No. 2017-2018

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM DENOLF

Petitioner-Appellant

v.

THE STATE OF OLYMPUS

Respondent-Appellee

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

BRIEF FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

(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?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Amendment VIII:

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

STATEMENT OF THE CASE

The following facts have been stipulated by both parties. On the night of March 17, 2014, Detectives Carney and Hammer observed Petitioner and citizen of Olympus Mr. William DeNolf meeting with Ms. Andrea Sommerville, a known prostitute, in the parking lot of Sleep Suites motel. *Record* 3. After witnessing Mr. DeNolf hand a roll of money to Ms. Somerville and walk with her towards the motel, the detectives stopped them and asked to see their identification. *Id.* 3. Carney and Hammer verified their identities and then left DeNolf and Sommerville outside of Sleep Suites. *Id.* 3.

The next morning, maids at the motel found Ms. Sommerville murdered in room 417. *Id.* 4. Detectives Carney and Hammer visited Mr. DeNolf's home and inquired if he would answer questions regarding the murder. *Id.* 4. Mr. DeNolf accompanied them to the Knerr Police Department, where he answered numerous questions cooperatively before stating that he wished to say nothing more. *Id.* 4. The detectives then informed DeNolf that they intended to administer a test. *Id.* Mr. DeNolf silently walked alongside them to the testing facility, where he was left with two technicians who were working by contract for the Knerr Police. *Id.* 4, 5. They told him that the Functional Brain Mapping Exam (FBME) was "purely procedural," and Mr. DeNolf again stated that he would say nothing further. *Id.* 5. The test was administered, and it showed heightened brain activity when Mr. DeNolf was shown images of the crime scene in room 417. *Id.* 5. Based on the evidence from the FBME, DeNolf was arrested and convicted of Ms. Sommerville's murder. *Id.* 5. After a jury found him guilty, Olympus Judge Fair sentenced Mr. DeNolf to a term of thirty years of solitary confinement at Poseidon Penitentiary, where he is required to serve at least a minimum of half of his sentence, at which time the warden may unilaterally decide whether to move him into the general prison population. *Id* at 6, 7.

Summary of the Argument

In *Schmerber v. California,* the Court held that "the integrity of an individual's person is a cherished value of our society." The intrusive nature of the Functional Brain Mapping Exam (FBME) test, as well as the unduly harsh sentence given to the Petitioner, William DeNolf, demonstrate violations of his Fifth Amendment right against self-incrimination and his Eighth Amendment right to protection from cruel and unusual punishment.

The Supreme Court has long recognized the broad scope of Fifth Amendment protection, noting in *Estelle v. Smith* that the right to be free from self-incrimination "does not turn upon the type of proceeding in which its protection is invoked," but the protection an individual is afforded depends on the disclosures that his environment invites. The safeguards supplied by the Fifth Amendment extend to the setting in which the Petitioner was administered the FBME. In *Rhode Island v. Innis,* the Court required that individuals be informed of their rights in situations that involve both freedom of action being significantly curtailed and interrogation. The Petitioner should have been afforded procedural safeguards—the reading of his *Miranda* rights—prior to the administration of the test.

In considering whether a Fifth Amendment claim is valid, the Supreme Court looks to three factors set forth in *United States v. Hubbell*: testimony, incrimination, and compulsion. The FBME is a test that elicits testimonial responses from suspects. In *Doe v. United States,* the Court defined testimony as "communication…that discloses information." The FBME entails a forced physiological response of the Petitioner's brain that reveals information about his memories. Furthermore, the evidence procured from the Petitioner's mind was incriminating, as both the evidence itself and the testimony of the technicians were presented during his trial. Compulsion

is also present, as precedent has acknowledged that an individual cannot knowingly waive his rights unless he is properly informed of them. If there are no safeguards afforded, the Petitioner cannot be said to have willingly waived his rights, but rather, he was compelled to incriminate himself. In addition, the presence of a warrant for the FBME constitutes legal compulsion.

Finally, the FBME exposes the contents of an individual's mind. Court precedent has consistently upheld the necessity of Fifth Amendment protection for a person's thoughts. The Court's ruling in *Kyllo v. United States* also speaks to this issue by recognizing that a constitutional violation can occur when the State intrudes on an area for which an individual has a reasonable expectation of privacy. The absence of *Miranda* safeguards prior to the administration of a test that involves the mind and entails all of the components of a Fifth Amendment claim demonstrates a clear facial violation of the Fifth Amendment. This violation was largely the basis of the harsh sentence the Petitioner received, which itself violates the Eighth Amendment's prohibition against cruel and unusual punishment.

In *Roper v. Simmons*, the Court held that "by protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." Although serious crimes certainly warrant punishment, that punishment must never transgress what the Court described in *Trop v. Dulles* as the "the basic concept underlying the Eighth Amendment…the dignity of man."

The Court in *Wilson v. Seiter,* cited in *Helling v. McKinney*, established a two-part test for determining whether a particular law, punishment, or practice constitutes an Eighth Amendment violation. First, the test requires an examination of the objective component, which is "contextual and responsive to contemporary standards of decency," and which analyzes "deprivations denying the minimal civilized measure of life's necessities." In *Helling,* the Court further clarified that "a

remedy for unsafe conditions need not await a tragic event," indicating that the objective component may be satisfied by demonstrating that there is "a risk of sufficient likelihood" of "sufficiently imminent dangers." The second part of the *Wilson* test, the subjective component, evaluates whether "the officials act[ed] with a sufficiently culpable state of mind." Each of these components demonstrates whether the punishment in question is both "cruel" and "unusual," as applied to the Petitioner.

