Fourth Amendment. Neither factor is satisfied here.

First, the surveillance at issue did not gather "information regarding the interior of the home that could not have otherwise been gathered without physical intrusion." *Id.* at 34. The Court has long held that "visual observation is no 'search' at all." *Id.* at 32. The visual surveillance doctrine

has been extended to cases involving aerial observation as well. *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989). DeNolf's conduct was "exposed to the public" in that it was plainly visible to any member of the public flying a drone in public airspace. *Katz*, 389 U.S. at 351; *Record* at 4 n.6.

Second, the technological capabilities used here are "in general public use." *Kyllo*, 533 U.S. at 34. Tens of millions of Americans either own a drone or have flown one in the past. *Record* at 9. And while the STEALTH EAGLE 2020 is a professional-grade drone, its optical sensors are unexceptional and available on commodity-grade models as well. *Id.* at 18. As with helicopters in *Riley* and airplanes in *Ciraolo*, camera-equipped drones routinely travel in public airways.

The foregoing reasons each independently compel the rejection of Petitioner's Fourth Amendment claim. His conviction should be affirmed accordingly.

Petitioner's sentence of life with parole after a minimum of fifty years for attempted murder does not violate the Eighth Amendment. Under the Court's Eighth Amendment jurisprudence, Petitioner could raise claims under either a categorical bar or an individualized finding of gross disproportionality. *Graham v. Florida*, 560 U.S. 48, 59 (2010). His challenge fails on both counts. First, the Court's categorical precedents allow for the sentence DeNolf received in light of his intent to kill. Second, the Court's gross disproportionality standard does not lend credence to Petitioner's appeal.

Regarding the existence of any categorical bar, *Graham v. Florida* is the most relevant source of authority and explicitly allows Petitioner's sentence. *Graham* categorically precludes the sentence of life without the possibility of parole for juveniles nonhomicide offenders. This general principle does not apply to DeNolf for two reasons.

First, Petitioner's crime is a homicide offense under the meaning of *Graham*. *See id.* at 69 ("[D]efendants who do not kill [or] intend to kill[] are categorically less deserving of the most serious forms of punishment."). *Graham* relied on precedent that excluded those who kill or intend to kill from the class of "nonhomicide offenders," and the Court has since cited *Graham*'s 'kill or intend to kill" language as the binding standard for determining whether a juvenile can receive a sentence of life without parole. *See Enmund v. Florida*, 458 U.S. 782 (1982) (finding that felony murder defendants may only receive the death penalty if they personally killed or intended to kill); *Miller v. Alabama*, 567 U.S. 460, 478 (2012) (analyzing the culpability of a defendant based on whether he killed or intended to kill). DeNolf's conviction for attempted murder means that he definitionally speaking possessed the intent to kill. *Record* at 4–5. *Graham*'s categorical protection turns on the moral culpability of an offender; accordingly, DeNolf cannot claim *Graham*'s protection.

Second, even if DeNolf's crime is considered a nonhomicide offense, Petitioner's sentence does not violate *Graham*'s categorical bar because it is not equivalent to life without parole. The Court held that covered juvenile offenders must be given a "meaningful opportunity to obtain release." 560 U.S. at 75. DeNolf will have his first opportunity of release on parole at the age of sixty-five, more than a decade before the end of his expected lifespan. *See Record* at 6 ("The average child born in the United States is estimated to have a life expectancy of 77–78 years."). Though other life expectancy statistics exist, they are unworkable for use as a national standard and the Court should refer to the general life expectancy when considering whether a defendant has a meaningful opportunity to obtain release. Under the standard set by *Graham*, Petitioner's sentence does not violate its holding considering his earliest potential release date.

Turning to an individualized analysis, the Court's relevant standard was set in *Harmelin v. Michigan*, 501 U.S. 957 (1991). The Court in *Harmelin* required there exist an "inference of

gross disproportionality" between the crime and the severity of the sentence imposed before any relief could possibly be granted. *Id.* at 1005 (Kennedy, J., concurring in part and concurring in the judgment). In the "exceedingly rare" case that such an inference exists, the Court then can legitimize that inference with jurisdictional analyses, as outlined by the Court in *Solem v. Helm*, 463 U.S. 277 (1983). *Harmelin*, 501 U.S. at 1001, 1005 (opinion of Kennedy, J.).

Inferences of gross disproportionality must be made with reference to similar cases involving proportionality challenges. The Court has upheld similarly lengthy sentences even for relatively minor *nonviolent* crimes. Even though Petitioner is a juvenile, the violent nature of his crime and his intent to kill require the Court to view his offense more seriously than nonviolent offenses. His sentence thus does not lead to the objective conclusion that his is among the "exceedingly rare" cases of gross disproportionality. *Solem*, 463 U.S. at 292; *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.).

