August 7, 2017

IN THE SUPREME COURT
OF THE UNITED STATES

No. 2017-2018

William DeNolf, Petitioner

v.

The State of Olympus, Respondent

On writ of certiorari to the Supreme Court of the State of Olympus

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ORDER OF THE COURT ON SUBMISSION

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

1.) Whether the Functional Brain Mapping Exam (FBME) conducted by the State of Olympus facially violates the right against self-incrimination protected by the Fifth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment?

2.) Whether the sentence of solitary confinement, as applied to Petitioner, violates the Cruel and Unusual Punishment Clause of the Eighth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment?

A violation of the Fourth Amendment is not a certified question and thus is not properly before this Court. Judges are not to ask about if the warrant was valid or why this is not an issue. While a direct appeal from the trial record, advocates may raise the issue of prison conditions. This is because the sentence imposed how Petitioner would serve his time in prison.

SUPREME COURT OF THE STATE OF OLYMPUS

No. 2017-2018

MR. WILLIAM DENOLF, PETITIONER

v.

THE STATE OF OLYMPUS, RESPONDENT

Before: Chief Justice PEREZ, and Justices BONNER, CRAIG, EATON, FAIRBANK, LEDFORD, AND STEFFENSEN.

Chief Justice PEREZ delivered the opinion of the Court, joined by Justices BONNER, EATON, AND STEFFENSEN. Justice FAIRBANK filed a dissenting opinion JOINED BY Justices CRAIG AND LEDFORD.

I. Factual Background and Procedural History

Petitioner, William DeNolf, appeals the constitutionality of his conviction for murder and his subsequent sentence from an Olympus trial court.[1] All of his claims arise under the Federal Constitution of the United States. No claims were brought under the Olympus State Constitution or any Olympus law.

A. The Functional Brain Mapping Exam ("FBME")

In an effort to crack down on crime in Olympus, scientists and crime scene investigators have teamed up to develop new diagnostic technology that will aid law enforcement officials during their investigations. The Functional Brain Mapping Exam ("FBME"), also known as forensic neuroimaging or brain finger-printing, is a brain mapping test that allows investigators to determine whether a suspect has memory of being at the scene of a crime. The exam applies a combination of neuroimaging techniques predicated on the mapping of biological quantities (neurons) onto spatial representations of the brain. In essence, certain areas of the brain will "light up" during an FBME exam if the subject has memories of being at a crime scene when he or she is shown pictures of it. The FBME uses an electroencephalograph to monitor activity of the brain. Electrodes are placed on the scalp and the temples. These electrodes are harmless and cause no pain to the subject. During the test, the subject is shown several images. The brain reacts to these images in certain predictable manners—meaning that the brain reacts in a noticeable manner when it views pictures of locations with which it is familiar. Thus, images, such as a loved one or a place that one has visited, will produce predictable activity in the brain that can be measured. This activity differs from the reaction to a photo of a person or place that is wholly unknown to the subject. Technicians are able to map or record the activity of the brain. High activity indicates

[1] The State of Olympus is the fifty-first state in the United States of America. Olympus does not have an intermediate trial court system. Under Olympus law Petitioner has a right of appeal to this court.

the subject has vivid memory of a particular image, while low activity indicates the subject has little to no memory of a particular image. Investigators and law enforcement officials around the country are beginning to use the FBME as a way to retrieve information regarding criminal activity, including homicides.

According to all scientific studies, this brain mapping technique is very reliable. These studies are not included in the record. The parties before the Court have stipulated to the FBME's accuracy and scientific validity, as well as to the fact the test is generally accepted by the relevant medical and scientific communities. In fact, Petitioner did not question the scientific validity of the FBME at trial. Thus, this issue was not preserved for this appeal. FBMEs are performed by trained technicians, often physicians, who work with law enforcement agencies as well as private industries. Typically, they are not law enforcement officers themselves. In this regard, they are similar to the polygraph examiners who perform polygraph tests, but are not themselves law enforcement officers. In this case, the use of the FBME was at the direction of Olympus law enforcement officers. The parties have stipulated and the trial court agreed that the FBME was admissible under the controlling standards for reliability and accuracy. The parties and the court further agreed that the test procedure and its result were within scientific standards and are accurate. Mr. DeNolf objected on Fifth Amendment – self-incrimination grounds to the admissibility of the evidence in question before us today.

B. The Sleep Suites Incident, the Questioning of Petitioner, and the Trial

Ms. Andrea Somerville was a twenty-eight-year-old woman who worked by day as a biologist specializing in the study of retromingents, and by night, as a prostitute in Olympus. Mr. William DeNolf is a fifty-five-year-old real estate agent of sound mind who recently moved to Olympus.[2] On March 17, 2014, Mr. DeNolf met Ms. Somerville late at night in the parking lot at a motel called Sleep Suites in the city of Knerr.

Jay Carney and Ashleigh Hammer are detectives for the Knerr Police Department. They are members of a special state and local task force that was established to investigate prostitution in Olympus. Detectives Carney and Hammer were parked under a Sleep Suites lamp post in an unmarked vehicle on the night that Mr. DeNolf and Ms. Somerville arrived at Sleep Suites. Detective Hammer recognized Ms. Somerville from past stakeouts and thought that the situation was suspicious. The detectives debated for a while about whether to intercede on suspicion that the woman was a prostitute and that Mr. DeNolf was her "john." The detectives observed Ms. Somerville exit Mr. DeNolf's vehicle and visit the reservations office where she rented a room from the clerk. Meanwhile, DeNolf purchased two sodas from a vending machine. As Mr. DeNolf and Ms. Somerville met up at Mr. DeNolf's car, Detective Hammer observed that Ms. Somerville was handed a roll of money and walked with Mr. DeNolf to the motel. Detective Carney approached the two, identified himself as a City of Knerr Detective, and asked to see their driver licenses. Both parties produced their driver licenses, along with voter ID cards for Olympus. Mr. DeNolf and Ms. Sommerville said they had just met and were only talking. Detective Carney returned their IDs and left the two outside the motel. He and Detective Hammer were called to

[2] According to briefs filed in this case, there is a history of major depression in his family and he alleges that after the time he has spent in prison he has trouble sleeping and little appetite. Major depression is the most severe form of depression. Expert witnesses for the State and Mr. DeNolf concur that he has shown signs of major depression: however, both have testified that such is common among individuals serving lengthy prison terms.

investigate a sex trafficking tip at a suspected brothel found in a neighborhood of Knerr known as La Grange. The locals have nicknamed the suspected brothel "The Home Across the Road." The local police call it "The House of the Rising Sun." The suspected brothel, which is owned by local gambler Frankie Lee, claims to be a restaurant and bar that goes by the formal name of "Paradise." Detectives Carney and Hammer did not return to Sleep Suites that night.

