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 Supreme Court of the State of Olympus

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the physical reactions measured by the Functional Brain Mapping Exam (FBME) are require heightened protections under the Self-incrimination clause of the Fifth Amendment.

(2) Whether the sentence of thirty years of solitary confinement, as applied to Petitioner, violates the Cruel and Unusual Punishment clause of the Eighth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases on Record

Supreme Court Cases:

Lower Court Cases:

Cases Cited Within Record

Supreme Court Cases:

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 offence 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 to by both parties. On the evening of March 17, 2014, detectives Jay Carney and Ashleigh Hammer were staking out a Sleep Suites Motel in the city of Knerr, Olympus. While observing the motel from the parking lot, the detectives observed Andrea Somerville meeting an unknown man. Andrea Somerville was a twenty-eight-year-old retromingent biologist who moonlighted as a prostitute. The detectives knew of Ms. Somerville's activities as a prostitute and suspected that the unknown man was her "john." Detective Carney confronted the pair after witnessing money being exchanged and asked for their identification. The unknown man was William DeNolf, the Petitioner in the case at bar. He insisted that they had just met and were only talking. Before Detective Carney could ask any further questions, both detectives were called away to investigate a more pressing lead.

The detectives did not return until the following morning, when they received a call that Andrea Somerville had been found murdered and mutilated in the room she rented the night before. Medical examination of Ms. Somerville's corpse showed that she had been tortured before finally being killed. Additionally, above the bed, the murderer had written "whore" in Ms. Somerville's own blood. The Petitioner was an obvious suspect, being the last person with whom she was seen alive. Detectives Carney and Hammer drove to Mr. DeNolf home and asked him if he would be willing to answer some questions about the murder. Petitioner agreed to accompany the detectives to the police station and stated that he was "100 percent innocent." The detectives took the Petitioner to the police station and began asking him questions. Prior to questioning, the Petitioner was reminded that he was not under arrest and that he was free to leave at any time or have an attorney present. Petitioner waived all these rights and agreed to answer the detectives' questions. Petitioner admitted that he intended to pay Ms. Somerville for sex, but denied murdering her and claimed that he had never even been inside the room. Petitioner stated that

before they entered the room he received a call from his wife who was angry and told him to come home.

After answering the detectives' questions, the Petitioner stated that he no longer wanted to say anything else. Detectives Carney and Hammer agreed but asked if he would be willing to accompany them to a separate facility to run a test. The detectives acquired a warrant for the test but did not need to serve it as the Petitioner willingly accompanied them to the Imaging and Screening facility. The Petitioner was not handcuffed and walked alongside the detectives. The facility was two buildings away from the police station and the Petitioner passed a bus stop and several taxi cabs during the short walk.

At the screening facility the detectives left the Petitioner with trained technicians who administered a Functional Brain Mapping Exam (FBME). The FMBE is a new test that was developed in order to increase the accuracy of criminal investigations. The FBME is a procedural diagnostic tool similar to a blood test or fingerprint analysis that uses chemical reactions to connect a suspect to a crime scene. Both parties stipulate that the FBME is an accurate test that is reliable and valid. The FBME works by placing sensors on the subject's head while presenting photographs. Neurons react in predictable patterns when stimulated with familiar versus unfamiliar images. These reactions can be used to suggest whether a person was present at the scene of a crime.

The technicians explained the exam to the Petitioner and began to show him photographs. The exam took approximately 30 minutes, and at no point did the Petitioner resist or raise any objections. He was shown 56 photographs of numerous hotel rooms, including room 417 where the murder occurred. The results of the exam showed the Petitioner's brain reacted more strongly when he was shown pictures of the crime scene than when shown pictures of other hotel rooms.

This suggested that he was present at the murder scene, contrary to his past claims. The results gave the Detectives enough evidence to arrest the Petitioner for the murder of Andrea Somerville.