Petitioner's disproportionality challenge is further foreclosed by inter- and intrajurisdictional analysis of sentencing practices. The sentence Petitioner received is commonly practiced throughout the nation and in Olympus specifically. *Record* at 8. In summary, Petitioner cannot contend that his sentence is grossly disproportionate, and therefore cannot prevail on an individualized basis.

Lacking a viable categorical or individualized claim, Petitioner has no basis for relief under the Eighth Amendment. His sentence is thus within the constitutional bounds set by this Court and should be affirmed.

ARGUMENT

I Visual observation of DeNolf's conduct at the Comerford Property is not a search under the Fourth Amendment.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. In the modern era, the Court determines whether a warrant is required by applying a two-part test first set out in Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347 (1967): (1) the aggrieved individual must "have exhibited an actual (subjective expectation of privacy" and (2) that expectation must be "one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

This case lies at the intersection of two lines of precedent descended from *Katz*. One line considers the legitimacy of an individual's expectation of privacy in a particular place, depending on the individual's connection to the location and the privacy that reasonably attaches to it. The other considers whether law enforcement's actions are sufficiently intrusive as to constitute a search, regardless of the particular location at issue. Both lines of precedent require the rejection of Petitioner's challenge.

A. DeNolf had no legitimate expectation of privacy in the RV.

The Fourth Amendment "protects people, not places." *Id.* at 351. Indeed, the Court has rejected formalistic property-based approaches to the Fourth Amendment throughout its existence, both to the detriment and benefit of aggrieved defendants. *See, e.g.*, *Hester v. United States*, 265 U.S. 57 (1924) (holding that the Fourth Amendment did not protect the defendant's privacy in an open field, irrespective of his ownership of the property), as cited by *Katz*, 389 U.S. at 352; *Chapman v. United*

States, 365 U.S. 610 (1961) (holding that the Fourth Amendment protects a leaseholder against an unreasonable search of his dwelling, even though he did not own the property), as cited by *Carter*, 525 U.S. at 96.

What the Court has held, however, is that the analysis of what protections are awarded to an individual "requires reference to a place." *Katz*, 389 U.S. at 361 (Harlan, J., concurring). One such place where the Court has recognized expectations of privacy are substantially reduced is a vehicle. The Court has historically exempted the search of vehicles from the warrant requirement entirely, citing the "pervasive regulation" and "ready mobility" of automobiles as inherently diminishing an individual's expectation of privacy in a vehicle. *Carney*, 471 U.S. at 392.

A second facet of the Court's legitimate expectation jurisprudence considers an individual's expectation of privacy when visiting a third party's property. The Court has held that individuals who lack any "significant. . . connection" to their location—such as residency, ownership, or the right to exclude others—do not have an expectation of privacy that society would recognize as reasonable. *Carter*, 525 U.S. at 91.

Both areas of law are implicated by the case at bar, and provide independent bases for finding the Task Force's observation permissible. First, DeNolf's challenge to the observation of his conduct inside a recreational vehicle is foreclosed by the vehicle exception to the warrant requirement. Second, Petitioner's incidental presence on a third party's property does not endow him with an objectively reasonable expectation of privacy.

1. The vehicle exception precludes any challenge to the surveillance at issue.

It is well settled that a "lesser degree of [Fourth Amendment] protection" applies to automobiles. *Carney*, 471 U.S. at 390. Specifically, the Court has held no warrant is required to search vehicles because their ready mobility "creates circumstances of such exigency that, as a practical necessity,

rigorous enforcement of the warrant requirement is impossible." *Opperman*, 428 U.S. at 367, as cited by *Carney*, 471 U.S. at 391. And "even in cases where an automobile [is] not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle [justifies] application of the vehicular exception." *Id.*

As the Court explained in *California v. Carney*, these considerations apply in equal force to recreational vehicles. In fact, *Carney* emphatically rejected the notion that a vehicle's "capab[ility] of functioning as a home" could bear on the application of the vehicle exception. *Id.* at 393–394. ("Our application of the vehicle exception has never turned on the other uses to which a vehicle might be put."). To say otherwise, the Court noted, would be to "ignore[] the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity." *Id.* at 394.

Instead, the *Carney* Court formulated a two-part test for determining when the vehicle exception applies. First, the vehicle must be "readily mobile," and second, the vehicle must not be "situated in a way or place that objectively indicates that it is being used as a residence." *Id.* at 394 n.6. The circumstances of this case satisfy both elements of this test.

As to ready mobility, both parties stipulate that, but for its underinflated tires, the RV "could have been readily driven off the property." *Record* at 3. In fact, whether the tires were fully inflated at the time matters little; the ordinary task of filling tires with air would not present a substantial impediment to the vehicle's mobility. Law enforcement could hardly assume that such a task would be so onerous as to eliminate the "circumstances of exigency" that would make it infeasible to obtain a warrant before the RV could be moved.