The following morning on March 18, 2014, Knerr Law Enforcement officials were called to the scene of a homicide. Two maids at Sleep Suites, Aleah Fisher and Abigail Kennefick, found Ms. Somerville dead inside room 417 at Sleep Suites—the same room she had rented the night before. Emergency responders quickly arrived at the scene of the crime, but were unable to revive Ms. Somerville. Mr. DeNolf was not present. The Knerr homicide detective who was assigned to the case, David Cazzarubyus, was aware of the deceased's suspected role in prostitution. Consequently, he contacted Detectives Carney and Hammer and informed them of Somerville's death and shared his suspicions that she had been tortured before she was murdered. The killer had written "whore" in the victim's blood on the walls of the room.

Detectives Carney and Hammer drove to Mr. DeNolf's home and asked if he would be willing to accompany them to the Knerr police department for questioning in connection with the murder of Ms. Somerville. Mr. DeNolf asked if he was under arrest and if he needed an attorney. Detective Hammer responded, "You are not under arrest—whether you want an attorney is up to you." Mr. DeNolf agreed to accompany the detectives. He did not call an attorney because in his words, "I am 100% innocent and I want to help you arrest the killer." The detectives transported Mr. DeNolf to the Knerr Police Department and took Mr. DeNolf into a room where investigators began interrogating him. Before doing so, they reminded him that he was not under arrest and was free to leave or stop talking if he wished. When asked if he had ever been inside any rooms at Sleep Suites, Mr. DeNolf answered "no." Mr. DeNolf was asked a few questions about being inside Sleep Suites, specifically room 417. He answered all their questions. Mr. DeNolf stated quite clearly that he had not been inside the motel, but that he had visited the exterior of the motel.

Mr. DeNolf admitted that he intended to pay Ms. Somerville for sex, but he consistently denied having killed or harmed her in any way. Mr. DeNolf stated that the transaction had not even occurred between himself and Ms. Somerville because he received a phone call from his wife telling him to "get home now!" Mr. DeNolf further said, "We didn't even have time to get into the motel room before my wife was yelling at me!" After answering these questions cooperatively, Mr. DeNolf informed the detectives that "I do not like the tone, or the direction of your questions." He also stated "I no longer want to speak with you and I will not say anything else to you guys." At this point, the detectives told Mr. DeNolf that they were done questioning him, but wanted to administer a test. The detectives requested a warrant for an FBME, which was granted by an Olympus trial judge Caitlin Wood. The parties stipulate that the warrant was valid.

After the warrant was issued, Mr. DeNolf was asked to accompany the detectives from the police department to an Imaging and Screening facility. Mr. DeNolf did not respond, but he did walk with the detectives to the facility located two buildings away from the police department. Mr. DeNolf was not handcuffed and he walked alongside the detectives. He had his wallet and identification. They walked past a bus stop and a few taxicabs that were parked outside the building. Once they reached the facility, Detectives Carney and Hammer left Mr. DeNolf alone

with two FBME technicians. The technicians, Bobby Bronner and Chester Comerford, are both medical doctors who work by contract for the Knerr Police Department and were acting at the detectives' direction. They identified themselves to Mr. DeNolf as physicians. He asked, "Are you cops?" to which one answered, "No, but we work with the police in certain investigations such as this one today." Mr. DeNolf did not ask to leave or to speak to an attorney. Drs. Bronner and Comerford explained the FBME to Mr. DeNolf. They informed him that the FBME was "purely procedural, much like drawing blood or taking fingerprints." They also informed him that the test would not require any needles, unlike a blood test. Mr. DeNolf expressly said that he would not answer any questions or say anything more. Drs. Bronner and Comerford conducted the FBME test without asking Mr. DeNolf any further questions. The test took less than thirty minutes. The test does not involve any communication, verbal or otherwise, between the technicians and Mr. DeNolf. They simply show him a photograph and measure his brain response. He did not speak or make any faces or gestures nor did the technicians. There was no recording of the process.

Mr. DeNolf did not resist the FBME and was cooperative during it. During the FBME, the technicians used images from the scene of the crime, including from room 417 and from other locations in and around the motel, as well as images from non-crime scenes in and around other hotels.[3] In the image of room 417, Ms. Somerville's corpse had been removed from the area but there was still blood about the room. The results of the FBME demonstrated high activity when images from Sleep Suites were shown, indicating that Mr. DeNolf had memory of being at the hotel and being in room 417. The results demonstrated low activity for all the other hotels that were shown. The test indicated that Mr. DeNolf only recognized one other hotel.[4] Based on these results, the police arrested Mr. DeNolf and he was arraigned for the murder of Ms. Somerville.

Mr. DeNolf filed a motion to suppress the results from the FBME. The trial judge, D.R. Fair, denied the motion. During trial, evidence was presented against Mr. DeNolf, including the results of the FBME and his statement to the police that he had not been inside Sleep Suites or in room 417. There were no witnesses other than Detectives Carney and Hammer who witnessed Mr. DeNolf at Sleep Suites, as the reservation clerk, "Big Dom" Noble, only interacted with the deceased. No DNA evidence was introduced at trial. The technicians who performed the FBME testified at Mr. DeNolf's trial. At trial, Judge Fair found that Mr. DeNolf showed no signs of mental deficiency (a point he did not contest). Neither at trial nor at sentencing did he present any mitigating factors that should be considered in assessing his guilt or penalty. Mr. DeNolf did not testify at his trial and instead invoked his Fifth Amendment right against self-incrimination.

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[3] In total, Mr. DeNolf was shown fifty-six photographs. He was shown seven images from eight different hotels. From Sleep Suites, he was shown a photo of room 417 (the crime scene), a photo of room 110 and a photo of room 212 (not affiliated with the crime scene), as well as a photo of the motel reservations desk, a photo of the vending machine on the 4th floor, a photo of the front of the hotel, and a photo of the parking lot. He was shown similar photos of other hotel rooms, lobbies, front doors, parking lots, and vending machines from other hotels. These included images from several well-known hotel and motel chains (Days Inn, Holiday Inn, Drury Hotel and Suites, and Courtyard by Marriott), as well as several iconic hotels, such as the Pink Hotel in Waikiki, the hotel featured on the cover of the Eagles LP *Hotel California* and Trump International Hotel in Washington, D.C. Four of the rooms he was shown were crime scenes (they had blood about the room) and four were not. The photos from the hotels without crime scenes were randomly selected. The photos from the four hotels with crime scenes were not randomly selected – however the technicians were careful to randomly select images of hotel crime scenes from a pool that included twenty possible hotel crime scenes.