At trial, both Detectives Carney and Hammer testified that they had seen the Petitioner with Ms. Somerville. The results of the FBME and the Petitioner's statements made to the detectives were introduced at trial to prove beyond a reasonable doubt that he had committed the murder. Petitioner was found to be of sound mind, a point which he did not contest. Additionally, the Petitioner presented no mitigating factors to consider during sentencing. He was found guilty of torture and murder by a jury of his peers and sentenced to thirty years in Poseidon Penitentiary. For the first 15 years of his sentence, he was to remain in solitary confinement due to the malice and brutality of his crime. After 15 years, the warden could review his case and decide whether to place him in the general population or keep him in solitary confinement for the rest of his thirty year sentence.

Olympus is one of 20 states where an inmate can be kept in solitary without a definite release date. Prisoners serving 15 to 30 years in solitary is not unheard of in Olympus. State law dictates that trial judges have the authority to sentence directly to solitary confinement in instances where torture is involved with a murder. The Petitioner was sentenced to one of six different restrictive housing forms at Poseidon Penitentiary. The six forms all have different purposes, ranging from protective custody to segregation for mental or physical health needs. The form Petitioner was sentenced to separates inmates from the general population based on crimes they committed prior to being imprisoned. The Petitioner will be joining almost 100 other convicted torturers in solitary confinement.

The conditions at Poseidon provide inmates with all the necessities and comforts of life. They are provided three meals a day, a bed, toiletries, and a light which can be controlled by the prisoner. The cells have air conditioning during the summer and heating during the winter. There are no issues related to lack of water, air quality, or sanitation. The inmates have access to books and mail. Once a month, prisoners are allowed to leave their cell for four hours and use a recreation area. It is located outside in full sunlight, with access to sports and athletic equipment. While in the recreation area, prisoners can hear and speak to other inmates in adjacent cells. Prisoners can meet with staff chaplains or their attorneys at any time they request. Poseidon Penitentiary meets the requirements of the Restrictive Housing Standards set forth by the American Correctional Association.

SUMMARY OF THE ARGUMENT

Every right is important, but no right is absolute. The Fifth Amendment particularly requires special care to balance the rights of the individual with the duties of the State. The State needs to have efficacy in its investigations, otherwise they will be unable to prosecute dangerous criminals. This case is about preserving the State's ability to perform its duties in investigating crime and preserving public safety. The FBME is an invaluable new innovation in crime investigation that reduces the chances of false convictions and provides law enforcement with the ability to build stronger cases against suspects. This Court striking down this piece of technology would restrict the ability of law enforcement to catch and prosecute criminals like the Petitioner.

Even if this Court sees the FBME as unconstitutional, this is the incorrect case to make that ruling, as it would damage Fifth Amendment precedent. In order to consider whether the FBME implicates the Fifth Amendment, this Court must first look to whether Petitioner invoked his Fifth Amendment Privileges. *Miranda v. Arizona* dictates that the Fifth Amendment is not self-executing. Its protections can only be present when a person expressly declares intentions to stand on his or her rights. It states in the Record that the Petitioner in the case at bar was compliant with all directions given to him. Additionally, the detectives took all necessary procedures to safeguard his Fifth Amendment rights. They reminded him that he was not under arrest before questioning. On multiple occasions they reminded Petitioner that he could consult an attorney. They did not pressure or coerce him, but rather cordially requested his cooperation. Petitioner obliged these requests without question; his decision to comply with the FMBE was an unfettered exercise of free will. Therefore, ruling that there is a valid Fifth Amendment challenge would do more damage to the integrity of the Fifth Amendment than the FBME ever could.

If this Court decides to consider the Fifth Amendment challenge to the FBME, the next step would be to determine whether the FBME is communicative. Not all evidence is protected equally under the Fifth Amendment. This Court outlined in *Schmerber v. California* that evidence that is physical and non-communicative is not protected by the Fifth Amendment. A suspect cannot claim Fifth Amendment exemptions from physical examinations. This includes blood tests, as in *Schmerber,* putting on a blouse, as in *Holt v United States,* and submitting to a voice exemplar, as in *United States v. Dionisio.* The FBME is most similar to these physical examinations. Just as a voice exemplar measures sound waves rather than the content of speech, so does the FBME measure brainwaves rather than the contents of the mind. There is difference between the brain and the mind, and the FBME only measures the brain. Its results are based on physical reactions, thus it does not have the testimonial elements necessary to warrant the protections of the Fifth Amendment.