The second element of the *Carney* analysis confirms the vehicle exception's application to the RV. The Court outlined several factors for making the determination as to whether a vehicle's setting "objectively indicates" residential use: "its location, whether the vehicle is readily mobile or instead,

for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road." *Carney*, 471 U.S. at 394 n.3. Not only did the Comerford Property have convenient access to a public road, but it was located so near one that law enforcement regularly observed the property *from* "a public two-lane highway" immediately adjacent to it. *Record* at 2. And while an electrical service line ran to the property, *id.* at 3., it is not stipulated that any utility line was connected to the RV itself. *See id.* (noting that flat tires were the *only* impediment to the RV being driven off the property). The remaining factor—whether the vehicle is licensed—is the very reason that law enforcement accelerated its investigation: the Task Force suspected the RV would soon be moved when it learned that Comerford had applied for a new vehicle registration and license plate for the RV. *Id.*

All of these factors then point towards an inescapable conclusion: the RV's setting did not objectively indicate it was being used as a residence, and law enforcement reasonably concluded as much. Because both elements of the *Carney* test are met, no warrant would have been required to search the RV. That alone is dispositive.

2. Petitioner is not entitled to Fourth Amendment protection solely because he was incidentally on a third party's property.

Even if the Court does not apply the vehicle exception, this Court's precedents regarding guests on third party property separately dictate that DeNolf lacked a legitimate expectation of privacy.

The Court has recognized that the legitimacy of an individual's expectation of privacy turns in large part on the ability to exclude others from the searched location. *Rakas*, 439 U.S. at 149, as cited by *Carter*, 525 U.S. at 107. That unifying principle accounts for the outcomes of *Katz*, in which the defendant held the exclusive right to exclude others from the phone booth he temporarily occupied, as well as *Minnesota v. Carter*, 525 U.S. 83 (1998), in which the defendants had no

reasonable expectation of privacy in a home they did not control access to. Like the defendants in *Carter*, Petitioner has not demonstrated any right to exclude others or any "significant . . . connection" to the property that might legitimize his expectation of privacy. *Carter*, 525 U.S. at 91.

DeNolf's lack of a right to exclude others is perhaps best exemplified by the context of the investigation that ensnared him. The Task Force undertook its observations not to observe Petitioner, but to surveil what it believed to be the site of an illicit commercial enterprise run by two *other* individuals. *Record* at 3. The sole basis for Petitioner's apparent connection to the property is his claim that "he liked to go to the RV to be 'left alone.'" *Id.* This assertion is not corroborated by any facts in the record; on the contrary, in the three months that the Task Force monitored the property, not a single visit by DeNolf is noted. *See id.* (describing frequent visits by Comerford and Bronner to the property, but mentioning no visits by DeNolf during this time).

To the extent that Petitioner's assertion has any factual validity, it lacks the kind of specificity and substance that would give rise to the "significant connection" required by *Carter*. If the defendant in *Carter* could not establish the requisite connection by entering "the apartment with the host's permission, remaining inside at least 2 1/2 hours, and, during that time, engaging in concert with the host in a collaborative venture," it must follow that DeNolf cannot establish that connection on this record. *Carter*, 525 U.S. at 109 n.2 (Ginsburg, J., dissenting) (cleaned up).

Finally, Petitioner's familial connection to the owner of the property is immaterial. A useful analogue is the case of *Bumper v. North Carolina*, 391 U.S. 543 (1968), as cited by *Carter*, 525 U.S. at 96. *Bumper* concerned a defendant's challenge to the search of his grandmother's home, in which he resided. *Bumper*, 391 U.S. 543. The Court ultimately found that the defendant's Fourth Amendment rights were violated "because the area searched 'was *his* home.'" *Carter*, 525 U.S. at 96 (Scalia, J., concurring) (quoting *Bumper*, 391 U.S. at 549 n.11). In other words, the controlling

factor was the defendant's reasonable expectation of privacy in *his own* home, not some abstract notion of familial ties that has no basis in this Court's precedents.

By contrast, DeNolf did not live at the Comerford Property. He did not own it. He did not stay overnight on any occasion. He had no exclusive right to exclude others from the property. And there is no factual evidence in the record that he visited the property with any regularity. These factors are what the Court has looked to in determining whether an individual's expectation of privacy is reasonable under *Katz*. Petitioner cannot satisfy any of these factors, nor can he establish any other meaningful connection to the property.

In short, the ruling Petitioner seeks would eviscerate this Court's Fourth Amendment doctrines. Finding for the government, conversely, would not undermine the protections set out by this Court for individuals who assert an objectively reasonably expectation of privacy. It would only reaffirm the baseline principle that being "legitimately on the premises where a search occurs" is not a sufficient basis on which to assert Fourth Amendment protection. *Carter*, 525 U.S. at 90 (internal quotation marks omitted) (describing the standard that was "expressly repudiated" in *Rakas*).

B. Drone surveillance from a public vantage point is not a search.

The second line of this Court's precedents look to the nature of law enforcement's actions to determine whether they are sufficiently intrusive to constitute a search. In the context of modern technology, the Court laid out a standard for deciding when the warrantless use of "sense-enhancing" technology violates the Fourth Amendment in *Kyllo v. United States*, 533 U.S. 27 (2001).

