

THE SUPREME COURT
OF THE UNITED STATES

No. 2009-3280

State of Olympus, Petitioner

v.

William DeNolf, Jr., Respondent

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

ORDER OF THE COURT ON SUBMISSION

The petition for writ of certiorari to the Supreme Court of the State of Olympus is granted for consideration of the following questions presented:

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

(1) Whether the deployment of a visual enhancement device without a warrant violates the 4th and 14th Amendments to the United States Constitution;

and,

(2) Whether life in prison without the possibility of parole sentence imposed on Respondent violates the 8th and 14th Amendments to the United States Constitution.

Supreme Court of the State of Olympus

State of Olympus, Petitioners-Appellants

v.

William DeNolf, Jr., Defendants-Appellees

No.CR-04-17-2

**State of Olympus
Petitioner-Appellant**

v.

**William DeNolf, Jr., Jr.
Defendant-Appellee**

OPINION

Opinion by Chief Justice Katie Kruger with Justices Amanda Ganoë and David Nash concurring

Dissent by Justices Curtis Clinesmith and Randolph Stout

Argued and Submitted March 17, 2009

Decided July 7, 2009

OPINION

Before Kruger, Ganoë, Stout, Clinesmith and Nash, JJ.

I

Overview

This court is asked to interpret two of our Constitution's most cherished civil liberties--the Fourth Amendment's guarantee that state searches of "persons, houses, papers, and effects" be reasonable, and the Eight Amendment's command against "cruel and unusual punishment."

II

Facts

William DeNolf, Jr., is a fifteen year old resident of Olympus with two criminal convictions for “serious” crimes. The first was for shooting passersby at a state fair with an air gun. For that, because of his age, he forfeited the right to possess a firearm in Olympus until he was 21 years of age, and he was sentenced to spend six weekends performing community service. The second was a state jail felony charge of cruelty to animals. In light of his age, the fact that this was a first offense, his expression of remorse, and an acknowledgement that he had a substance abuse problem (he admitted he was drunk and high on marijuana at the time of both of the incidents), he was sentenced to four weeks in a juvenile correctional “boot camp,” and he was ordered to undergo substance abuse counseling.

In 2009, William DeNolf, Jr. was convicted of the kidnapping and aggravated rape of a high school classmate. The crime was uncovered by a law enforcement task force investigating a conspiracy to grow and distribute marijuana. During the course of the drug trafficking investigation in the City of Knerr, State of Olympus, several agents participating in the joint task force began to suspect the respondent’s step-father, Chester Comerford and an associate, Bobby Bronner, with being major growers. State law enforcement officials provided additional information from confidential informants which strengthened suspicions. The task force, led by Assistant District Attorney for the State of Olympus, Geronimo Gusmano, obtained utility records from the Comerford/DeNolf, Jr. residence and discovered that the family owned two properties: a residential home and a wooded area of approximately twenty-five acres on the outskirts of the Knerr city limits. The utility company provided a spreadsheet for estimating average electrical use for both properties. Task force officers concluded that the electrical usage at the wooded property was abnormally high, while the main residence was slightly below average in electrical usage. From this, the task force began to concentrate on the wooded property as the possible site for the drug operation.

For nearly three months, the task force observed the wooded property from a public highway. In particular, the task force focused on a thirty-five foot long recreational vehicle parked near the center of the property. The team found that Comerford and Bronner often visited the property using a truck, taking in items in boxes and removing items in black bags—typically remaining for brief periods of time. On several occasions, however, they did spend the night. The recreational vehicle was never moved during this surveillance period. It had four flat tires, but otherwise it appeared in good working order. Had the tires been replaced, or fixed, the vehicle could have been readily driven off the property except that it did not have a current registration, nor insurance.