Even if this Court finds the FBME to be testimonial, that alone does not implicate the Fifth Amendment. Pursuant to this Court's ruling in *Hiibel v Nevada.* Evidence additionally requires the presence of compulsion in order to implicate the protections of the Fifth Amendment. Compulsion is what prevents law enforcement from imposing substantial penalties on suspects exercising Fifth Amendment rights. In other words a Fifth Amendment challenge requires that law enforcement pressure an unwilling suspect to give up testimonial evidence. Compulsion in the context of the Fifth Amendment refers to custody or other substantial coercion that could influence a suspect's ability to exercise Fifth Amendment Privileges. Additionally, the challenge to the FBME is facial, meaning that Petitioner must prove that the FBME is unconstitutional in every possible application. If this Court could think of one possible example where the FBME is not compelled, Respondent prevails. The case at bar provides one

such example. Petitioner was not pressured into taking the FBME. Additionally, the record contains no indication that a suspect would be punished for refusing to take the FBME. Therefore, the FBME is not compulsory in the context of the Fifth Amendment.

With regard to the Eight Amendment claim, Petitioner's sentence does not violate the Eighth Amendment because it is neither cruel nor unusual. As per this Court's jurisprudence, for a punishment to rise to the level of an Eighth Amendment violation, it must involve the unnecessary or wanton infliction of pain, be grossly disproportionate to the severity of the crime, or totally lack penological justification. Petitioner's sentence does not meet this standard for three main reasons.

First, Petitioner's sentence does not involve the unnecessary or wanton infliction of pain. Pursuant to *Rhodes v. Chapman*, punishment which deprives a prisoner of the minimal civilized measure of life's necessities constitutes unnecessary pain. For instance, denial of medical care or serious deprivations of basic human needs amount to an Eighth Amendment violation because they result in pain without any penological purpose. However, this is not the case with Petitioner. All of DeNolf's basic needs are met and he is provided with comfortable accommodations that meet the Restrictive Housing Standards set forth by the American Correctional Association. Although DeNolf's conditions of confinement may not be ideal, they are part of the penalty he must pay for his offense against society.

Additionally, the laws and practices of the State of Olympus fall completely within the realm of the narrow proportionality principle set forth in *Ewing v. California*. The narrow proportionality principle stipulates that the Eighth Amendment does not demand that the punishment needs to be strictly proportionate to the crime. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime. When evaluating DeNolf's sentence in

light of the repugnant murder he committed, it becomes clear that his punishment is a far cry from "grossly disproportionate" to his offense.

Lastly, the interest of public safety provides sufficient penological justification for Petitioner's sentence. In the case of *Ewing v. California*, the Court held that a sentence can have a variety of justifications, some or all of which may play a role in a State's sentencing scheme. In the case at bar, Olympus' public-safety interest requires that dangerous criminals like DeNolf are punished and incapacitated for their offenses against society. Due to the brutal and violent nature of Petitioner's offense, the State has reason to believe that he poses a threat to the prison community. This belief is sufficient to justify incapacitation by means of extended solitary confinement. The State has a reasonable basis for believing that DeNolf's sentence advances these interests in a substantial way, and, as per this Court's ruling in *Ewing*, that belief is enough to justify a particular sentencing scheme. It is for these reasons that we respectfully ask this Court to affirm.

ARGUMENT

I. THE FBME IS A VALID FORENSIC TOOL THAT DOES NOT IMPLICATE THE PROTECTIONS OF THE FIFTH AMENDMENT

A. The Fifth Amendment challenge is meritless since Petitioner participated in the unfettered exercise of his own free will