Under the *Kyllo* standard, Petitioner must show two factors to assert an unreasonable search: first, that the surveillance in question gathered "information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area" and second, that the surveillance utilized "sense-enhancing technology" that is

"not in general public use." 533 U.S. at 34. Where, as here, law enforcement conducted visual surveillance using technical capabilities available to members of the general public, neither of these factors are satisfied.

1. This Court has consistently upheld warrantless visual surveillance.

Beginning with the first element: the nature of the information gathered. Even as this Court's Fourth Amendment jurisprudence has evolved in other respects, it has always been clear-eyed about a simple principle: "visual observation is no 'search' at all," as the *Kyllo* majority put it. *Id.* at 32. Dating back to the common law, *see Entick v. Carrington*, 19 How. St. Tr. 1029 (K. B. 1765) ("the eye cannot by the laws of England be guilty of a trespass"), as cited by *Kyllo*, 533 U.S. at 32, this doctrine ensures judicial constraints do not render police less capable than a typical member of the public. Put simply, the Fourth Amendment does not "require law enforcement to shield their eyes when passing by a home" simply because they might learn information about its interior. *Ciraolo*, 476 U.S. at 213. It is only when that information "could not have otherwise been obtained without physical intrusion" that the use of technology may exceed constitutional bounds. *Kyllo*, 533 U.S. at 34.

It is true that the surveillance here was more than incidental ground-level observation, but this does not alter the essential nature of the case. In *California v. Ciraolo*, this Court upheld visual surveillance of a backyard by officers flying overhead in a fixed-wing aircraft. 476 U.S. 207 (1986). There, the Court concluded that the officers' low-altitude surveillance flight was materially similar to an officer "passing by a home on a public thoroughfare." *Id.* at 213.

The thermal imaging device used in *Kyllo* differs from visual observation in this important sense. In plain terms, looking through windows is different from looking through walls. *Compare Florida v. Riley*, 488 U.S. 445, 448 (1989) (allowing aerial visual observation "through the openings

in the roof" of a greenhouse even though it was obscured from view at ground level), *with Kyllo*, 533 U.S. at 29–30 (finding unconstitutional the use of a thermal imager that could show the relative heat emanating from different parts of the interior of a home).

These modern applications of the visual surveillance doctrine are rooted in *Katz*: "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351; *see also Kyllo*, 533 U.S. at 31–33 (discussing the evolution of the Court's visual observation jurisprudence from English common law through to modern "reasonable expectation" analysis). The Court has been unwavering in its treatment of conduct visually observable from a public vantage point as "knowingly expose[d] to the public." *See, e.g.*, *Ciraolo*, 476 U.S. at 213 (explaining that Ciraolo had no reasonable expectation of privacy in the contents of his backyard because it was "clearly visible from a public vantage point" and thus "knowingly exposed to the public") (cleaned up); *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986) (finding that enhanced aerial photography of an industrial complex was not a search and did not unconstitutionally reveal "intimate details"), as cited by *Kyllo*, 533 U.S. at 37.

2. The drone technology used in this case is in general public use.

Even assuming, as the dissent below does, that the visual surveillance here is akin to a "physical intrusion," a challenge under *Kyllo* can only succeed if Petitioner can show that law enforcement used "sense-enhancing technology not in general public use." *Id.* at 34. The government does not dispute that the STEALTH EAGLE 2020's optical zoom capabilities are sense-enhancing technology under the meaning of *Kyllo*. But available evidence makes apparent that camera-equipped drones are in general public use.

The *Kyllo* Court defined the term "general public use" with reference to its holding in *California v. Ciraolo*, emphasizing that the relevant consideration is whether a given technology

is "routine[ly]" used in society. *Id.* at 40 n.6 (quoting *Ciraolo*, 476 U.S. at 215). The controlling opinion of *Florida v. Riley* followed a similar logic, looking to the extent of "public use of airspace at altitudes [that the helicopter surveillance occurred in]." *Riley*, 488 U.S. at 455 (O'Connor, J., concurring in the judgment).

Evidence in the record shows that drones are a regular part of the lives of tens of millions of Americans. One out of every thirteen people in the United States currently owns a drone, and one in seven have flown a drone at some point in their life. *Record* at 9. As Olympus and FAA drone regulations explain, members of the public and law enforcement alike are free to operate drones over public property. *Record* at 4 n.6, 17.

The record does not speak to the exact proportion of the population that owns a private plane or helicopter. That said, one might reasonably assume that every tenth neighbor does not regularly take to the skies in a private aircraft. Thus, the proposition that drones are not in general public use is irreconcilable with the findings of this Court in *Riley* and *Ciraolo*—that the aforementioned aircraft were used with "sufficient regularity" and "routine[ly]." *Riley*, 488 U.S. at 454 (controlling opinion); *Ciraolo*, 476 U.S. at 215. The implication of those findings must likewise apply here: there can be no reasonable expectation of privacy in conduct observable by a commonly used aircraft in public airspace.