[4] According to the test, the only hotel images that Mr. DeNolf recognized were the hotel from the cover of the Eagles LP *Hotel California* and images from the Sleep Suites.

A jury found Mr. DeNolf guilty of the murder of Ms. Somerville. After Mr. DeNolf was convicted, Judge Fair, pursuant to Olympus law, sentenced him to 30 years of solitary confinement within a Supermax prison known as Poseidon Penitentiary. This was not a mandatory penalty, and under the terms of the statute the judge could have sentenced Mr. DeNolf to death or to a longer or shorter term of years. The judge did not explain why he chose this exact period of years rather than a longer sentence, but he indicated that he sentenced Mr. DeNolf to solitary confinement because "he tortured his victim." In 20 states, inmates can be kept in solitary without definite release dates. While it is not unheard of for inmates to serve 15 to 30 years in solitary confinement, such a term is not the most common outcome. In fact, a few of these 20 states have no inmates serving without definite release dates. Mr. DeNolf entered prison on July 7, 2014. He has been in solitary confinement, without exception, since that date.

C. Olympus Law and Petitioner's Sentence

Olympus has a population of 10,000,000 people. .11% of the population (11,000 persons) are incarcerated. In Olympus, 385 (3.5%) of its 11,000 inmates are in jail for homicide and aggravated assault.[5] In Olympus, convicted murderers are subject to the death penalty, though it is a sentence that is rarely issued. Sentences such as life without parole or long terms such as fifty years without a possibility of parole, are much more common for those convicted of murder.

Under Olympus law, the sentencing authority possessed by judges includes the authority to sentence convicts to a variety of forms of what the state labels "restrictive housing."[6] Olympus is the only jurisdiction that grants judges this authority. Trial judges have the additional authority to determine how long an inmate will serve in restrictive housing and the level of that restrictive housing. Although Olympus does not grant parole to persons convicted of murder, a warden may elect to move a prisoner from solitary confinement back into the general prison population once the inmate has served half of the sentence. This can be important as studies find that inmates who are released directly from solitary confinement as opposed to from general population are more likely to reoffend and likely to do so quicker (12 vs 27 months) and that inmates who have served in solitary confinement are more likely to reoffend than those who have not. Olympus law provides six levels of restrictive housing, the most extreme of which is solitary confinement. This penalty tends to be reserved in Olympus for the most violent criminals.[7] Under Olympus law, inmates who "torture" their victims are eligible to be sentenced by a judge to solitary confinement at trial. Mr. DeNolf is one of 100 inmates in prison in Olympus who tortured a murder victim.[8]

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[5] These figures are comparable to figures released by the United States Federal Bureau of Prisons (BOP), which in 2015 found that 5,537 (3.1%) of all federal inmates were in jail for homicide, kidnapping, and aggravated assault.

[6] This authority is not being challenged on its face.

[7] The six forms of restrictive housing in Olympus are: (1) Protective custody, which protects an inmate from threats of violence and extortion from other inmates; (2) Segregation due to acute or serious mental health needs; (3) Segregation due to acute medical needs other than mental health needs; (4) Investigative segregation, which temporally segregates an inmate while serious allegations of misconduct are investigated; (5) Disciplinary segregation, which punishes an inmate for a violation of a major disciplinary rule; and (6) Solitary confinement, which segregates inmates based on crimes they committed while they were a member of the non-prison general population.

[8] It is not clear how many murderers who tortured their victims were not sentenced to solitary confinement by a judge or assigned to solitary confinement by prison officials. But majority of those who tortured their victims were sentenced to solitary confinement.

Inmates who torture their victims are not the only inmates sentenced to solitary conferment in Olympus.

In Olympus, solitary confinement is defined in the state code as "the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day with no environmental or sensory stimuli and almost no human contact for a period of up to 30 consecutive days." Presently, 6% of the Olympus inmate population, or 660 inmates, are in some form of restrictive housing: 25 inmates in protective custody, 100 inmates in segregated housing due to mental health issues, 40 inmates in segregated housing due to non-mental health medical issues, 20 in investigative segregation, 75 in disciplinary segregation, and 400 in solitary confinement. The State can house 750 inmates in restrictive housing. Olympus does not subject juveniles to solitary confinement. The decision to sentence inmates to solitary confinement is based on their offenses for which they are serving a prison sentence. *See supra* footnote 5. 100 of these 400 inmates are in prison for murder or aggravated assault. The rest are in prison primarily for sexual offenses (150 inmates) or gang-related crimes (150 inmates). Some of these 400 inmates also suffer from mental illness.

D. Solitary Confinement in the United States

The use of solitary confinement in the United States dates to the early 1820s. According to the U.S. Bureau of Justice Statistics (BJS), the Federal Government and 40 states use some form of solitary confinement. Of the 1.5 million adults incarcerated in federal and state facilities,[9] about 80,000 to 100,000 are in some form of solitary confinement. With respect to the federal inmate population, the United States Bureau of Prisons (BOP) reported that as of January 2017, 5.75% (or 8,819) of inmates in custody are in segregated housing units (SHU). This is the federal equivalent of solitary confinement.[10] The BOP states that of these 8,819 inmates in SHU, 1,274 (14.45%) are in SHU for disciplinary reasons (disciplinary segregation). The BOP reports that 7,545 (85.6%) are in SHU for administrative reasons (administrative segregation), such as "they are under investigation for misconduct and/or criminal behavior." No equivalent data is available for the states that subject inmates to some form of solitary confinement. What is known is that 15 (30%) of the states automatically sentence gang-members to some form of restrictive housing. This is due to fears that gang members will pose a threat to other inmates as well as prison officials. As noted, however, Olympus subjects a similar percentage of its inmates to such confinement. Where federal and Olympus data differ is that Olympus subjects inmates to solitary confinement based on their crimes committed before they entered prison (400 of 660 or 60.6%). The Federal Government uses the term "restrictive housing" instead of the term "solitary confinement." However, the federal practice of restrictive housing is functionally the same as solitary confinement despite the terminological difference. Simply put, the United States practices solitary confinement; it just calls it restrictive housing.