At 6:30 on the morning of January 17, 2009, from an unmarked police car parked on the nearest public highway adjacent to the property, Detective Kristin Paige of the Knerr police department examined the recreational vehicle, located some nine hundred feet away, utilizing a CYCLOPS-237 optical device which she had used on patrol in Iraq where she had served in the military as a reservist. This device is a mechanical monocular vision enhancing device which has not only military applications, but it is also popular among bird and wildlife enthusiasts because distant objects can be detected, magnified, and various images recorded digitally through a camcorder which can be attached. The device measures motion in the lens and sends an audio beep so that the observer can focus more closely on motion within the viewfinder. It does not pick up actual sounds coming from objects. It is useable for both day and night-vision, and with enhanced camera lenses available for additional, but expensive costs, the viewing range and quality is considered to be the highest level available on the public market. The CYCLOPS-237 is available in certain specialty catalogues, through U.S. military suppliers, and with a relatively small, but growing, level of public distribution because of its high cost and military applications.

Using the device, Detective Paige identified, through a window with no curtains, the tops of a number of small plants growing under a lamp in the rear of the recreational vehicle parked on the property. No member of the task force could discern these objects using the naked eye from the road; these objects could only be seen with the aid of CYCLOPS-237, and the type of plants themselves could not be readily identified by law enforcement.

Based on the above information, law enforcement sought to obtain a warrant to search the property including the recreational vehicle. The Olympus state task force decided to go ahead and obtain a warrant because two weeks earlier it had learned that Commerford and Bronner had applied for a state registration permit for the recreational vehicle. Prior to executing the warrant on January 17, 2009, the CYCLOPS-237 was deployed for another visual inspection to determine if the recreational vehicle was occupied. Detective Paige was able to identify movement within the vehicle. Specifically, she was able to identify not only the respondent, but she could also see the shadow of another person within the vehicle. She could not see specific motions, nor could she identify the persons. Detective Paige testified that she believed the two persons appeared to be fighting during different times of the observation, but that there was no indication of an immediate struggle. At one point William DeNolf, Jr. did come outside with what appeared to be a bloody nose and mouth. All of Detective Paige's observations were recorded digitally and introduced at trial.

Detective Paige, along with fourteen members of the drug task force, entered the wooded area and searched the interior of the recreational vehicle. Inside, authorities discovered DeNolf, Jr. along with a young girl approximately 15 years of age,

subsequently known as Jane Doe, whose injuries were severe and required immediate medical attention, emergency surgery, and hospitalization. Doe reported that she had been abducted by DeNolf, Jr. 24 hours earlier at gunpoint while they were walking home from school and taken to the isolated property where she was repeatedly raped and sodomized by the respondent.

A complete search of the vehicle produced more than one hundred tomato and bell pepper plants. No drugs or drug paraphernalia were found on the property.

Fifteen year old William DeNolf, Jr. was convicted in a one-day trial by an Olympus State trial court for first degree aggravated rape and first degree aggravated kidnapping of a minor. Judge Julie Burt sentenced Mr. DeNolf, Jr. to life in prison without the possibility of parole. There was no evidence that Mr. DeNolf, Jr. was mentally challenged. While he had a discipline problem at school and a record of disruptive behavior, along with physical violence, he did well in his class grades.

Olympus does not have a “three strikes law”, but Proposition 417, adopted by the voters of Olympus in November, 2008, denies parole for anyone with “a record of serious crimes”, and it establishes that the punishment for “aggravated rape” (defined as “rape accompanied by other heinous acts”) would be life in prison without parole. Proposition 417 did not speak to the issue of age or mental capacity.

DeNolf, Jr. appealed his conviction which was upheld by the lower state courts. He then appealed to the Supreme Court of Olympus.

-III-

We begin with consideration of the Fourth Amendment question. Respondent’s position is two-part: (1) a warrant was necessary before the government agents utilized the CYCLOPS-237 device and (2) the recreational vehicle was a home protected by enhanced Fourth Amendment restrictions on governmental powers over searches and seizures.

The seminal case in the regime of the Fourth Amendment is *Katz v. United States*, 389 U.S. 347 (1967). Under *Katz*, the individual need not show actual physical intrusion or invasion into a protected space as the Fourth Amendment protects people—and not simply areas—against unreasonable searches and seizures. The issue there was the government’s warrantless use of electronic listening and recording devices in a public phone booth. The Court deemed the taps unconstitutional on the grounds that an individual has a “reasonable expectation of privacy” that is protected by the Fourth Amendment and that what a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” This logic applies with

equal force to the facts of this case given that the basis for the warrant was the unapproved surveillance and that a recreational vehicle is a far less private place than a phone booth.