Petitioner may contend that *Riley* and *Ciraolo* are distinguishable because they concerned naked-eye surveillance rather than the camera concerned here, but this cannot salvage Petitioner's claim. A proper reading of the Court's precedents indicates there is no *inherent* significance to the distinction between naked-eye and camera-assisted surveillance. Instead, *Ciraolo* relied upon the naked-eye character of the observation because "[a]ny member of the public who glanced down could have seen everything that [the] officers observed." *Id.* at 213–214. That is to say, the aerial

surveillance there was constitutional because law enforcement used the capabilities available to any other "private and commercial flight in the public airways." *Id.* at 215.

The same is true here. The Task Force relied on technology generally available to the drone-faring public. Appendix II of the record notes that consumer-grade drones have identical optical zoom capabilities to the STEALTH EAGLE 2020. *Record* at 18. Additionally, all drone models described are equipped with a transmitting camera and are capable of hovering in one place for an extended period of time. *Id.* These capabilities—like the ability of an airplane pilot to peer at the ground below—are unexceptional, even universal aspects of drone technology. It is this routineness, rather than any metaphysical distinction between the naked-eye and a camera, that controlled the outcomes of *Ciraolo* and *Riley*. That principle binds here, too.

In summary, four independent justifications compel the rejection of Petitioner's claim. To prevail, Petitioner must show that a Recreational Vehicle is not a vehicle, that he has a legitimate expectation of privacy on a property to which he has no significant connection, that drone technology used by millions is not in general public use, and that visual surveillance from a public vantage point is akin to physical intrusion. These assertions are striking in their breadth, and ask this Court to unsettle virtually every aspect of its search and seizure jurisprudence.

There is no basis for doing so. The "right of the people be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is not abridged when law enforcement observes violent conduct in public view, committed by an individual who incidentally happens to be on a third party's property. U.S. Const. amend. IV. Those circumstances are bound by well-settled precedent. Petitioner's challenge should be rejected accordingly.

II A sentence of life with parole after a minimum of fifty years for attempted murder does not violate the Eighth Amendment.

States hold a general police power to sentence criminals to prison. *Rummel v. Estelle*, 445 U.S. 263 (1980), as cited by *Solem*, 463 U.S. 277. Petitioner's term-of-years sentence is thus presumptively constitutional absent a particular constitutional violation under the Eighth Amendment. This Court has engaged in two forms of Eighth Amendment analysis: protections of entire classes of criminals and offenses by imposing "categorical restrictions" on sentencers and particularized considerations of sentences "given all the circumstances" of a defendant's case under the gross disproportionality standard. *Graham*, 560 U.S. at 59. Under either frame of analysis, DeNolf's sentence remains permissible. His sentence neither runs afoul of a categorical rule nor warrants individual relief under proportionality review. Thus, DeNolf's sentence is a proper exercise of the state's "pure[]. . . legislative prerogative" to punish violent offenders. *Rummel*, 445 U.S. at 274.

A. The Court has never issued a categorical protection precluding a sentence of fifty years to life.

Although this Court has set out several categorical protections for various classes of offenders, no such protection applies to DeNolf. Most closely to this case, the Court in *Graham v. Florida* forbade the sentence of life without parole for juvenile offenders with "twice diminished moral culpability" in the Court's words, meaning those convicted of "nonhomicide" offenses. *Graham*, 560 U.S. at 69. While DeNolf may assert he is entitled to relief under *Graham*, its protections do not apply because DeNolf has committed a homicide offense as *Graham* defined the term, and because his sentence is not equivalent to life without parole.

The only other case with a categorical protection applying to term-of-years sentences for juveniles is *Miller*, 567 U.S. 460, which by its plain terms does not apply to DeNolf. *Miller* outlawed

mandatory life without parole sentences for juveniles, and DeNolf's sentence is neither mandatory nor life without parole. *Record* at 5. Section 4 of Olympus Proposition 417 stipulates a juvenile can only receive a sentence of fifty years to life "if a judge concludes that the offender is incorrigible." *Id.* at 19. The judge in DeNolf's case exercised discretion under that provision to consider DeNolf's unique circumstances. *Id.* at 5. *Miller* therefore cannot apply to this case because it dealt solely with mandatory sentencing. While *Graham*'s protection cannot be applied to DeNolf, it is the only holding that merits additional analysis.

1. *Graham v. Florida*'s categorical rule offers no protection to those juveniles who kill or intend to kill their victim.

DeNolf's intent to kill his victim places him outside the class of offenders that the *Graham* Court defined as protected "nonhomicide" offenders. The Court found that defendants who do not "kill, intend to kill, or foresee that life will be taken" are categorically "less deserving" of severe punishments than those who do. 560 U.S. at 69. It cited the lesser "moral depravity" for such offenders in justifying their lesser sentences and affirmed that those who kill or intend to kill differ from other crimes morally. *Id.* (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 410 (2008)).