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[9] The BJS estimated in 2015 that on average nearly 2.2 million persons are incarcerated in the United States. This includes 154,389 federal inmates, 1,345,611 state inmates, 585,000 persons in local jails, 86,000 in juvenile facilities, 13,000 inmates in U.S. territories, 10,000 persons detained by Immigration and Customs Enforcement, 2,000 in inmates in Tribal facilities, and 1,600 persons held in military installations.

[10] The United Nations has observed "there is no universal definition of solitary confinement." Many nations, including the United States and many of its 51 states, do not use the term solitary confinement to describe its sentences. If there is one yardstick by which to distinguish what is solitary confinement from what is not, it is that the reduction in stimuli inflicted upon inmates is not only quantitative it is also qualitative. Put simply, it is not just the reduction in time outside one's cell, there is an overall diminished quality of life that occurs wherever the inmate may be.

The proliferation of restricted or segregated housing, which reflects the drive toward Supermax facilities, was driven in large part by: economics, trends in the 1980s and 1990s toward mandatory sentences, the rise of gang-activity in prisons, and the threat that gang-associated inmates posed to both officers and the general prison population.[11]

E. Conditions of Segregated Confinement at Poseidon Penitentiary

Poseidon Penitentiary is a Supermax prison located in central Olympus.[12] It is one of three Supermax prisons in Olympus. The other two are located in northern and southern Olympus. Each facility has the capacity to house a total of 500 prisoners—250 of whom are housed in single-inmate cells, which are designed to "separate dangerous prisoners from the rest of the general prison population." Currently, each of these Supermax prisons has about 30 open single-inmate segregated cell units. Olympus does not double-cell inmates who are serving solitary confinement. Not all prisoners at Poseidon Penitentiary are in solitary confinement.

Incarceration at the Poseidon Penitentiary is synonymous with extreme isolation. Within solitary confinement, almost every aspect of an inmate's life is controlled and monitored. The cells have solid metal doors with metal strips along the sides and bottoms, which prevent communication with other inmates. These doors block most light and vision and are operated by electronic command rather than by a guard using a key. The rooms and hallways all look similar and are comprised of concrete that is painted white. Each cell has a video surveillance system that is constantly monitored by correctional officers. The cells have no windows. A light remains on in the cell at all times, though it may be turned off using a clap-sound operated light switch if the inmate so chooses. Restroom facilities, which can be flushed by the inmates, are available within the inmate's cell.

Basic conditions of hygiene are provided: all cells have air conditioning and heating options. There are no allegations of issues related to lack of water, air quality, or sanitation. Three meals a day are delivered to the inmate's cell where he or she eats alone instead of in a common eating area. The food is reported to be palatable. Inmates have limited access to books and mail, and they have a mattress of their own which must remain in their cell at all times. There is a recreation area that is located outside. It has a 20-foot wall around it and a plastic cover to protect inmates from the rain. The floor is a synthetic type of turf that absorbs the sunlight. There is room for inmates to run short sprints and to perform other exercises. There is a basketball and a soccer ball, but no other recreational equipment or facilities are available. The guards inflate the balls so they can be used.

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[11] Supermax facilities were designed to house dangerous inmates long-term with minimal interaction with other persons—for example, other inmates or court personal. A study by the group Judicial Watch and several newspaper accounts reported that of the 80,000 to 100,000 inmates in solitary confinement, 25,000 are presently in Supermax prisons. In addition, 50,000 to 60,000 more are in conditions approaching or consistent with solitary confinement in the nation's Secure Housing Units, Restricted Housing Units, and Special Management.

[12] A Supermax prison is comprised of "control units." In these units one typically finds the most dangerous offenders as well as offenders who may be segregated to protect them or because they are awaiting trial on additional charges unrelated to their original incarceration. Supermax prisons have high levels of security.

Inmates must remain in their cells, which measure 7 feet by 14 feet, for 24 hours per day, for up to 30 consecutive days. Once every 30 consecutive days, the prisoner is allowed in a recreational cell for four hours where he or she can hear and talk to (but not see) other inmates. Some inmates yell at other inmates throughout the four-hour period and others try to intimidate guards during all their hours within the recreational cells. While inmates are deprived of almost any environmental or sensory stimuli and almost all human contact, their basic needs are met and they are provided comfortable accommodations that meet the Restrictive Housing Standards set forth by the American Correctional Association. The American Psychological Association estimates that half of all inmates in correctional facilities in the United States suffer from some form of mental illness. This rate increases for inmates housed in segregated units.

Inmates can request religious counseling, which is provided by two chaplains on the prison staff. There can be a delay of up to a week before inmates are able to meet with prison chaplains. It is unclear from the record whether Mr. DeNolf has ever requested such a meeting. Prison staffers do not interact verbally with the inmates and inmate behavior is observed by closed circuit televisions. Prisoners are not allowed to visit with outsiders, but they can correspond through mail once it has been reviewed and censored by prison staff. Prisoners are allowed to communicate uncensored with their lawyers, though few do after their appeals are finished.

The prison is staffed by guards 24 hours a day under the supervision of Warden Beta Diego. Prison guards must have at least a high school diploma and have passed a CPR class. Prison guards have the authority, if they choose, to report if an inmate is in need of medical or mental health attention. In fact, they perform medical/mental health triage to the extent that it occurs. However, prison guards have not received any training in mental health issues. When an inmate is reported to have mental health issues, or if an inmate requests mental health services, mental health services are provided by licensed professionals who have a minimum of a master's degree in social work. In fact, 90% of mental health professionals working at Poseidon Penitentiary received their degrees online from either Kedesh College or Olympus State University. These professionals are randomly chosen from a pool of mental health professionals to deal with inmates who are referred for evaluation. While none are full-time employees at the prison, there are always three mental health professionals on-call for residents in restricted housing. On average, there is one for every 200–220 inmates in restricted housing. Psychiatric outpatient treatment and medications are available on-site, but intensive psychiatric inpatient treatment is not available. Due to security concerns, inmates who need such care cannot be transported off-site to state mental health facilities. The mental health staff can participate in a voluntary system of peer review. Not all of the mental health professionals participate. This is the closest system of professional oversight of the mental health staff that exists at Poseidon Prison. Poseidon's record keeping on mental health referrals appears adequate.

Both the American Psychological Association and the BJS estimate that half of all inmates in the United States suffer from some form of mental illness. In addition, the BJS has reported that acute levels of mental illness are associated with persons who are subject to restrictive housing, such as solitary confinement (the term used by Olympus), segregated housing (a term used by many states), Security Housing (the term used by California), Special Housing (the term used in New York), Intensive Housing Units (the term used by Oregon), Isolation Confinement (the term used

in Arkansas) and Administrative Housing (the term used by the United States Government). Not all who suffer from mental illness are in segregated housing.