Petitioner takes issue with our application of *Katz* to the facts at hand. It contends that the recreational vehicle in this case is not a home within the meaning of the Fourth Amendment and thus no reasonable expectation of privacy attaches. *California v. Carney*, 471 U.S. 386 (1985). The essence of its overall argument is that this expectation of privacy is not unfettered. See *California v. Greenwood*, 486 U.S. 35 (1988), and *Florida v. Riley*, 488 U.S. 445 (1989).

Petitioner is correct, privacy is not absolute, however, this truth does not negate the people's right to expect privacy in their own home. It is reasonable for citizens to believe that they are not being spied upon by means of extraordinary devices. Petitioner errs when it argues that respondent had no basis of a privacy expectation because he was in a recreational vehicle. The controlling case is *California v. Carney*, 471 U.S. 386 (1985). Under *Carney* when a vehicle is being used on the highway or is capable of such use and is found stationary in a place not regularly used for residential purposes, the following two justifications for a vehicle exception come into play. First, if the vehicle is readily mobile. Second, if there is a reduced expectation of privacy stemming from the pervasive regulation of vehicles capable of travelling on the highways. The vehicle in the immediate case never moved during the long period of surveillance, nor was it likely to be moved anytime soon. It was parked in an area traditionally used for residential purposes. In addition, the tires were flat. Although this vehicle was used only occasionally for daily life, we are satisfied that the vehicle was placed upon the property for primarily residential purposes. Thus, enhanced protections apply under the Fourth Amendment. Petitioner needed a warrant.

Equally problematic was the use by the police of visual enhancement equipment, which is not readily available to the general public. *Kyllo v. United States* 533 U.S. 27 (2001) states the applicable rule. There Justice Scalia, writing for a divided Court, held that "what a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection" and that in instances where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." Because the CYCLOPS-237 is so uncommon, in the context of a criminal investigation, its use constitutes a search and thus required a specific warrant. The lack of such a warrant and any exigency stemming from the vehicle being readily moved renders the evidence obtained prior to attaining a warrant inadmissible. Furthermore, because the view was somewhat clouded, the police proceeded based on an inference. Inferences are searches and as such require a warrant. *United States v. Karo*, 468 U.S. 705 (1984). In fact, the moment the CYCLOPS-237 was used this changed the nature of the police activity from

a drug search to a different type of search and, again, as such required a warrant. *Illinois v. Caballes* 543 U.S. 405 (2005).

-IV-

We now turn to the issue of the punishment itself. The real issue here is whether proportionality is a requirement of the Eighth Amendment and if so whether this punishment fits with the evolving standards of decency.

The Constitution says little about sentences passed down for crimes and the Court has tended to defer to the states in sentencing cases where possible. See *Rummel v. Estelle* 445 U.S. 263 (1980). This traditional deference aside, it is our duty to place the punishment in this case within this history of what is allowed and what is not. It is a duty from which we cannot shirk. In addition, it is important to note that *Rummel* pre-dates several of the Supreme Court's more recent, and exacting rulings, and while deference may be the norm, it is never due to unconstitutional state actions.

In examining the Eighth Amendment in its present context, we are mindful of United States Chief Justice Earl Warren's famous statement that the Eighth Amendment's words are neither "precise" nor "static." To the contrary, he wrote in the case of *Trop v. Dulles*, 356 U. S. 86, 101 (1958) that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The US Supreme Court, in that case, and others, has struck down as violative of the Eighth Amendment, stripping a citizen of citizenship for wartime desertion, death for rape, the imposition of capital punishment or life in prison without individualized consideration of mitigating factors, executing persons under eighteen years of age or mentally challenged criminals, and death for the rape of a child.¹ Petitioner asserts that the penalty is neither cruel nor unusual. It notes that the US Supreme Court has upheld both life sentences without parole for a first offense of drug possession and, in the name of public safety, three-strikes laws that proscribe life in prison for repeat offenders.² It argues that life in prison avoids taking a life and as such is a humane punishment and that states regularly pass down this sanction for violent acts. In addition, it defends Proposition 417 as a perfectly reasonable response to shifting precedent. In *Coker v. Georgia* 433 U.S. 584 (1977) and *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), for instance, the Court held that under the *Trop* framework crimes against individuals that did not involve killing, including the rape of a child by an