By permitting a sentence of thirty years of solitary confinement, precluding any opportunity for the Petitioner to be removed from his conditions of confinement based upon findings of medical or mental health necessity, and failing to mandate adequate constitutional safeguards at Poseidon Penitentiary, the State of Olympus has infringed upon the most basic principle underlying the Eighth Amendment: the dignity of man.

The violation of the objective component can be seen by looking to two matters. First, the Court laid the groundwork in *Hutto v. Finney* for recognizing that solitary confinement, while not necessarily unconstitutional, may become so depending on factors such as duration and prison conditions. DeNolf suffers from a family history of major depression, which heightens his predisposition to suffering an objective harm. Considering that the Court as far back as 1890 in *In Re Medley*, as cited in *Madrid v. Gomez*, recognized the unique psychological harm that solitary confinement can cause, his sentence poses a serious risk of substantial harm. The conditions of Poseidon Penitentiary also fail to provide the Constitutional minimum of safeguards to DeNolf, and have parallels with the unconstitutional violations found in *Madrid.* Second, societal consensus is moving away from solitary confinement. Over the past two decades, roughly twenty states have instituted reforms to limit or discontinue this form of punishment. Factoring in several other states who have abolished the practice, there are between twenty-seven and thirty states, plus the federal government, who have sought to reduce or eliminate the use of solitary confinement. International consensus also reflects a similar trend away from the punishment. Because the Eighth Amendment

is responsive to "evolving standards of decency," the Court should follow the pattern of *Roper v. Simmons*, and other similar cases, in permitting a limitation on solitary confinement.

The subjective component is also violated because of the deliberate indifference of the Poseidon Penitentiary administration. Despite having a higher-than-average rate of inmates leaving the prison with some form of mental illness, and despite modern science indicating the severe effects that solitary confinement can have upon inmates, Poseidon Penitentiary lacks basic healthcare services. These deficiencies include an absence of any sort of inmate screening, inadequate reporting and training policies, lack of guaranteed access to basic mental health treatment, and non-mandatory peer review.

Taken as a whole, the presence of both components demonstrates a clear violation of the Eighth Amendment. While the State of Olympus may have various penological justifications to validate its use of solitary confinement, those justifications cannot withstand Eighth Amendment scrutiny when the punishment and conditions undermine the prohibition on cruel and unusual punishment. The Court should permit a modification of the Petitioner's sentence in a manner that avoids constitutional transgression, and mandate reform of the conditions at Poseidon Penitentiary.

ARGUMENTS

I) THE FUNCTIONAL BRAIN MAPPING EXAM IS AN INTRUSIVE PHYSIOLOGICAL TEST THAT FACIALLY VIOLATES THE SELF INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT.

A. Petitioner was entitled to *Miranda* rights prior to the administration of the Functional Brain Mapping Exam.

In the Tenth Circuit Court case of *United States v. Von Behren,* the court recognized an important principle of Fifth Amendment jurisprudence, noting that "to assure an individual is not compelled to produce evidence that may later be used against him in a criminal action, the Supreme Court has always broadly construed the protection afforded by the Fifth Amendment privilege against self-incrimination." *United States v. Von Behren,* 822 F.3d 1139, 1144 (10th Cir. 2016). Court precedent clearly reflects the broad scope of Fifth Amendment protection. In the majority opinion of *In re Gault,* the Court observed that "the availability of the privilege" is not dependent upon the "type of proceeding in which its protection is invoked," but rather, is determined by the types of admissions that are to be elicited from an individual. *In re Gault,* 387 U.S. 1, 49 (1967); as cited in *Estelle v. Smith,* 451 U.S. 454, 462 (1981). Both the setting in which the Functional Brain Mapping Exam (FBME) was administered and its revealing nature demonstrate that it falls within the bounds of Fifth Amendment protection.

1. Petitioner had his freedom of action significantly curtailed.

The Supreme Court's ruling in *Rhode Island v. Innis* defines the factors that must be present in order for an individual to be entitled to *Miranda* rights, holding that "in the context of 'custodial' interrogation certain procedural safeguards are necessary to protect a defendant's Fifth…Amendment privilege against compulsory self-incrimination." *Rhode Island v. Innis,* 446

U.S. 291, 297 (1980). Importantly, the Court has not construed the safeguards so narrowly as to limit their applicability to persons who are in custody. Procedural safeguards are also necessary for individuals whose freedom of action is significantly curtailed. While the Petitioner was not in custody, the situation of his interaction with police officers indicates that his freedom of action was restricted. At the Knerr Police Department, the Petitioner stated that he wished to answer no further questions, at which point the detectives told him that they "wanted to administer a test." *Record,* 4. A valid warrant was then issued for the FBME, after which the Petitioner was escorted by two detectives to the facility where the test was to be administered. *Id.* The technicians performing the FBME were working "by contract for the Knerr Police Department and were acting at the detectives' direction." *Id,* 5.