Both sides have stipulated that mental health is a serious issue in American correctional facilities. In addition, both sides have stipulated that an estimated 75 % of the prisoners who leave Poseidon Penitentiary have psychological disorders. No data has been gathered on the number of psychological disorders possessed by intimates before their incarceration in solitary confinement. In fact, prison staff does not perform any mental health screening of inmates before their sentencing or housing decisions.

F. Petitioner's Appeal

Mr. DeNolf alleges Fifth Amendment and Eighth Amendment violations of his constitutional rights as they are applied to the states through the Due Process Clause of the Fourteenth Amendment. We review the substantive merits of the constitutional arguments raised below. The parties to the case have stipulated to the aforementioned facts. We review all questions *de novo*. We AFFIRM the ruling of the trial court.

Chief Justice PEREZ delivered the majority opinion, joined by Justices BONNER, EATON, AND STEFFENSEN.

I.

Petitioner argues that the use of the FBME facially violates the Fifth Amendment's guarantee of the right against self-incrimination. We reject this argument and find no such violation to be represented by the facts before us today.

We hold that Mr. DeNolf's Fifth Amendment rights were not violated. Historically, the legal protection against compelled self-incrimination was directly related to the question of torture for extracting information and confessions. In modern times, this Court has focused on coercive methods that fall short of torture. The general presumption is that evidence that a defendant produces involuntarily is compelled. However, Mr. DeNolf did not resist the FBME conducted by law enforcement officials. Therefore, he was aware that he gave up his privilege against self-incrimination. In addition, the FBME is constitutional for several of the forthcoming reasons.

In *Schmerber v. California*, 384 U.S. 757 (1966), petitioner was convicted of driving an automobile while under the influence of alcohol. The United States Supreme Court held, over the petitioner's objection, that the analysis of petitioner's blood, which was taken by a physician in the hospital, was admissible because it did not violate the Fifth Amendment privilege against self-incrimination. *See id.* at 765 ("Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.").[13]

The blood test at issue in *Schmerber* was a reasonable one, which is generally accepted by medical and scientific experts as a highly effective means of determining the level of alcohol in a person's

[13] Although the police lacked a warrant in *Schmerber*, the Court rejected Schmerber's Fourth Amendment claims.

blood. The test in that case was performed in a reasonable manner in a hospital environment and in accord with accepted medical practices. These facts bear a strong resemblance to the case before us today. Mr. DeNolf's FBME was a reasonable and highly effective test performed by medical doctors in an appropriate environment and manner. Unlike the test in *Schmerber*, the FBME did not physically invade Mr. DeNolf's body. Contrary to Mr. DeNolf's claims, the FBME does not capture thoughts. Rather, like a blood test conducted to ascertain one's blood-alcohol level, the FBME simply reveals electrical impulses in the body—namely what one remembers. The facts that no fluid is withdrawn and no part of the body is penetrated make the FBME less likely to violate the Fifth Amendment than the blood test in *Schmerber*. There is nothing in the Constitution to protect electrical impulses of the body being passively read by a reliable machine.
In certain critical ways, the FBME is similar to a polygraph test. Generally, polygraphs are not admissible in courts of law. There is at least one of our sister courts, however, that has sustained the use of polygraph tests from Fifth Amendment challenges. We find such analysis persuasive. *See Commonwealth v. Knoble*, 42 A.3d 976, 983 (Pa. 2012) (finding that the reliance on the results of a polygraph to revoke a convict's probation did not violate the Fifth Amendment.)

We are reminded today that the Constitution is constantly being tested by new and destabilizing technologies. *See Kyllo v. United States*, 533 U.S. 27 (2001). Yet these new technologies can, and should, be reviewed in light of these constitutional rights. *Id.* at 36–40. For example, in *Kyllo* a brand new technology, which could see where the naked eye could not, required a warrant. Here, there is such a warrant, so the concerns of *Kyllo* are met.

The course of action taken by law enforcement was lawful. We affirm the lower court's finding.

II.

We hold that Mr. DeNolf's Eighth Amendment rights were not violated. The penalty here is not cruel and unusual for a number of reasons.

It is a slippery slope to determine how much solitary confinement is cruel and unusual for an individual. Cases involving such claims need to be decided on an independent, case-by-case basis that follows precedent. Typically, the state need only advance one legitimate penological justification to save a law or policy controlling prison conditions. The state has at least three legitimate penological justifications that support this penalty. It is important to note that the record finds that Mr. DeNolf is an adult who showed no signs of mental deficiency at trial and he presented no mitigating factors that would have prevented him from performing the cost-benefit analysis necessary for a punishment to satisfy the demands of the Eighth Amendment. See *Roper v. Simmons*, 543 U.S. 551 (2005). Thus, the state's interest in deterrence is rational, not vindictive. Further, the state has a valid interest in special deterrence, which is served by this penalty. Thus, it meets the standard set in *Ewing v. California*, 538 U.S. 11, 29–31 (2003) (plurality).

While not a case involving a challenge to solitary confinement, *Rhodes v. Chapman*, 452 U.S. 337 (1981), is illuminating. In that decision, the first to involve a challenge to prison conditions, the Court noted that while conditions can be unconstitutional, "[t]o the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 347. *Rhodes* establishes that prison conditions imposed by judges or by

statute must be judged by "objective factors to the maximum possible effect." *Id.* at 346 (internal citations and quotations omitted). In a more recent prison conditions ruling, *Helling v. McKinney*, 509 U.S. 25, 28 (1993), the Court heard an Eighth Amendment claim that McKinney, an inmate in a Nevada prison, was put in serious health risk by second-hand smoke and as a result subject to a penalty forbidden by the Constitution. The Court, without ruling on the merits, held that McKinney could prevail in the future if he established that "he himself is being exposed to unreasonably high levels of [environmental tobacco smoke]." *Id.* at 35. The Court in *Helling* looked to clarify how inmates bringing suits alleging unsafe prison conditions must proceed:

> [W]ith respect to the objective factor, determining whether McKinney's conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS. It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.

Id. at 36.