In defining the term "nonhomicide," the Court referenced *Enmund v. Florida*, 458 U.S. 782 (1982) as a case in which the Court categorically protected nonhomicide offenders. *Graham*, 560 U.S. at 61. *Enmund*, like *Graham*, explicitly circumscribed its categorical "nonhomicide offender" protection to those who did not "intend to kill." *Enmund*, 458 U.S. at 789, as cited by *Graham*, 560 U.S. at 108 n.8. And the Court has later cited *Graham*'s "kill or intend to kill" language as the binding standard for determining when juveniles may be given life without parole sentences. *Miller*, 567 U.S. at 478 (considering, under *Graham*, the culpability of a defendant based on whether he

killed or intended to kill); *see also id.* at 490–93 (Breyer, J., concurring) (extensive discussion of the implications of *Graham*'s "kill or intend to kill" categorical rule).

DeNolf was convicted of attempted murder; by definition, he intended to kill his victim. *Record* at 5. His intent to commit a "sever[e] and irrevocab[le]" crime shows his increased moral culpability, *see Kennedy*, 554 U.S. at 410, as cited by *Graham*, 560 U.S. at 69, demonstrably outside the class of offenders which the *Graham* Court intended to protect. That his victim was saved from near-certain death by law enforcement officers does not diminish his intent or culpability; it would be illogical to tie his own personal culpability to the officers' fortunate intervention. *See Record* at 5.

The *Graham* Court further clarified its position when considering the practices of the international community. It relied on the findings of a scholarly article, which found that "only 2 [nations]. . . ever impose[d] the punishment [of life without parole to juveniles]" when *Graham* was decided: the United States and Israel. *Graham*, 560 U.S. at 80. In distinguishing the sentencing practices of Israel from that of the United States, the Court found that even Israel did not impose life without parole for nonhomicide crimes; it only imposed the sentence on juveniles "convicted of homicide or attempted homicide." *Id.* at 81. This proposition directly implies that attempted murder is a homicide crime; otherwise, the Court could not have arrived at this conclusion. The Court's review of incarceration patterns within the United States similarly relied on studies that defined attempted murder as a "homicide offense." *People v. Caballero*, 282 P.3d 291, 297 n.1 (Cal. 2012) (Werdegar, J., concurring).

One of two possibilities must be true. Either the *Graham* Court—in defiance of its national consensus analysis, its reasoning about moral culpability, and the very precedent it cited to define the term "nonhomicide"—intended to protect attempted murderers, or it did not. The weight of

textual and precedential evidence compels the conclusion that *Graham* set apart those who "kill or intend to kill" as having a unique moral culpability warranting the harshest prison terms. DeNolf cannot claim protection under a holding that explicitly excludes offenders like him.

2. A sentence that offers parole at age 65 does not deprive a juvenile of a "meaningful opportunity to obtain release."

Even if attempted murderers can receive *Graham*'s protection, the Court held that such juvenile offenders are only precluded from receiving life *without* parole. 560 U.S. at 82. DeNolf's sentence is distinct from life without parole in both name and substance, and he therefore has no basis for relief under *Graham*. Sentencers are not required to ensure "eventual freedom to a juvenile offender convicted of a nonhomicide crime"; they need only ensure juvenile offenders receive some "meaningful opportunity to obtain release" during their lifetime. *Id.* at 75.

The facts indicate that DeNolf has been given a meaningful opportunity to obtain release. His sentence of life with parole after a minimum of fifty years offers him an opportunity for release at age 65. *Record* at 1. As the record notes, the average American's life expectancy is 77–78 years old. That means that DeNolf will receive his first chance at release more than a decade before the end of his expected lifespan. That is more than sufficient to satisfy *Graham*'s "meaningful opportunity" standard.

Olympus does not dispute the notion that exorbitantly lengthy sentences can be functionally equivalent to life without parole. Take, for instance, a hypothetical sentence of three hundred years in prison and it becomes evident that the nominal distinction between life with and without parole can be rendered meaningless. The standard drawn by the *Graham* Court protects juveniles from these kinds of sentences that attempt to circumvent its core holding, and rightly so. *See, e.g.*, *People v. Caballero*, 282 P.3d 291 (Cal. 2012) (finding that defendant's sentence of 110 years to life

unconstitutionally deprived him of a realistic opportunity for release during his lifetime). But by the terms of both *Graham* and *Caballero*, DeNolf's sentence falls on the opposite side of that line. His sentence is well within constitutional bounds and presents him an overwhelming likelihood of release if he demonstrates rehabilitation during his term and earns parole.