The environment created by the warrant, the detectives, and the technicians was one that did not allow the Petitioner to act according to his own discretion. The warrant made the test a legal obligation rather than a choice for the Petitioner. In addition, the requirement of *Miranda* safeguards in an examination setting was upheld in *Estelle.* That case demonstrated that an individual facing an examination at the direction of the State as opposed to an examination by an agent of the State may still be in an environment that meets the Court's standards for protection. In *Estelle,* the Court ruled that the fact that an individual was given a court-ordered examination by a psychiatrist instead of an agent of the State was "immaterial" to the Fifth Amendment claim. *Estelle,* 451 U.S. 454, 467. This precedent informs this Court's analysis of the case at bar. The facts of Petitioner's situation illustrate that he was not simply free to leave the Imaging and Screening facility. He had his freedom of action significantly curtailed in the setting of the FBME's administration and was entitled to *Miranda* rights prior to the test.

2. The FBME is a form of interrogation.

The second factor necessary for an individual to qualify for procedural safeguards is that they be subjected to interrogation. In its *Rhode Island* decision, the Supreme Court held that the term "interrogation" encompasses "express questioning or its functional equivalent," with the latter being defined as "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island,* 446 U.S. 291, 301. While the FBME did not amount to express questioning, it does fall under the definition of the functional equivalent of express questioning. The FBME had the effect of a question on the Petitioner. He was shown images, and his brain was effectively compelled to give an answer about his recognition and memory of those scenes.

The Court further clarified that the determination of whether or not the functional equivalent of express questioning has occurred depends substantially on the "perceptions of the suspect." *Id.* Petitioner could reasonably understand the actions of the detectives as actions that required him to comply and give an incriminating response. The detectives told the Petitioner of their desire to administer a test and subsequently walked him to the testing facility after obtaining a warrant for the FBME. *Record,* 4. The scenario meets the definition of the functional equivalent of express questioning because the detectives certainly knew of the possibility that the FBME would produce incriminating results, and their actions directly influenced the Petitioner to submit to the test. The setting in which the FBME was administered significantly curtailed the Petitioner's freedom of action and amounted to interrogation, thus necessitating the reading of *Miranda* rights in order to uphold the Fifth Amendment.

3. Petitioner executed his Fifth Amendment privilege.

The Court has held that the Fifth Amendment is not self-executing, noting in *Garner v. United States* "in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Garner v. United States,* 424 U.S. 648, 654 (1976); as cited in *Commonwealth v. Knoble,* 42 A.3d 976, 979 (Pa. 2012). However, the Petitioner invoked his Fifth Amendment rights just prior to the administration of the FBME. The Record indicates that "Mr. DeNolf expressly said that he would not answer any questions or say anything more." *Record,* 5. Without the advantage of *Miranda* safeguards to inform his opinion, the Petitioner, to the best of his abilities, made it clear that he wished to reveal no further information to the government. Upon invocation of this right, all proceedings should have ceased immediately. The Petitioner suffered from both the absence of procedural safeguards and the lack of recognition regarding his invocation of the Fifth Amendment protection.

B. The FBME violates the Fifth Amendment by compelling a suspect to reveal incriminating testimony.

The components that must be present in order to demonstrate a Fifth Amendment claim were put forth by the Supreme Court in its decision in *United States v. Hubbell* and summarized in *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County.* In that case, the Court held "To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County,* 542 U.S. 177, 189 (2004); as cited in *Von Behren,* 822 F.3d 1139, 1144. If each of these

elements is present, than a Fifth Amendment claim prevails. The FBME entails all three factors, and when administered without procedural safeguards, facially violates the Fifth Amendment.

1. The FBME is a physiological test that elicits testimonial responses.

In *Schmerber v. California,* the Court established a distinction between those tests that it considers to be physical and those that are physiological. *Schmerber* dealt with a blood test, holding that it was a purely physical test that captured only material evidence. Though this test did not qualify for the protection of the Fifth Amendment, the majority noted that "to compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment." *Schmerber v. California,* 384 U.S. 757, 764 (1966). Physiological tests are those that go beyond procuring simple bodily evidence and require the body to respond to testing.

Supreme Court precedent reveals that a bodily communication such as that required by the physiological FBME qualifies as testimony. *Doe v. United States* set a clear definition of testimonial, holding that testimony is communication that "relate[s] a factual assertion or disclose[s] information." *Doe v. United States,* 487 U.S. 201, 210 (1988). The purpose of administering the FBME is to determine an individual's recognition of specific places and people. *Record,* 2. In the case of Petitioner, his brain's physiological response revealed a recognition of the crime scene at Sleep Suites Motel. *Id,* 5. The test exposed his memories, which represents a disclosure of information about the Petitioner. This is exemplified by the words of the majority opinion in *Doe,* which are telling as to the testimonial nature of the FBME. The Court stated "'it is the extortion of information from the accused,' the attempt to force him 'to

disclose the contents of his own mind,' that implicates the Self-Incrimination Clause." *Couch v. United States*, 409 U.S. 322, 328 (1973) and *Curcio v. United States,* 354 U.S 118, 128 (1957); as cited in *Doe,* 487 U.S. 201, 211. The FBME is designed to reveal the contents of the mind, and thus, it entails exactly the kind of testimony that the Court spoke of in *Doe.*