This was the approach followed in *Madrid v. Gomez*, 889 F. Supp 1146 (N.D. Cal. 1995).[14] In that case, the Northern District Court of California considered whether the direct conditions of solitary confinement as practiced at a specific prison violated the Eighth Amendment. *See id.* at 1260–79. *Madrid* stemmed from a class action suit brought by prisoners in California's Pelican Bay State Prison alleging a range of Eighth Amendment violations, including excessive force, inadequate physical and mental health care, and inhumane conditions in the prison's housing units. *Id.* at 1155–59. In that case, the district court held that there was unnecessary and wanton infliction of pain and use of excessive force, and prison officials did not provide inmates with constitutionally adequate medical and mental health care, among other conditions. *Id.* at 1279–80. The *Madrid* analysis, however, is starkly different from the case at bar. Given the conditions at the Poseidon Penitentiary, Mr. DeNolf's sentencing will not inflict pain nor involve the use of excessive force. The facts of the case present no evidence of the same sort of harsh conditions found to be unconstitutional in *Madrid.* The record reflects that Mr. DeNolf has an adequate amount of physical and mental health care within his solitary confinement facility, and there is no evidence in the record of inhumane conditions.

Madrid found that "[t]he Eighth Amendment simply does not guarantee that inmates will not suffer some psychological effects from incarceration or segregation." *Id*. at 1264. The same is true here. Like the court in *Madrid,* we find that the degree of psychological trauma inflicted on the average prisoner—in this case, Mr. DeNolf—by itself is not enough to violate the Eighth Amendment. Much like the *Madrid* court found, we recognize that for prisoners with pre-existing mental health conditions, as well as those with an abnormally high risk of suffering mental illness, being subjected to solitary confinement conditions may be serious enough to constitute cruel and unusual

[14] The Ninth Circuit addressed this case on appeal in 1999, but that ruling focused solely on the issue of attorney's fees and did not reach the issue of whether the confinement was constitutional. *See Madrid v. Gomez*, 190 F.3d 990 (9th Cir. 1999). Therefore, that ruling is neither relevant to this case, nor part of this record.

punishment in violation of the Eighth Amendment. However, according to the facts of this case, Mr. DeNolf is of sound mind.

With regard to the dissent's belief that solitary confinement might jeopardize an individual's psychological state, we highlight Justice Stevens' concurrence in *Hudson v. McMillian,* 503 U.S. 1, 13 (1992) (Stevens, J., concurring). There, Justice Stevens argued that the Eighth Amendment forbids "unnecessary and wanton infliction of pain." The majority in *Hudson* found use of excessive force against a prisoner might constitute cruel and unusual punishment even though the prisoner does not suffer serious injury. *Id.* at 1. In Mr. DeNolf's case, there is no serious injury. In fact, Mr. DeNolf has not alleged any injuries. In their dissent to *McMillian,* Justices Thomas and Scalia found that the facts of the case emphasized that petitioner's injuries were "minor." *Id.* at 26 (Thomas, J., dissenting).

This case asks whether Mr. DeNolf has established that he has suffered a significant injury and that the conditions of confinement are "so grave" that they offend "contemporary standards of [human] decency." *Helling*, 509 U.S. at 36. We find that Mr. DeNolf has failed to carry this burden. The sentence in question is not cruel. We find that a use of force that causes only insignificant harm to a prisoner may be immoral, torturous, and despicable, but it is not cruel and unusual punishment. Furthermore, for an act of murder such as the one committed against Ms. Somerville, thirty years of "alone time" seems less severe than other possible punishments.

The use of solitary confinement, by any name, is both widespread and hardly new. Simply put, even if solitary confinement is found to be cruel, it is not unusual. To violate the Constitution, it must be both. *See Harmelin v. Michigan*, 501 U.S. 957, 994–95 (1991) (holding "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history.) To hold otherwise would be to rewrite our Constitution—an authority that we as judges lack."

Conviction and sentence of William DeNolf is AFFIRMED.

Justice FAIRBANK **dissenting, joined by Justices CRAIG and LEDFORD.**

I.

The first issue before the Court is whether or not the Constitution protects a person from the production of maps of cognition. The majority errs in its decision that Mr. DeNolf's constitutional rights were not violated because the Functional Brain Mapping Exam (FBME) did not force Mr. DeNolf to incriminate himself. The actions of the state are unconstitutional under the Fifth Amendment predominately because brain-based testing wrongly condemns the accused and tramples on the civil liberties of individuals.

The Fifth Amendment of the United States Constitution provides in pertinent part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The notion that the state has the authority to, in essence, read the minds of its citizens is unconstitutional on its face, regardless of a warrant. The FBME enables the state to discover our thoughts. It is an appalling concept that appears to come straight from the most dystopian of science fiction. That our public officials would even consider using such a technology is shocking

and their actual use of such power in this case constitutes a shocking attack upon our civil liberties. It is an abomination too terrible in its potential for misuse to even consider. Put simply, it is the stuff of which nightmares are made. While no Fourth Amendment claim was preserved, or argued in this record, this case brings to mind *Kyllo v. United States,* 533 U.S. 27 (2001). In that case, the Court warned that society must be protected against advances in the technology available to the law enforcement profession. *Kyllo* 533 U.S. at 34. ("To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment."). The simple truth is that as society changes, the law as applied in practice has and must evolve alongside it. *See, e.g., id.* at 33–34 ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality) (recognizing that the Eighth Amendment draws its meaning from "the evolving standards of decency that mark the progress of a maturing society."). It is common knowledge that in the arena of civil rights and civil liberties, laws pertaining to segregation, reproductive rights, regulation of homosexual conduct, and marriage equality have all evolved as society has evolved. Times change, people change. The law must keep pace with it. The right against self-incrimination should be no exception.

Many policies which have been addressed by the Court reflect the basic concern of protecting the individual from unfair and inherently coercive government attempts to extort information involuntarily and inadmissibly. The privilege of self-incrimination was designed to halt the sort of physical invasions represented by the FBME. The majority in *Schmerber v. California*, 384 U.S. 757, 762 (1966), viewed the privilege against self-incrimination as a constitutional guarantee that the government will gain convictions "by its own independent labors, rather than by the cruel, simple expedient of compelling it from his [the suspect's] own mouth."

Mr. DeNolf's constitutional right was abridged. The Constitution protects against communication that is "testimonial, incriminating, and compelled." *United States v. Von Behren*, 822 F.3d 1139, 1144 (10th Cir. 2016) (internal citation and quotation marks omitted). This standard is satisfied in the immediate case. The majority's reliance on interrogation cases in which the accused either offered evidence that incriminated him on his own accord without being subject to questioning or allowed the accused to leave the police station and go home, is misplaced. *See, e.g., Rhode Island v. Innis*, 446 U.S. 291, 302–03 (1980) (upholding confession where officers exchanging "a few offhand remarks" could not have reasonably expected suspect to confess). These holdings are easily distinguishable from the case before us today.