1. Even if this court wishes to rule the FBME unconstitutional, this is the wrong case to do so.

The challenge to the FBME is facial, meaning that Petitioner bears the immense burden of proving that the FBME has no possible application where it can be used without violating the Fifth Amendment. *Record* 1, §1. When applied to the case at bar, a facial challenge means that Respondent will prevail if this Court can imagine just one scenario where the FBME would not violate the Fifth Amendment. Even though a facial challenge requires this Court to look beyond the circumstances of this one Petitioner, the facts of Mr. DeNolf's situation are still important in deciding the merits of the case at bar. The case of Petitioner is one that does not implicate the Fifth Amendment, meaning this case is without merit. The Petitioner participated willingly without coercion and thus the Fifth Amendment claim should not be considered. Ruling in favor of Petitioner would damage this Court's precedent regarding what implicates the Fifth Amendment. Even if this Court sees the FBME as facially unconstitutional, this is the not the case to make that assertion. Ruling this case implicates the Fifth Amendment would inflict more damage to the integrity of the Fifth Amendment than the FBME ever could. This Court should affirm solely on this basis.

2. The Fifth Amendment is not self-executing.

The important precedent that would be damaged by ruling for Petitioner relates to what is necessary to consider Fifth Amendment challenges. The Fifth Amendment fundamentally

prevents any person to be "compelled to be a witness against himself" *Twinning v. New Jersey*, 211 U.S. 78 (1908). In practice, the Fifth Amendment prohibits law enforcement from compelling subjects to produce self-incriminating testimony. *Schmerber v. California*, 384 U.S. 757 (1966). However, the Fifth Amendment is different than other rights in the sense that it is not self-executing. It is not passively present at all times like other liberties, and it requires that a person express the intent to exercise the right before it can be considered. This Court found in *Miranda v. Arizona*, 384 U.S. 436 (1966) that the protection of the Fifth Amendment is not present in cases where the individual participates in the "unfettered exercise of his own free will." This is necessary to prevent individuals from retroactively proclaiming Fifth Amendment privileges in an attempt to suppress evidence willingly given to investigators. If Petitioner did not affirmatively claim his intention to exercise his Fifth Amendment right or willingly produced incriminating information after exercising his rights, the Fifth Amendment is not implicated.

3. Petitioner participated willingly and knowingly, waiving his Fifth Amendment privilege.

The Fifth Amendment privilege is waived in instances where a person voluntarily produced information, even if that form of evidence is protected by the Fifth Amendment. The Petitioner in the case at bar was made aware of his rights by detectives Carney and Hammer before being taken into questioning. *Record*, 4 §3. Before beginning with questions, the detectives once again reminded Petitioner that he was not under arrest and could leave at any time. *Ibid.* He raised no objections to taking the FBME and instead willingly accompanied the detectives to the facility. Once there, he made no attempt to question or stop the test, but rather complied with every instruction. *Record*, 5 §1. These factors clearly demonstrate an intent and a will to cooperate with the exam. Petitioner participated in the unfettered exercise of his own free will, and at no point did the detectives pressure or coerce him to participate. This Court found in

Miranda that pressure and coercion are two factors which are necessary to field a Fifth Amendment claim. Since neither of these are present, there is no valid Fifth Amendment claim in the case at bar.

B. The physical measurements of the FBME are not protected by the Fifth Amendment.

1. The proper standard to apply is found in *Hiibel v. Nevada*

Even if this Court wished to review the Fifth Amendment claim, the FBME meets constitutional muster. For instruction, this Court should turn to the case of *Hiibel v. Nevada* 542 U.S. 177 (2004). In that case this Court drew precedent from *Schmerber* and *United States v. Hubbell*, 530 U.S. 27 (2000) to provide a comprehensive definition of what forms of evidence implicate the Fifth Amendment. Under *Hiibel*, a communication implicates the protections of the Fifth Amendment when it is testimonial, compelled, and incriminating. All three elements of this analysis are required to implicate the Fifth Amendment. Additionally, since the case at bar is a facial challenge, all three elements are required to be present in every possible application of the FBME. If the Court could imagine even one situation where not all three factors are present, Respondent prevails. Respondent only contests the testimonial and compelled aspects of this analysis. Incrimination only requires that a form of evidence have the possibility of building a case against a suspect. The FBME is a scientifically sound tool that reduces the chances of a false conviction. It clearly meets the lower standard for incrimination, but the higher standards of testimony and compulsion are not met.