Additionally, the Court in *Schmerber* noted that certain tests which appear to be procuring physical evidence "may actually be directed to eliciting responses which are essentially testimonial." *Schmerber,* 384 U.S. 757, 764. The Court pointed to the example of polygraph tests, which contain an element of testimony due to the verbal responses required from a suspect. However, the testimonial aspect of the polygraph that the Court was speaking to in *Schmerber* looks at physiological responses that occur while an individual is being questioned in order to determine which answers are truthful and which are false. In *Von Behren,* it was found that Mr. Von Behren's Fifth Amendment rights were violated when a sexual offender treatment program required him to submit to a polygraph test. Mr. Von Behren objected to the test, and the court upheld his claim, ruling that because the test was compelled and Mr. Von Behren's answers would likely have incriminated him, the polygraph would violate his Fifth Amendment rights. *Von Behren,* 822 F.3d 1139, 1151. The responses that occur while a subject is undergoing the FBME make it a physiological test that elicits testimony in the same way as the bodily responses occurring during a polygraph do.

2. The evidence obtained by the FBME was incriminating.

The record reflects the significant role that the FBME evidence played in the trial and subsequent conviction of the Petitioner. It is indicated that "the results of the FBME" were presented as evidence against him and that "the technicians who performed the FBME testified at

DeNolf's trial." *Record,* 5. The test results showed the Petitioner's recognition of the scene of the murder, and the technician's ability to testify demonstrated the testimonial significance of those results. Little other evidence was introduced at trial. Only Detectives Carney and Hammer served as witnesses that Petitioner was at the motel, and Petitioner's "statement to the police that he had not been inside Sleep Suites or in room 417" was presented. *Id.* The results procured by the FBME made up a substantial part of the evidence at trial and were critical in incriminating the Petitioner.

The link present between Petitioner's brain responses and the incriminating evidence of his memories is also highly relevant to the Court's consideration in this case, as seen through a comparison of the cases of *Doe* and *Hubbell.* In *Doe,* the Court dealt with a court order that required an individual to sign a subpoena releasing access to foreign bank records. The subpoena, however, permitted access to these documents without requiring the individual to acknowledge their existence. Because the signing of the subpoena in no way connected the individual to any possibly incriminating documents, the Supreme Court found that there was no Fifth Amendment violation. *Doe,* 487 U.S. 201, 218.

In contrast, the ruling in *Hubbell* found that requiring an individual to sign a subpoena releasing access to a number of documents did violate his right to protection from self-incrimination. The meaningful difference was that the subpoena at issue in *Hubbell* established a direct link between the suspect and the incriminating evidence. Because it required the production of documents, the Court held that it entailed a form of incriminating testimony that was connected to the individual. *United States v. Hubbell,* 530 U.S. 27, 45 (2000). This precedent demonstrates that the presence of a direct link to incriminating evidence is considered a crucial

factor in establishing proof of incrimination. The FBME test establishes this kind of link because there is no separating the physiological responses of an individual's brain from the incriminating contents of his mind. The component of incrimination is met in the case at bar.

3. Petitioner was compelled to submit to the FBME.

Several different factors contributed to Petitioner's compelled participation in the administration of the FBME. The absence of *Miranda* safeguards denied the Petitioner access to the knowledge necessary to make a free decision to submit to the FBME. The Supreme Court has recognized that: "[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege." *Maness v. Meyers,* 419 U.S. 449, 466 (1975); as cited in *Estelle,* 451 U.S. 454, 471. As such, an individual must be properly informed of his rights. The Court has established that waiving of constitutional rights "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege…." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); as cited in *Estelle,* 451 U.S. 454, n. 16. Without his *Miranda* safeguards made known to him, the Petitioner cannot be said to have knowingly relinquished his rights. The Fifth Amendment was violated because the Petitioner did not have "an intelligent decision" as to the "exercise" of his rights in the setting of the FBME. *Miranda v. Arizona,* 384 U.S. 436, 467 (1966); as cited in *Estelle,* 451 U.S. 454, 467.

The Petitioner also faced a form of legal compulsion to submit to the FBME. It is indicated that a warrant was issued for the test, after which time the Petitioner was asked to accompany two detectives to the Imaging and Screening facility where the test was to be administered. *Record,* 4. With the existence of a valid warrant, the Petitioner had no choice but to submit to the FBME. The Petitioner faced the risk of legal sanctions such as being held in

contempt of court for refusing to take the test after the warrant was issued. He was not able to act of his own will in the setting of the FBME, but rather was required to comply with the requests of the detectives.

C. The mind falls within the scope of Fifth Amendment protection.

Both the physiological nature of the FBME and the direct link that it forges between an individual's brain activity and his memories demonstrate that it goes beyond procurement of mere physical evidence and instead implicates the mind. An examination of this Court's precedent reveals the heightened level of respect with which the Court has always viewed the Fifth Amendment's protection of a person's thoughts. In *Couch v. United States,* the Court noted that the prohibition on forcing an individual to incriminate himself: "protects `a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.'" *Couch,* 409 U.S. 322, 327; as cited in *Pennsylvania v. Muniz,* 496 U.S. 582, 596 (1990). In following with this precedent, the Court should consider the FBME to be within the scope of the Fifth Amendment in order to protect the mind from the intrusions of the State.