The FBME may be a fairly unique test in how it operates and in what it reveals. Nevertheless, it is analogous to a polygraph test in many ways. Other courts have found that the use of polygraph results can violate the Fifth Amendment. *See Von Behren*, 822 F.3d at 1151. While the facts of the record and *Von Behren* may differ slightly, they are similar enough for *Von Behren* to be instructive. In that case, the Tenth Circuit held the polygraph test in question compelled Von Behren to testify against himself. *Id.* The majority's reliance on *Commonwealth v. Knoble,* 42 A.3d 976 (Pa. 2012) is misplaced. Simply put, *Von Behren* is the more instructive case.

Mr. DeNolf was required to submit to a process that produced images from his own brain, which were ultimately used against him. Given that fact, the most analogous cases are *Estelle v. Smith,* 451 U.S. 454 (1981) and *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). In those cases, the content

of the answers was considered part of the accused's mind and off-limits to prosecutors and the police, who used them against defendants, without a warrant. *Id.* at 598–600. In the same way, the content of the brain impulses belongs to Mr. DeNolf and, again similarly, this content was used against DeNolf.

The FBME is also analogous to the plethysmograph test in *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006). Matthew Weber, a convicted sex offender released on probation, challenged his supervised release condition that he submit to a plethysmograph test—a test requiring him to observe sexually explicit images while a probation officer observed and measured his arousal and changes in his genitals. *Id.* at 555–56. Much like the plethysmograph, the FBME "not only encompasses a physical intrusion but a mental one …." *Id.* at 562. In *Weber*, Judge Noonan concurred with the majority, noting "the procedure violates a prisoner's mental integrity by intruding images into his brain." *Id.* at 570–71 (Noonan, J., concurring). In *Weber*, the Ninth Circuit held that the plethysmograph was imposed without the justification necessary for such a procedure. I find the same conclusion today with regard to the FBME.

The Fifth Amendment privilege protects "the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government." *Doe v. United States*, 487 U.S. 201, 213 (1988). In my view, *Doe* is the controlling case. There the Court held that, at a minimum, the privilege is triggered when a suspect is confronted with the "cruel trilemma" of truth, falsity, or silence. *Id.* at 212. When a suspect is forced to make a choice between truth, falsity, or silence, the suspect "disclose[s] the contents of his own mind," thereby implicating the privilege. *Id.* at 211. Much like an MRI, the FBME essentially rips the thoughts out of the accused and cannot be considered constitutional. Mr. DeNolf was ensnared by ambiguous circumstances, and therefore his Fifth Amendment rights have been violated. The same was true in *United States v. Hubbell*, 530 U.S. 27 (2000). In that case, the Court held that the cognition necessary to produce evidence sought by the state was of a testimonial nature. Where *Doe* stressed process, *Hubbell* stressed cognition. Under both approaches, a violation occurred. What is more, Justice Thomas, in his concurrence to *Hubbell*, offers an interpretation of what the term "witness" means in the text of the Fifth Amendment that is instructive to this case. *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Thomas, J. Concurring).

The majority cites *Kyllo* for the proposition that new technologies can be used so long as there is a warrant. This is an oversimplification of what *Kyllo* requires when we assess the impact of new technologies on civil liberties. The proposition that new technologies may require a new test under the Constitution is the case we have before us. The Constitution evolves with the changes in science and new types of technology that may be created in the future. This new technology reads minds. No warrant can fix the constitutional violations caused by a mind reading device.

II.

The majority errs in ruling that Mr. DeNolf's sentence of 30 years of solitary confinement did not violate the Eighth Amendment. Our nation has a long history with the use of solitary confinement—one that dates back over 200 years. But that hardly disqualifies it from being cruel. The Supreme Court has noted that sentences such as solitary confinement are "subject to scrutiny

under Eight Amendment standards." *Hutto v. Finney*, 437 U.S. 678, 685 (1978). Under this scrutiny, courts inquire as to whether the law serves any valid penological purpose and whether, when judged objectively, it is cruel. In my opinion, Mr. DeNolf has carried his burden.

Solitary confinement is not only cruel—it is also unusual—and accordingly unconstitutional (except perhaps in the most unusual of circumstances).[15] It is time that the judiciary brings an end to this form of punishment.

The Eighth Amendment of the United States Constitution prohibits the federal government from "inflicting cruel and unusual punishments" onto individuals. U.S. CONST. amend. VIII. This prohibition applies to the states. *See, e.g.*, *Ewing v. California*, 538 U.S. 11, 20 (2003); *Harmelin v. Michigan*, 501 U.S. 957 (1991). The Eighth Amendment forbids punishments that are at odds with "the evolving standards of decency that mark the progress of a mature society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). I know of no opinion issued by any court in the United States holding that the Eighth Amendment does not protect mental or psychological health and is instead limited solely to physical health.[16] Applying the standard laid out in *Trop*, the Court declared in 1978 that "[c]onfinement in . . . an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards." *See Hutto*, 437 U.S. at 685. That case did not take a position on solitary confinement per se, because Arkansas did not dispute that the condition of its isolation cells was unconstitutional. *Id.* The case for such a statement has arrived. I find that Olympus has inflicted cruel and unusual punishment onto Mr. DeNolf on the following reasoning.

The ruling of the District Court for the Northern District of California in *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995) is instructive. In that case, the court wrote:

> Regardless of whether there is an "exact syndrome" associated with incarceration in solitary confinement or security housing units, the Court is well satisfied that a severe reduction in environmental stimulation and social isolation can have serious psychiatric consequences for some people, and that these consequences are typically manifested in the symptoms identified above.

Id. at 1231–32. The following analysis is particularly important:

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[15] I do not here address the issue of whether suspected terrorists, for example, or persons believed to be at risk from others, can or cannot be placed into some form of solitary confinement for the good of others or for their own good.

[16] In fact, the opposite is true. *See Rhodes v. Chapman*, 452 U.S. 337, 364 (1981) (Brennan, J., concurring) (noting that "[i]n determining when prison conditions pass beyond legitimate punishment and become cruel and unusual . . . . [C]ourt[s] must examine the effect upon inmates of the condition of the physical plant (lighting, heat, plumbing, ventilation, living space, noise levels, recreation space); sanitation (control of vermin and insects, food preparation, medical facilities, lavatories and showers, clean places for eating, sleeping, and working); safety (protection from violent, deranged, or diseased inmates, fire protection, emergency evacuation); inmate needs and services (clothing, nutrition, bedding, medical, dental, and mental health care, visitation time, exercise and recreation, educational and rehabilitative programming); and staffing (trained and adequate guards and other staff, avoidance of placing inmates in positions of authority over other inmates)."