¹ These cases, respectively, are: *Trop v. Dulles*, 356 U.S. 86 (1958), *Coker v. Georgia* 433 U.S. 584 (1977), *Eddings v. Oklahoma* 455 U.S. 104 (1982), *Solem v. Helm* 463 U.S. 277 (1983), *Atkins v. Virginia* 536 U.S. 304 (2002), *Roper v. Simmons* 543 U.S. 551 (2005), and *Kennedy v. Louisiana* 128 S.Ct. 2641 (2008).

² See *Harmelin v. Michigan* 501 U.S. 957 (1991), *Rummel v. Estelle* 445 U.S. 263 (1980), and *Ewing v. California* 538 U.S. 11 (2003).

adult, may not be punished by death. *Roper v. Simmons*, 543 U.S. 551 (2005) barred the states from executing minors. Petitioner argues that precedent such as *Coker*, *Roper*, and *Kennedy* have left the states with little choice but to find alternatives to capital punishment for crimes involving minors and acts other than killings. The people of Olympus took such a step. In light of this precedent, we must decide whether mandating life without the possibility of parole for rape for a fifteen year old falls into the same category as death for minors or death for crimes not involving death. We believe it does and, as such, is unconstitutional.

Respondent argues that it follows logically from the Supreme Court's decision in *Roper* to strike down the death penalty for crimes committed by sixteen and seventeen-year-olds that life without parole for juveniles is unconstitutional. In a majority opinion, Justice Anthony Kennedy wrote that all minors, including older teenagers, are different from adults. They are less mature, more impulsive, more susceptible to peer pressure and more likely to change for the better over time. Thus, they need not be mentally challenged to be treated differently by the law from those who have reached adulthood. Given this fact, it defies logic, and is horribly unfair, to sentence a young man or woman to spend his or her natural years behind bars for a crime committed as a mere child. In our view, while the crimes committed in this case are despicable and shocking in and of themselves, to send a boy away for life at this stage in this young life does not square within the evolving standards of decency in a free society. See *Trop v. Dulles*, 356 U. S. 86, 101 (1958). Juveniles are not permitted to vote, to contract, to purchase alcoholic beverages or to marry without the consent of their parents. It seems inconsistent that one be denied the fruits of the tree of the law, yet subjected to all of its thorns. To say that a 15-year-old will never change and that life without parole is an appropriate punishment is strong medicine given what we know today about human development. However well intended, there appears to be a quantum of cruelty lurking in the application of Proposition 417 to minors. In a civilized society, this punishment cannot stand. We find that the state should have adopted as part of its scheme some sliding scale to achieve justice. Such is common for the punishment of criminal actions and they ensure the kind of proportionality that is absent in this case. The evolving standards of decency require no less.

In *Solem v. Helm* 463 U.S. 277 (1983), the Court found that a sentence "grossly disproportionate" to the crime violates the Eighth Amendment. The Court applied a three part test to determine proportionality. This test examined: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties; and (3) the sentences imposed for commission of the same crime in other jurisdictions. Applying this standard, we find that Olympus's actions fail at least two planks of the test. There are murderers in Olympus who do not get life in prison and its sentence here goes far beyond what most states impose for the same act. Such are the hallmark of a punishment that is out of step with those of Olympus's fellow states and out of balance with common standards of decency.