The use of the general American life expectancy is the only workable standard that can give force to *Graham*'s "meaningful opportunity" holding. Petitioner may cite a 2012 U.S. Sentencing Commission study, which found that "the life expectancy of the average inmate... serving a life term is 39 years once imprisoned," to assert that DeNolf can be expected to die before his first opportunity for parole in fifty years. *Record* at 6. But this would constitute a misapplication of statistics and present profound workability issues if applied to this case.

It is undisputed that Petitioner is much younger than the average inmate serving a life term. *See id.* at 6 n.9 (fewer than 7% of inmates serving life sentences in the United States are under the age of 18). This immediately reveals a core problem with the application of the Sentencing Commission's study: if the average inmate is much older than Petitioner when sentenced, then his or her remaining "life expectancy... *once imprisoned*" is inherently that much lower than Petitioner's. *Id.* at 6 (emphasis added). The folly of applying an average to the outlier is well illustrated by the lower court's discussion of the study: "a 20-year-old could be expected to live to 59, a 30-year-old to 69, and a 40-year-old to 79 and so-on." *Id.* That is to say, applying the study to conclude that DeNolf's life expectancy will be shortened to 54 (39 years after his sentencing) necessarily implies that a 70-year-old will have his life expectancy *lengthened* to 109 as a result of being sentenced to prison. The Court should not abide a theory of the case that so easily produces absurd results.

More broadly, the difficulty of applying the Sentencing Commission study epitomizes the workability problems with granular life-expectancy analysis. To begin with, there is no principled

line that the Court could intelligibly draw as to what attributes of an offender should and should not be considered in a life expectancy analysis. At best, the use of granular analysis would produce a smorgasbord of inconsistent sentencing standards in courts throughout the nation based on different offense categories, incarceration patterns, and data sources. At worst, the consideration of attributes such as race and gender (dimensions on which life expectancy is known to vary) in determining an offender's sentence would create troubling fairness and equal protection concerns.

Recognizing these workability issues and adhering to the general life expectancy would not give states license to impose sentences that severely reduce an offender's life expectancy; such sentences are in and of themselves cruel and unusual. *See, e.g.*, *Weems v. United States*, 217 U.S. 349 (1910) (finding a sentence of fifteen years hard labor and enshacklement unconstitutional). Olympus does not dispute the notion that prison can generally reduce an individual's life expectancy. But that is not sufficient to find for Petitioner. In order to support the assertion that DeNolf is likely to die in prison, the record would need to establish specific causal evidence that prison reduces an individual's life expectancy by *more than a decade*. The record contains no such evidence. A single study that establishes little more than the fact that the average prisoner is older than Petitioner cannot be the basis for a categorical holding of this Court.

The foregoing reasons show that there is no categorical bar against DeNolf's sentence. Neither *Graham* nor *Miller* intended to preclude a discretionary sentence of fifty years to life for attempted murder. In the absence of a categorical restriction, the only other possible avenue for relief is an individualized analysis of Petitioner's sentence under the gross disproportionality standard.

B. Petitioner's sentence is not grossly disproportionate to the gravity of his offense.

This Court's primary test when determining a sentence individually unconstitutional is to consider whether the sentence imposed leads to an "inference of gross disproportionality." *Harmelin*, 501

U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment). If and only if this is the case, the Court has laid out a more detailed framework to support this inference. *See Solem*, 463 U.S. 277. Since the Court has previously upheld lengthy offenses for relatively minor felonies, Petitioner's sentence for his violent crime does not lead to any inference of disproportionality and is strongly supported by precedent. Even if the Court wished to engage in a more detailed analysis in light of this, his sentence is prevalent throughout the nation and cannot be considered cruel or unusual under this detailed framework.

1. A threshold comparison of DeNolf's offense to the severity of his punishment does not indicate gross disproportionality.

The *Harmelin* Court's inference of disproportionality test forecloses Petitioner's attempt for individualized relief and explicitly refutes the need for any detailed analysis. When considering the constitutionality of a term-of-years sentence for a defendant convicted of cocaine possession, the Court only recognized a need for a "narrow proportionality principle." *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring in part and concurring in the judgment); *see Graham*, 560 U.S. at 59–60 (finding Justice Kennedy's concurrence in *Harmelin* to be controlling). Comparative analyses between crime and sentence need only be conducted "in the *rare case* in which a threshold comparison" of the two gives rise to an "inference of gross disproportionality." *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.) (emphasis added).

Petitioner's sentence falls well within the acceptable parameters of severity as set out by this Court's precedent, and this finding is all that is necessary to foreclose a proportionality appeal. A threshold comparison mainly requires the Court to consider whether the severity of DeNolf's attempted murder brings his sentence of fifty years to life "within the constitutional boundaries established by [the Court's] prior decisions." *Id.* at 1004. In *Hutto v. Davis*, 454 U.S. 370 (1982), as

cited by *Harmelin*, 501 U.S. at 1004, the Court rejected a proportionality challenge on a sentence of forty years for possession with intent to distribute a mere nine ounces of marijuana. In *Ewing v. California*, 538 U.S. 11 (2003), the Court rejected another challenge on a life with parole sentence imposed on a defendant for stealing golf clubs under a recidivist statute. Finally, the Court in *Rummel v. Estelle*, 445 U.S. 263 (1980), as cited by *Harmelin*, 501 U.S. at 997, upheld a life with parole sentence for a habitual fraudulent check casher. The Court in these cases upheld lengthy sentences for even relatively minor nonviolent felonies.