2. Pursuant to *Hiibel*, the FBME is not testimonial in any circumstance.

The testimonial element of the *Hiibel* analysis evaluates the nature of the evidence in question and determines whether that evidence involves the organized expression of thought. The key concept overhanging this case is the dichotomy between the brain and mind. There is a

substantial difference between reading the brain and reading the mind. The FBME is the undoubtedly the former. Calling the FBME a mind reading device is reductive given the true extent of the test. The FBME does not extract the thoughts of its subject, but merely correlates patterns in firing neurons to infer familiarity. *Record,* 2 §2. Most importantly, the FBME is different from regular testimony in the sense that it alone will not convict a suspect. The FBME does not exist in a vacuum and it requires the presence of other evidence to contextualize its results.

In the case at bar, Sleep Suites Room 417 was not the only photograph that Mr. DeNolf recognized. In addition, Mr. DeNolf recognized the *Hotel California* album cover when it was shown to him. *Record,* 5 fn. 3. The results of the FBME do not tell us whether Mr. DeNolf has listened to the album, been to the hotel, or even heard any of the songs. Similarly in the case at bar, the FBME did not instantly ascertain petitioner's guilt, but was only a piece of the puzzle used in his case. It was not enough to simply show that Mr. DeNolf recognized the room. That information by itself would have proved nothing and proving his guilt required context provided by actual testimony. The detectives needed to testify that they saw Mr. DeNolf at the hotel. The FBME results needed to be submitted alongside his contradicting statements claiming he was never in the room. *Record,* 5 §3. The FBME does eliminate the need for further crime scene investigation, but rather it is just another tool in the toolbox to help detectives catch dangerous criminals.

According to precedent, the FBME does not meet this Court's definition of testimony. Jurisprudence states that the Fifth Amendment only protects disclosers related to the "contents of one's mind." *Curcio v. United States,* 354 U.S. 118, 128 (1957). The forms of evidence that are traditionally protected include spoken or written testimony *United States v. Hubbell,* 530 U.S. 27

(2000). This means that forms of evidence which are purely material or relating to physical bodily reactions are not protected. *Doe v. United States,* 487 U.S. 201 (1988).

The FBME is most similar to a physical test. In *Schmerber v. California,* 384 U.S. 757 (1966), this Court looked to whether a blood test contained the necessary elements of communication to implicate the protections of the Fifth Amendment. A blood test was found to be a physical test that contained no elements of communication. Thus, an individual could not claim the privilege against self-incrimination when asked to take a blood test.

The FBME is similar to the blood test this Court looked at in *Schmerber*. Just as a blood test measures chemical reactions in the blood, so does the FBME measure chemical reactions in the brain. Just because these chemical reactions are taking place in the brain does not automatically make them synonymous with the coherent exercise of thought. Considering the FBME as testimony would be an "extravagant extension of the Fifth Amendment." *Holt v. United States*, 218 U.S. 245, 252 (1910). The results of the FBME are useless to investigators without the presence of other testimony to put it into context. This factor makes is fundamentally different than verbal or written testimony.

The FBME is far more similar to other forms of physical evidence reviewed by this Court. In *United States v. Dionisio,* 410 U.S. 1, 7 (1973), this Court looked at whether providing a voice exemplar was testimonial. A voice exemplar was found to be purely physical since it was not the content of one's speech that was being measured but rather the patterns of sound waves. Similarly with the FBME, it is not the contents of the mind that are being read, but rather the pattern of brain waves. Other notable comparisons include the breathalyzer from *Pennsylvania v Muniz,* 496 U.S. 582 (1990) or the handwriting sample in *Gilbert v. California*, 388 U.S. 263

(1967). In all of these cases, and in the case of the FBME, the body is being used rather than the mind, making this a form of physical evidence.

One final notable comparison is the plethysmograph examined by the 9th circuit in *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006). In *Weber*, that court found the plethysmograph to be a mental intrusion. It relied on physiological reactions in response to visual stimuli, like the FBME. However, what is interesting is that the 9th Circuit did not find that the plethysmograph was unconstitutional, but rather only required enhanced procedural requirements to be justified in its use. This means that even if this Court finds that the FBME meets all the requirements *Hiibel*, this Court would not be required to rule it unconstitutional.