Finally, in evaluating whether the punishment was cruel, we turn the judicial process that produced this challenge. Cases involving the death penalty receive careful review at multiple levels. Life sentences can receive almost none. Mr. DeNolf, Jr.'s trial, for instance, lasted but a single day. He was represented by a lawyer who made no opening statement and whose closing argument occupies about three double-spaced pages of the trial transcript. These facts do not suggest the actions of a "mature" or "decent" society. Nor do they suggest the kind of individualized consideration of mitigating factors required by the 8th Amendment. See *Eddings v. Oklahoma* 455 U.S. 104 (1982). They suggest a witch-hunt intent of achieving a guilty verdict and not due process of law. Such is cruel and cannot stand.

We turn now to the matter of if the punishment is unusual. Reasonable people can disagree about whether the punishment in Mr. DeNolf, Jr.'s case is cruel. However, the views expressed in the dissent aside, there is no question that it is unusual. Consider that few states in the Union have such penalties. This fact causes Olympus to fail the third tier of *Solem's* test of proportionality. Under this test, courts are to consider "the sentences imposed for commission of the same crime in other jurisdictions." Olympus may not stand alone in this approach to sentencing, but it stands outside the norm. To put the rarity of the sentence in a broader context, consider that while only ten other states have no minimum age for life sentences without the possibility of parole, statutes vary widely across the country as to a minimum age for life sentences. Further, virtually all countries in the world reject the punishment of life without parole for child offenders. It is telling that all countries except the United States and Somalia have ratified the U.N. Convention on the Rights of the Child, which explicitly forbids "life imprisonment without possibility of release" for "offenses committed by persons below eighteen years of age." This sets the State of Olympus apart from not only other states, but from much of the world as well. Consideration of punishment in other nations can not only be helpful in cases such as this, it is also appropriate under *Roper*. We must never forget that America is not an island unto itself nor does it possess a monopoly on issues of morality and decency. Other decent societies exist and how they have evolved can be instructive to this endeavor. *Roper*.

We are of the view in this case that the penalty imposed is "cruel and unusual."

The ruling of the lower court is reversed.

Dissenting Opinion

Dissent by Judges Curtis Clinesmith and Randolph Stout:

We reject the claim that a recreational vehicle is a home entitled to heightened scrutiny under the Fourth Amendment. Not one shred of evidence was proffered to establish that DeNolf, Jr., Jr. or his step-father -- the owner of the property -- utilized the property for anything other than residential purposes.

The essential issue here is whether the Fourth Amendment prohibits the warrantless search of a property using sense enhancing techniques. The vast majority of other courts that have addressed the issue and have found that it does not. Sadly, the court today chooses to issue a ruling that flies in the face of those rulings. Even more troubling, is its willingness to punish the police, and endanger society, for using a device legal under the laws of the State of Olympus. If the people of Olympus wish to ban the use of the CYCLOPS-237 let them do so. What we have today is an example of judicial law-making at its ugliest.

It has long been recognized that if a person manifests a reasonable subjective expectation of privacy then the Fourth Amendment applies. See *California v. Greenwood* (citing *Katz*) 486 U.S. 35 (1988). In the instant case, the respondent may have an expectation of privacy in the abstract. Only an unusually high powered optical device used by the police some distance from the recreational vehicle was able to breach that. However, an expectation of privacy does not give rise to Fourth Amendment protections unless society is prepared to accept such as reasonable. *Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J. Concurring). By leaving the vehicle's windows open and without curtains, the respondent did not exhibit much care to assure his privacy. The fact is that there is no expectation of privacy that applies to all surveillance from outside the house. See: *Florida v. Riley*, 488 U.S. 445 (1989); *Oliver v. United States* 466 U.S. 170 (1984). Respondent, as a guest to the recreational vehicle respondent, had no reasonable expectation of privacy. *Minnesota v. Carter* 525 U.S. 83 (1998).

Accordingly, there is no reasonable expectation of privacy in the behaviors that one exposes to the public. The Supreme Court has long held that "what a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection." *Katz, supra*, at 351. As a practical matter, law enforcement officers cannot be expected to avert his or her eyes from evidence of criminal activity that could have been observed by any member of the public. Though a monocular was used in this case, any member of the public possessing such a device could have witnessed the conduct at issue here. It was not the use of technology which led to the discovery of the criminal activity in this case, but rather a careful investigation by law enforcement which included a warrant verified by the local court.