The standard determined by the Court in *Kyllo v. United States* is highly relevant to the case at bar. In *Kyllo,* the Court ruled that a thermal imaging device used to determine the heat of an individual's home violated the Fourth Amendment. The majority opinion held that a violation occurs when "'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable." *California v. Ciraolo,* 476 U.S. 207, 211 (1986); as cited in *Kyllo v. United States,* 533 U.S. 27, 33 (2001). An individual certainly has such a reasonable expectation of privacy when it comes to the mind. Importantly, the Court in *Schmerber* noted "The values protected by the Fourth

Amendment thus substantially overlap those the Fifth Amendment helps to protect." *Schmerber,* 384 U.S. 757, 767. *Kyllo* speaks to the Court's skepticism of advanced technology in dealing with the private aspects of an individual's life. Like the home, the mind is an area that must be kept sacred from government intrusion such as the type entailed by the use of the FBME. As the Ninth Circuit stated in *United States v. Weber,* the Court has long recognized the constitutional significance of avoiding "unwanted bodily intrusions or manipulations." *Harrington v. Almy,* 977 F.2d 37, 43-44 (1992); as cited in *United States v. Weber,* 451 F.3d 552, 563 (9th Cir. 2006).

II) DENOLF'S SENTENCE OF THIRTY YEARS IN SOLITARY CONFINEMENT AT POSEIDON PENITENTIARY VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

A. Petitioner's sentence subjects him to an objective risk of harm.

In *Trop v. Dulles* the Court held that the scope of the Eighth Amendment "is not static," but that it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This evolving standard guides the Court's Eighth Amendment precedent and determines whether certain forms of punishment comport with Constitutional requirements. Although the Court recognized in *Weems v. United States* that the words of the Eighth Amendment are not precise, it utilizes a two-part test to examine claims of cruel and unusual punishment. *Weems v. United States,* 217 U.S. 349 (1910); as cited in *Trop*, 356 U.S. 86, 101 (1958). In *Helling v. McKinney*, the Court stated that "both the subjective and objective elements [are] necessary to prove an Eighth Amendment violation." *Helling v. McKinney*, 509 U.S. 25, 35 (1993). The "objective component" was defined in *Helling* as requiring "scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused," as well as proof that "society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency." *Helling*, 509 U.S. 25, 36. The Court in *Wilson v. Seiter* also held that when Eighth Amendment

claims are raised regarding conditions of confinement, "such claims require proof of a subjective component" for which "the standard for that state of mind [of prison officials] is 'deliberate indifference.'" *Wilson v. Seiter*, 501 U.S. 294 (1991); as cited in *Helling*, 509 U.S. 25, 30.

The State of Olympus may claim a variety of penological justifications—such as retribution, deterrence, and incapacitation—and although any of these rationales for punishment may constitute a "legitimate goal," the legitimacy of such methods is simply not the standard utilized for evaluating Eighth Amendment challenges. *Ewing v. California*, 538 U.S. 11, 20 (2003). If both objective and subjective components are proven, then the punishment in question—as applied to the Petitioner—is cruel and unusual, and therefore unconstitutional.

1. The duration and conditions of the Petitioner's sentence breach the Eighth Amendment's prohibition on cruel and unusual punishment.

As held in *Trop*, "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." *Trop*, 356 U.S. 86, 100. Solitary confinement is no exception. Although solitary confinement "is not necessarily unconstitutional…it may be, depending on the duration of the confinement and the conditions thereof." *Finney v. Hutto*, 410 F. Supp., 274, 275 (E.D. Ark. 1976); as cited in *Hutto v. Finney*, 437 U.S. 678, 685 (1978). Other courts, such as the Eleventh Circuit in *Sheley v. Dugger,* have found that exceedingly long periods of solitary confinement may indeed indicate an Eighth Amendment violation, noting that "twelve-year[s] [of solitary] confinement…raises serious constitutional questions." *Sheley v. Dugger*, 833 F.2d 1420, 1429 (1987); as cited in *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 n. 207 (N.D. Cal. 1995). The Petitioner was sentenced to thirty years in solitary confinement—well above the norm both in this country as well as in most Western democracies. *Record* 6, 18. Despite the unusual nature of this sentence, the Petitioner does not contend that thirty years of solitary confinement is *ipso facto* unconstitutional. Rather, the totality of the circumstances surrounding the Petitioner's sentence make it unconstitutional. As this Court held in *Wilson*, even when individual conditions don't violate the Constitution, "in combination…when they have a

mutually enforcing effect that produces the deprivation of a single, identifiable human need," they may infringe upon Eighth Amendment rights. *Wilson*, 501 U.S. 294, 304; as cited in *Madrid*, 889 F. Supp. 1146, 1265 n. 207. Accordingly, the combination of the Petitioner's sentence type, its duration, and the terms and conditions of confinement all amount to cruel and unusual punishment.