DeNolf's crime is notably distinct as it is appreciably more serious in nature. In case this Court does not find it intuitive that Petitioner's attempted murder is significantly more serious than the minor nonviolent felonies of *Hutto*, *Ewing*, or *Rummel*, the Court in *Solem* laid out the criteria to determine the relative severity of crimes. It determined that comparisons between crimes should be based on the amount of "harm caused or threatened to the victim or society, and the culpability of the offender." 463 U.S. at 292. Though it is an accepted principle that youth diminishes one's culpability, *see, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 572–74 (2005), this has already been factored into Olympus's penological scheme. Whereas Section 2 of Olympus Proposition 417 *requires* all adults convicted of second degree attempted murder to be sentenced to life without parole, for juveniles convicted of the same crime, Section 4 reduces the maximum possible sentence and only allows for fifty years to life on a discretionary basis for "incorrigible" juveniles with the highest level of culpability. *Record* at 19.

Thus, a threshold comparison leaves no indication that DeNolf's sentence is grossly disproportionate. Given that the Eighth Amendment forbids "only extreme sentences that are 'grossly disproportionate' to the crime," DeNolf's lengthy sentence is constitutionally permissible for his serious violent felony, even at his age. *Harmelin*, 501 U.S. at 1001 (opinion of Kennedy, J.) (quoting

Solem, 463 U.S. at 288, 303). More detailed analyses, such as the one undertaken by the *Solem* Court, need only occur after the Court finds an inference of disproportionality. As the Court clarified, detailed analyses are only meant to "*validate* an initial judgment that a sentence is grossly disproportionate to a crime"; they should not be used as a vessel to arrive at such a judgment. *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.) (emphasis added).

2. The sentence Petitioner received is widely accepted and commonly used throughout the nation.

Even if the Court wished to conduct a detailed proportionality analysis, Petitioner would still not be entitled to relief. The *Solem* Court laid out three objective indicia to serve as litmus tests of disproportionality: a comparison between the crime and severity of the sentence, an analysis of the sentencing practices within the relevant jurisdiction, and an analysis of the sentencing practices elsewhere. *Solem*, 463 U.S. at 290–92. The first factor is similar to *Harmelin*'s threshold analysis and does not require further discussion. This leaves only the jurisdictional analyses for further consideration.

DeNolf's sentence of life with the possibility of parole after fifty years is legal in almost every state and consistent with society's "evolving standards of decency" that are used to "determine which punishments" are unconstitutional. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion), as cited by *Roper*, 543 U.S. at 561. Thirty-nine states permit and actively impose sentences of this length, with each state averaging twenty such inmates. *Record* at 8. The laws of a supermajority of states are the "clearest and most reliable objective evidence of contemporary values" and indicate there is nothing grossly disproportionate in sentencing a violent juvenile to a lengthy term with the possibility of parole. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), as cited by *Roper*, 543 U.S. at 594. Though these types of sentences have decreased in frequency somewhat over the last

decade, there remain two thousand such inmates across thirty-nine states. *Record* at 8. Petitioner's claim is no more supported within the state of Olympus. There are currently fifty inmates serving such a sentence, mostly for attempted or completed second degree murder. *Id.* DeNolf's sentence is thus not inconsistent with the general practices of Olympus nor those of the nation; he therefore lacks basis for a claim under *Solem*'s comparative framework.

Olympus's sentence is presumptively constitutional absent either a categorical bar or a finding of gross disproportionality. Simply put, DeNolf committed a homicide offense, received a sentence meaningfully less severe than life without parole, and received a sentenced proportional to his heinous crime of brutally beating a girl and leaving her "permanently disfigured." *Id.* at 5. *Graham* explicitly excludes attempted murderers from its protection, and even if it did not, Petitioner's sentence does not violate *Graham*'s requirement for a "meaningful opportunity to obtain release." *Graham*, 560 U.S. at 76. *Graham*'s repudiation of protection for offenders like DeNolf itself implies that an individualized consideration would fare no better, and this is indeed the case. *Harmelin* only grants relief to extreme cases of disproportionality; to rule otherwise would be "inimical to traditional notions of federalism" and state sovereignty. *Rummel*, 445 U.S. at 282, as cited by *Harmelin*, 501 U.S. at 1000. This case implicates the central holdings of *Graham* and *Harmelin*, and both dictate the rejection of Petitioner's Eighth Amendment challenge.

CONCLUSION

The judgment of the Supreme Court of the State of Olympus should be affirmed.

Respectfully Submitted,

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