Even the majority's tortured interpretation and application of leading case law cannot save respondent. *California v. Carney*, 471 U.S. 386 (1985) allows searches of

recreational vehicles. Nor can the majority's conclusion that *Kyllo v. United States* 533 U.S. 27 (2001) invalidates searches that rely on devices not readily available to the public. *Kyllo* turned on devices unavailable to the public because they are "not in general public use." Here the CYCLOPS-237 is available, not only to the public, but it is widely used by military personnel in combat and to protect civilians in war zones. The majority's use of case law is selective. Indeed, it is arguable that the police could have conducted a *warrantless search* of the vehicle given that Detective Paige viewed an injured minor outside the trailer and the U.S. Supreme Court's recent decision in *Brigham City v. Stuart*, 547 U.S. 398 (2006) upholding such warrantless searches of even residences.

We look now at majority's treatment of the Eight Amendment. The respondent contends that even if the use of optical enhancement was constitutional, the Eighth Amendment to the United States Constitution prohibits the extreme sentence handed down today. However, in our view, the Constitution says nothing about the length of an appropriate sentence for any criminal activity. This is a matter for the people to decide through their elected representatives or, as they have in Olympus, through direct democracy. If the respondent wants to change the law, he should petition his legislators or arrange a ballot initiative to repeal Proposition 417, not this court. According to United States Justice Department data, more than one thousand people under the age of fifteen are arrested for rape every year. This sad situation reflects the reality of the world we live in. It is certainly not unconstitutional for citizens to push for law to protect themselves from criminal activity nor is it unconstitutional for legislatures to reflect the will of the people.

There is nothing that is cruel about a life sentence for a rapist. Especially not one who has a prior record of criminal activity. According to the brief filed by the state, in the United States, every two and a half minutes someone is sexually assaulted. This amounts to approximately one in four women and one in eight men that are sexually assaulted during their lifetime. Consider also the damage done by these criminals. About 44% of rape victims are under age 18 (it is estimated that nearly a third are under twelve), and 80% are under age thirty. This criminal conduct also causes great damage to society as more than 59% of all sexual assaults go unreported to police. This then leads to even more crime as rapists have a 19% reconviction rate for sexual offenses and a 46% reconviction rate for new, non-sexual offenses over a five year period.

Taking the above into consideration, the majority's reliance on *Solem v. Helm* 463 U.S. 277 (1983) is misplaced. There, the respondent was not a violent criminal. The correct precedent is *Harmelin*. There the prevailing opinion upheld a life sentence for a relatively minor offense. In doing so, the Court rejected the *Solem* framework and abandoned its requirement that to be constitutional punishments be proportional to the crime and that they satisfy *Solem's* three tier test. Even more recently, the US Supreme Court again affirmed a life sentence for relatively minor offenses in *Ewing v. California*

538 U.S. 11 (2003). Such sentences would be hard pressed to be upheld under a test of proportionality. If such offenses merit life, then surely so can aggravated rape. If *Ewing* specifically upheld such sentences then, again, the *Solem* calculus must be inoperative.

Atkins v. Virginia 536 U.S. 304 (2002) and *Roper v. Simmons* 543 U.S. 551 (2005) are cited favorably by the majority. Unfortunately, it reads far more into those decisions than is actually there. *Atkins* forbid executing mentally challenged inmates. *Roper* established only one new constitutional right, the right for a juvenile not to be given the death penalty. DeNolf, Jr. was not sentenced to death nor is he mentally challenged. In fact, quite the contrary is true. To base a decision voiding respondent's penalty on *Atkins* or *Roper* is misplaced. It is even more egregious to deem, as the majority does implicitly, adolescents comparable to the mentally challenged simply because of their age.