The specific terms of the sentence only allow removal from solitary confinement after fifteen years, pending approval by the Warden based upon unknown factors. *Record*, 6. This necessarily precludes removing the Petitioner from solitary confinement even if medical experts believed his mental or medical condition were to warrant a change of location. Moreover, such a possibility is more than an undifferentiated claim. Medical experts and psychologists have noted that solitary confinement poses unique risks to an inmate's mental wellbeing. As far back as 1890, the Court noted the extreme and often disturbing effects that punitive isolation would have upon prisoners, stating "the complete isolation of the prisoner from all human society" resulted in severe symptoms, including violent insanity, suicide, and permanent mental deterioration. *In re Medley*, 134 U.S. 160 (1890); as cited in *Madrid*, 889 F. Supp. 1146, 1231. More recent studies have affirmed "the ill effects of solitary confinement," both medically and psychologically. *Davenport v. Derobertis,* 844 F.2d 1310, 1316 (7th Cir. 1988), citing Grassian, *Psychopathological Effects of Solitary Confinement*, 140 American Journal of Psychiatry 1450 (1983); as cited in *Madrid,* 889 F.Supp. 1146, 1231. The health risk posed to the Petitioner is substantially increased due to the fact that he has a family history of major depression. *Record*, 3, n. 2. Although expert psychologists have stated that symptoms of major depression are common for those serving lengthy prison sentences, the Petitioner has already begun exhibiting such signs after three years of solitary confinement, and his family history exacerbates this risk. *Id.*

There is significant consensus among the lower courts that an objective risk of harm does not include only physical conditions, but mental and psychological wellbeing as well. According to the Fourth Circuit, there is "no underlying distinction between the right to medical care for physical

ills and its psychological or psychiatric counterpart." *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977); as cited in *Madrid,* 889 F.Supp. 1146, 1255. The Ninth Circuit held that "requirements for mental health care are the same as those for physical health care needs." *Doty v. County of Lassen,* 37 F.3d 540, 546 (9th Cir. 1994); as cited in *Madrid,* 889 F.Supp. 1146, 1255. The Eighth Circuit asserted the equality of importance of mental health in *Cody v. Hillard* sitting *en banc*: the adequacy of mental health care "is governed by the same constitutional standard which applies when determining the adequacy of a prison's medical…system." *Cody v. Hillard,* 830 F.2d 912 (8th Cir. 1987), citing *Cody v. Hillard*, 599 F. Supp. 1025, 1058 (D.S.D. 1984); as cited in *Madrid,* 889 F.Supp. 1146, 1255. Additionally, Justice Blackmun noted in his concurrence in *Hudson v. McMillian* that the Court's prior cases have demonstrated the significance of psychological wellbeing, stating that "'Pain' in its ordinary meaning surely includes a notion of psychological harm. I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes." *Hudson v. McMillian*, 503 U.S. 1, 16 (1992). It is abundantly clear, then, that matters of mental health are to be taken as seriously as any other medical concern.

While the Petitioner has not yet been diagnosed with a mental illness, he need not suffer one to raise a claim under the Eighth Amendment. A serious risk of substantial harm is sufficient. As held in *Helling*, "a remedy for unsafe conditions need not await a tragic event." *Helling*, 509 U.S. 25, 33. The conditions of Poseidon Penitentiary, in addition to the Petitioner's terms of confinement and his predisposition to suffering from mental illness, create the unsafe conditions the Court warned against. In *Helling*, the Court held a prison was in violation of the Eighth Amendment because it lacked policies safeguarding a prisoner from being exposed to his cellmate's environmental tobacco smoke. The Court recognized "reasonable safety" is included in inmates' "basic human needs." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200 (1989); as cited in *Helling*, 509 U.S. 25, 32. The same kind of risk is present here, due to

solitary confinement's heightened threat of harm coupled with the inadequacies of Poseidon Penitentiary's policies to prevent such harm from befalling the Petitioner.

These inadequacies are made evident through the striking similarities between Poseidon Penitentiary and Pelican Bay, the prison in *Madrid.* There, the institution was "riddled with systemic and gross deficiencies—deficiencies which preclude ready access to adequate care" such that the "system for providing mental health care and medical care fail[ed] to comport with minimum constitutional standards." *Madrid,* 889 F.Supp. 1146, 1259. The first major deficiency in *Madrid* was poor screening practices. While Pelican Bay conducted minimal entry screening, physicians were not present for them, nor was there any routine medical screening. *Id.* at 1204. Poseidon Penitentiary is even more problematic, as they "[do] not perform any mental health screening of inmates before their sentencing or housing decisions," despite the fact that "health screenings are a necessary supplement to ordinary avenues of access to medical care." *Record*, 10; *Madrid*, 889 F.Supp. 1146, 1257. The fact that the Petitioner's family history of major depression was not detected until three years into his sentence due to examination on appeal demonstrates the severity of this oversight. *Record* 3, n. 2; 5. The next deficiency found in *Madrid* was the fact that there was inadequate access to medical health staff. This was due in part to the fact that "medical technical assistants" functioned as gatekeepers to the physicians. They possessed sole discretion to recommend an inmate be visited by a physician, yet had "insufficient training and supervision to perform this vital function." *Madrid*, 889 F.Supp. 1146, 1206. The third failure in *Madrid* was the absence of any true peer review to ensure accountability for physicians. *Madrid*, 889 F.Supp. 1146, 1208. Poseidon Penitentiary also lacks mandatory peer review. Although a "voluntary system of peer review" exists, "not all of the mental health professionals participate." *Record*, 9. The fourth *Madrid* failure was the lack of actual medical and mental health treatment being offered at Pelican Bay, which was considered largely a "predictable" consequence of the poor policies to safeguard inmates' health. *Madrid*, 889 F.Supp. 1146, 1212. Poseidon Penitentiary lacks some of the essential