> Certain inmates who are not already mentally ill are also at high risk for incurring serious psychiatric problems, including becoming psychotic, if exposed to the SHU for any significant duration. As defendants' expert conceded, there are certain people who simply "can [no]t handle" a place like the Pelican Bay SHU. Persons at a higher risk of mentally deteriorating in the SHU are those who suffer from prior psychiatric problems, borderline personality disorder, chronic depression, chronic schizophrenia, brain damage or mental retardation, or an impulse-ridden personality. Consistent with the above, most of the inmates identified by Dr. Grassian as experiencing serious adverse consequences from the SHU were either already suffering from mental illness or fall within one of the above categories.

Id. at 1236 (internal citations omitted).

> In contrast, persons with "mature, healthy personality functioning and of at least average intelligence" are best able to tolerate SHU-like conditions. Significantly, the CDC's own Mental Health Services Branch recommended excluding from the Pelican Bay SHU "all inmates who have demonstrated evidence of serious mental illness or inmates who are assessed by mental health staff as likely to suffer a serious mental health problem if subjected to RES conditions."

Id. (internal citations omitted).

In order to determine whether a particular restriction constitutes "cruel and unusual punishment," the conditions of the confinement, as well as the length of confinement, should be considered. Studies, not included in this record, have shown that a high percentage of prisoners in the United States have reported suffering from heightened anxiety (91%), hyper-responsivity to external stimuli (86%), difficulty with concentration and memory (84%), confused thought process (84%), wide mood and emotional swings (71%), aggressive fantasies (61%), perceptual distortions (44%), and hallucinations (41%). Moreover, fully 34% of the sample experience all eight of these symptoms, and more than half (56%) experience at least five of them.

While Mr. DeNolf was found guilty of the murder of Ms. Somerville, I find that a near lifetime sentencing of solitary confinement is cruel and unusual. It is not that Mr. DeNolf will be eighty-five years old upon his release from Poseidon Penitentiary that is problematic—after all life in prison is frequently the sentence for murder—rather it is *how* he will spend the next thirty years that is a problem. This analysis more than meets the requirements set by the Court in *Helling v. McKinney*, 509 U.S. 25 (1993). I cannot understand how this sentence serves any valid penological purpose and as such it is vindictive and forbidden. *See Rhodes*, 452 U.S. at 364 (stating that "[w]hen 'the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration,' the Court must conclude that the conditions violate the Constitution") (internal citation omitted); *Trop*, 356 U.S. at 102 (finding denationalization unconstitutional in part because it "subjects the individual to a fate of ever-increasing fear and distress").

Mr. DeNolf is deprived of human contact for thirty-day cycles within the Poseidon Petitionary; a need that is so basic it is essential to quality of life. Prisoners in solitary confinement suffer a loss that is both quantitative and qualitative in nature. The Court, in *Hudson v. McMillian*, 503 U.S. 1 (1992), found that the Eighth Amendment prohibits unnecessary psychological as well as physical pain. The harm to which DeNolf is sentenced qualifies as such. In light of these facts, and our legal traditions, I judge this sentencing to be cruel under the Eighth Amendment.

Turning now to the issue of unusualness, solitary confinement is not new and is fairly widespread in terms of the number of states that utilize solitary confinement. That said, the number of inmates who are subjected to solitary confinement is a small percentage of the overall inmates in prison in the United States. The number enduring prolonged periods of solitary confinement is also low.

These facts reveal that solitary confinement, even though it occurs daily, is an unusual penalty. Moreover, there is a clear trend among the states toward reforming the nation's reliance on solitary confinement. This pattern began in 1998 when West Virginia banned the use of solitary confinement for juveniles for longer than ten days. Ten years later, New York banned its use for the mentally ill. In 2010, two states (Maine and Mississippi) reformed its use. In 2012, two states, Colorado and Massachusetts, took action to limit its application to juveniles and the mentally ill. In that same year, Alaska, Connecticut, Mississippi, and West Virginia took action to ban the use of solitary confinement for juveniles and the mentally ill. In 2013, five states (Illinois, Nevada, New York, Oklahoma, and Virginia) and the United States took actions that limited, if not discontinued, the use of solitary confinement. In 2014, at least ten states (Arizona, California, Colorado, Indiana, Michigan, Nebraska, New Mexico, New York, Ohio, and Wisconsin) adopted or formally proposed solitary confinement reforms meant to ease or reduce the practice.

The Supreme Court has held that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Roper v. Simmons*, 543 U.S. 551, 556 (2005) (internal citations omitted). The history before us today indicates a trend away from the expansion of solitary confinement toward its easement, if not prohibition—a history that dates over fifteen years and has been consistent in its direction. Since 1998, twenty states[17] and the United States Government have adopted laws limiting or banning its use. In addition to those twenty states, there are seven additional states that prior to 1998 already did not subject inmates to solitary confinement. No state since 1998 has adopted laws adding or increasing its use. What is more, the United Nations has issued a report on torture and other cruel, inhumane, and degrading treatments or punishments that condemned the use of solitary confinement. That report found that while states around the world continue to use solitary confinement extensively, it is a penalty that is exceedingly rare among Western style democracies. Admittedly, of all Western style democracies, the United States was by far the nation that practiced solitary confinement the most.

[17] They are: Alaska, Arizona, California, Colorado, Connecticut, Illinois, Indiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Virginia, Wisconsin, and West Virginia.

That said, as a percentage few prisoners are sentenced to solitary confinement and the direction of the trend is away from its adoption.

All of this evidence compels me to conclude that solitary confinement is an unusual penalty both in terms of real practice and adoption by the state. Perhaps there may be conditions under which it is constitutional, but this is not one of them. To my way of thinking, the public would be shocked that a prisoner would go straight into solitary confinement and that public would be shocked at what it entails. Simply put, solitary confinement is at odds with the modern standard of decency that exists in the United States. I find its use unconstitutional in Mr. DeNolf's case. Short of that, at a minimum, I would rule that its use must be curtailed and better regulated.

Because I judge these acts to violate the Fifth and Eighth Amendments, I respectfully dissent.

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