Respondent, has a pattern of disturbing, even violent, acts far more serious than those in *Ewing v. California* 538 U.S. 11 (2003) or *Rummel v. Estelle* 445 U.S. 263 (1980). In those cases, the Supreme Court affirmed life terms for relatively minor offenses. That someone guilty of a string of crimes, including a vicious rape, would go free due to the happy fortune of age is at best horribly wrong, and at worse perverse and short-sighted. Consider the message sent to would-be rapists: to avoid life in prison commit your crimes in your youth. The public has rights as well, and one must be for common sense government and official acts that support public safety – alas this decision achieves neither. Our brethren themselves write, “Precedent such as *Roper*, *Coker*, and *Kennedy* leave the states with little choice but to find alternatives to capital punishment for crimes involving minors and acts other than killings. The people of Olympus took such a step.” Unfortunately, this court sees fit to further restrict the choices a free and sovereign people can make about one of the most fundamental, and basic, issues it faces – how to best protect ourselves. This is not to say that the people can punish *carte blanche* – that is without reference to standards. But when a free people adopt a punishment that squares with the written requirements of higher law that policy should stand both because it satisfies the Constitution and because we are a democracy.

There is nothing cruel about locking up a rapist for the remainder of his natural life. The majority, however, has established that for this state a punishment needs to be either cruel or unusual. Thus, we are compelled to turn, however needlessly, to the issue of whether the punishment was unusual. The majority holds that it is unusual. It does so largely because state laws vary widely and other nations do not sentence individuals fifteen years of age to life in prison. The majority seems to be saying that “a state cannot do what has not been done before, or what is rarely done.” This is most illogical in that it will completely cut off the ability of states to innovate in the area of corrections. Any trail-blazing law is unusual – that is what makes it trail-blazing. Further, what is unusual ought to be examined over time, and not so soon after a law is

adopted and before other states might adopt similar approaches. If the majority's logic had applied to the three strikes laws or to the mandatory sentencing laws they would have been unconstitutional on their face. The fact that the US Supreme Court has affirmed these very innovations points out the fact that the majority's logic is untenable. That same body has recognized the nearly unfettered authority of the states to punish as they see fit. See *Rummel*.

For the foregoing reasons, we respectfully dissent.

Cases Cited in the Record:

4th Amendment Cases:

Katz v. United States, 389 U.S. 347 (1967)
Oliver v. United States, 466 U.S. 170 (1984)
United States v. Karo, 468 U.S. 705 (1984)
California v. Carney, 471 U.S. 386 (1985)
California v. Greenwood, 486 U.S. 35 (1988)
Florida v. Riley, 488 U.S. 445 (1989)
Minnesota v. Carter, 525 U.S. 83 (1998)
Kyllo v. United States, 533 U.S. 27 (2001)
Illinois v. Caballes, 543 U.S. 405 (2005)
Brigham City v. Stuart, 547 U.S. 398 (2006)

8th Amendment cases:

Trop v. Dulles, 356 U.S. 86 (1958)
Coker v. Georgia, 433 U.S. 584 (1977)
Rummel v. Estelle, 445 U.S. 263 (1980)
Eddings v. Oklahoma, 455 U.S. 104 (1982)
Solem v. Helm, 463 U.S. 277 (1983)
Harmelin v. Michigan, 501 U.S. 957 (1991)
Atkins v. Virginia, 536 U.S. 304 (2002)
Ewing v. California, 538 U.S. 11 (2003)
Roper v. Simmons, 543 U.S. 551 (2005)
Kennedy v. Louisiana, 128 S.Ct. 2641 (2008)

Proposition 417:

The State of Olympus penal code shall be amended as follows:

The crime of aggravated rape shall be punished in the State of Olympus by a mandatory life term. No person convicted of aggravated rape in the State of Olympus will be eligible for parole. Aggravated rape shall be defined as the act of rape in conjunction of with other heinous acts directed at the victim. These acts shall include, but not be limited to, abduction, kidnapping, torture, two or more perpetrators participating in the act, the use of physical force and threats of great and immediate bodily harm to the victim, or the use of a dangerous weapon to prevent victim resistance.

The act of raping a minor sixteen and younger shall be considered an aggravated rape. Lack of knowledge of the victim's age shall not be a defense.

This law shall take effect on January 1, 2009