services that Pelican Bay also lacked, as "intensive psychiatric inpatient treatment is not available." *Record* 9; *Madrid*, 889 F.Supp. 1146, 1220. While Poseidon policy states that inmates have access to mental health professionals, the efficacy of such access is limited due to the reliance upon prison guards to report concerns, the limited educational background of the professionals (the minimum standard is a Masters degree; there is no mention of any requirement of clinical training or field experience), and the fact that professionals are randomly chosen from a pool (meaning there is no consistent treatment or doctor-patient relationship established within prison walls). *Record*, 9. While the same consequences in *Madrid* don't appear to be present at Poseidon Penitentiary, the likelihood of such situations occurring is high due to the plethora of poor policies. Poseidon lacks any screening practices; guards are not required to report any issues; there are insufficient forms of treatment options; and there is no mandatory system of peer review. *Id.* 9-10. In sum, Poseidon Penitentiary possesses all of the same kinds of flaws that resulted in Pelican Bay's conditions being deemed unconstitutional, and while Poseidon may not have yet reached a the point of *Madrid*, the risk of harm is substantial, and the Petitioner's reasonable safety is not guaranteed as the Eighth Amendment requires.

2. Societal consensus does not support the Petitioner's sentence, rendering it unusual.

In *Roper v. Simmons*, the Court reaffirmed its longstanding recognition that the Eighth Amendment is "evolving." *Roper v. Simmons*, 543 U.S. 551, 561 (2005). The *Roper* decision followed past precedent by recognizing that societal consensus surrounding the legality or practice of a form of punishment is dispositive to a proper understanding and application of the Eighth Amendment. Societal consensus is an important part of the objective component test. In the 1989 case of *Stanford v. Kentucky*, half of the states allowed the death penalty for juveniles, and so at that point, there was "no national consensus 'sufficient to label a particular punishment cruel and unusual.'" *Stanford v. Kentucky,* 492 U.S. 361, 370-371 (1989); as cited in *Roper,* 543 U.S. 551, 562. However, by the time of *Roper* in 2005, the Court found that when "a majority of States have

rejected the imposition of the death penalty on juvenile offenders under 18," the Eighth Amendment also forbade it. *Roper*, 543 U.S. 551, 568. The same principle was utilized in the pair of cases *Penry v. Lynaugh* and *Atkins v. Virginia.* In *Penry*, the Court held that there was not "sufficient evidence at present of a national consensus" due to only two states prohibiting execution of the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989); as cited in *Roper*, 543 U.S. 551, 562. This decision was reversed thirteen years later in *Atkins* when the Court ruled that because a majority of states had abandoned the death penalty for the mentally retarded, it was no longer supported by society. *Atkins v. Virginia*, 536 U.S. 304, 314-315 (2002); as cited in *Roper*, 543 U.S. 551, 563. These parallel sets of cases demonstrate the underlying precedent that has guided this Court's understanding: domestic consensus is a key touchstone of "evolving standards of decency." The Court noted in *Atkins* and reaffirmed in *Roper* that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. 304, 315; as cited in *Roper,* 543 U.S. 551, 566. Thus, the trend of legislative movement in a particular direction is itself dispositive to the evolving nature of the Eighth Amendment.

There is a similar pattern of consensus regarding the practice of solitary confinement in the United States. In Olympus, 60.6% of those in solitary confinement are there for crimes committed prior to prison entry, in contrast with the federal government, which only uses solitary confinement for disciplinary or administrative purposes. *Record*, 7. Only thirty states are known to sentence offenders to solitary confinement at trial, and even those states do so for effectively administrative reasons (i.e., protecting other inmates from offenders with gang affiliations). *Id.* While forty states still allow for solitary confinement today, many states have began to limit this practice, signifying a shift in societal consensus. *Id.* Prior to 1998, seven states had entirely abandoned the practice, meaning that between 1998 and 2017, three states had also ceased the use of solitary confinement in any capacity. *Id*, 18. Additionally, twenty other states have implemented reforms to "ease or reduce the practice" of solitary confinement in the last twenty years. *Id.* In total, twenty-three states

have taken steps away from or ceased the practice solitary confinement in the past two decades, and that number rises to thirty when factoring in the seven states who had abandoned the punishment prior to 1998. The fact that there are thirty states who have either abolished or sought to limit solitary confinement in the past several decades meets both elements of the Court's consistent precedent on societal standards. Even if the Court does not consider this number to be equivalent to a majority, the "consistency of the direction of change" is evident.

The United Nations's condemnation of solitary confinement also speaks to both the cruel and unusual aspects of this type of criminal sanction. It has been noted that this "cruel, inhumane" punishment is "exceedingly rare among Western style democracies." *Record*, 18. This Court has frequently factored international norms into its standards. In *Trop*, the Court looked to the "virtual unanimity" of the "civilized nations of the world" for guidance, taking particular note of a United Nations report condemning denationalization. *Trop*, 356 U.S. 86, 102-103.

The Petitioner is not requesting that the Court abolish the practice of solitary confinement, as societal standards do not currently support such a movement. Rather, a sufficient remedy for the Petitioner would be a modification of the sentence allowing him to be removed from isolation if medical and/or mental health professionals were to find that solitary confinement was contributing to a serious medical or mental health deficiency. This would need to be coupled with mandated reforms to poor prison conditions. While this does not guarantee that the Petitioner will be removed from solitary confinement, the Constitutional infirmity is not in the sentence itself, but in the totality of the sentence and the fact that there are insufficient guarantees for the Petitioner's wellbeing. The fact that Olympus is the only state in the union that permits judicially determined at-trial sentences of solitary confinement, especially in the face of widespread discontinuation of that form of punishment, justifies this limitation on the practice. *Record*, 6. Thus, the fact that most states still *practice* solitary confinement is not dispositive in light of the fact that many states have begun to *limit* this form of punishment.

B. Poseidon Penitentiary is deliberately indifferent to the needs of prisoners.

The subjective component of the *Wilson* test requires proof that the state has been deliberately indifferent to the needs of prisoners. The Court stated that "deliberate indifference" occurs when a prison official "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan,* 511 U.S. 825, 847-848 (1994); as cited in *Madrid*, 889 F. Supp. 1146, 1247. The situation at Poseidon Penitentiary demonstrates this sort of deliberate indifference. Although excessive force and beating of inmates (such as what was found in *Hudson*) is not present, there is a form of deliberate indifference that is equally unconstitutional. Both parties to the case have stipulated that "75% of the prisoners who leave Poseidon Penitentiary have psychological disorders." *Record*, 10. The American Psychological Association also estimates that "half of all inmates in correctional facilities in the United States suffer from some form of mental illness." *Record*, 9. This means that prison administrators ought to take reasonable steps to ameliorate the higher rate of mental illness that Poseidon Penitentiary prisoners suffer. However, the absence of any sort of screening policy in the face of a rate of mental illness that is 50% higher than the nationwide average demonstrates going out of the way to avoid unwelcome knowledge of injury to inmates. *Record*, 10. This is especially concerning in light of the Seventh Circuit's finding that "going out of your way to avoid acquiring unwelcome knowledge is a species of intent." *McGill v. Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991); as cited in *Madrid,* 889 F. Supp. 1146, 1247. The prison also has yet to train prison guards in mental health services, offer any form of intensive inpatient psychiatric treatment, or permit prisoners to be transferred off-site to state mental health facilities if their condition warrants it. *Record*, 9.

The District Court ruled in *Madrid* that "if the particular conditions of segregation being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of

human existence — indeed, they have crossed into the realm of psychological torture." *Madrid*, 889 F. Supp. 1146, 1264. The failure to ensure adequacy of treatment and safety policies despite knowledge of greater-than-normal risks of mental illness constitutes deliberate indifference. As the Court held in *Helling*, "we have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Helling*, 509 U.S. 25, 33.

Conclusion

The administration of the FBME and the terms and nature of the Petitioner's sentence constitute violations of the Fifth and Eighth Amendments of the United States Constitution. The features of the proceedings surrounding the FBME entitled the Petitioner to procedural safeguards. The test compels the disclosure of incriminating testimony, demonstrating the presence of all the elements necessary to meet the Court's standards for a valid Fifth Amendment claim. Additionally, the Court has clearly sought to avoid granting the State excessive power to extract information from the accused, stating in the case of *Schmerber* "[the fact] that the Constitution does not forbid States' minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions." *Schmerber,* 384 U.S. 757, 772. The advanced technology involved in the FBME allows it to breach an individual's privacy, contributing to the intrusive nature of the test and demonstrating the necessity of Fifth Amendment protection for the mind as society evolves.

The Petitioner's resulting sentence subjects him to a term of solitary confinement that is growing increasingly unusual both in this nation and internationally. The fact that a majority of states have either abandoned or are moving away from solitary confinement demonstrates the growing and evolving societal consensus that has for decades guided the Court's jurisprudence.

Even absent a majority, the clear consistency in the direction of change is dispositive to the Petitioner's claim, and demonstrates a failure of the State of Olympus to adhere to Constitutional requirements. Moreover, the sentence also precludes any possibility of alteration to the term of solitary confinement—despite the serious risk of harm the Petitioner faces due to his own medical history and due to the inadequacy of prison policy. This meets the Court's definition of deliberate indifference and indicates the substantial risk of harm the Petitioner is likely to suffer.

The fact that the State may have various penological justifications behind the FBME and the sentence of solitary confinement does not change the fact that the Fifth and Eighth Amendments exist precisely to safeguard the inalienable rights of individuals from excessive government overreach. While the FBME may serve as a useful tool for law enforcement, it cannot encroach upon the right against self-incrimination, and thus necessarily infringes on constitutional requirements absent procedural safeguards. Likewise, although criminals must face justice, the Eighth Amendment stands for the principle that "the duty of the government [is] to respect the dignity of all persons," "even those convicted of heinous crimes." *Roper,* 543 U.S. 551, 560. It is the responsibility of the State to balance societal wellbeing with the individual rights of the incarcerated. A sentence of solitary confinement that forbids alteration for mental or medical health —particularly in the absence of essential treatment options and wellness policies—is patently unconstitutional.

We respectfully ask the Court to find the the administration of the FBME without *Miranda* safeguards and the Petitioner's prison sentence and conditions unconstitutional and reverse the decision of the Supreme Court of the State of Olympus.

Respectfully Submitted,

Counsel for the Petitioner.