3. The circumstances surrounding the FBME do not rise to the level of compulsion.

Unlike the testimonial element, compulsion requires observing the circumstances surrounding the FBME rather than the FBME itself. It is also worth noting that there is no case in the table of authorities that finds a piece of technology to be facially compulsory. Compulsion is always reviewed in light the suspect's actions and the actions of investigators. Compulsion is the most important element of the *Hiibel* analysis. This Court has listed compulsion as the "touchstone of the Fifth Amendment" *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) meaning that a Fifth Amendment claim turns on its presence. Constitutional compulsion differs from the common understanding of compulsion. Colloquial understanding of compulsion might define any form of pressure as coercion, however this Court's precedent provides a narrower definition for compulsion in the context of the Fifth Amendment. The compulsion privilege prevents the State from threatening to impose "substantial penalties because a witness elects to exercise Fifth Amendment rights." *Ibid.* The State cannot use significant threats of imprisonment or physical force to coerce a suspect to give up testimony. In the case of compulsion, the

circumstances surrounding the disclosure determine its presence, rather than the nature of the disclosure itself. With this in mind, the circumstances surrounding the FBME will determine whether it is inherently compulsory.

The key fact of compulsion is the imposition of penalties that prevent a suspect from exercising the Fifth Amendment privilege. In *Schmerber,* this Court found that the blood test was compulsory because it was extracted by force from an unwilling participant. The 10th circuit case of *United States v. Von Behren,* 822 F.3d 1139 (10 c. 2016) provides us with the most recent evaluation of compulsion. *Von Behren* looked at compulsion in the context of probation requirements. The plaintiff was required to submit to sexual history polygraph examinations as a part of his probation program. Failure to comply with these exams would result in a violation of probation and immediate imprisonment. In the eyes of the 10th circuit, this was enough to confer compulsion. Since his refusal would result in a direct and tangible consequence, he was compelled in that court's eyes. Similarly in the lower court case of *Commonwealth v. Knoble*, 42 A.3d 976 (Pa. 2012) the Pennsylvania court also reviewed the legitimacy of polygraphs in a probationary setting. Unlike in *Von Behren,* the court found that Knoble was not compelled as he failed to affirmatively State his intentions to exercise the Fifth Amendment. Both of these cases illustrate that the nature of the test itself is irrelevant to determining compulsion. Instead, in the case at bar compulsion is determined by whether a suspect who refuses the FBME without consequence.

Compulsion is only present when a suspect is in custody or in a situation that exerts similar pressures. In *Minnesota v. Murphy,* 465 U.S. 420, (1984) the Court found that Murphy was not in custody and therefore his confessions were not compelled. In the case at bar, Petitioner was reminded numerous times that he was not under arrest *Record,* 4 §3. He had no

pressures exerted on him besides non-threatening requests by the detectives. Requests do not rise to the level of compulsion. Therefore, by this Court's precedent in *Murphy,* Mr. DeNolf was not compelled to take the FBME.

Even if this Court finds that there are elements of compulsion present, it would automatically confer the protections of the Fifth Amendment. In *McKune v. Lile*, 536 U.S. 24, (2002) this Court found that the Fifth Amendment does not prohibit all penalties "levied in response to a person's refusal to incriminate himself." In *Mckune* this Court found that denying prison supplies to inmates who refused to confess to past crimes was constitutional since the penalties were not significant. It is not enough to have the mere presence of penalties, those penalties must also be substantial. There are no penalties levied against any suspect who refuse to take the FBME, so therefore it is not compelled in the constitutional sense.

Just one example of a constitutional exercise of the FBME is enough to fail a facial challenge. The case of the Petitioner provides this Court with such an example. Mr. DeNolf was asked politely to accompany the detectives to the police station *Record,* 4 §5. At no point did he raise objections or exercise his Fifth Amendment privileges before taking the FBME. He was explained what the FBME entailed by the technicians but still willingly sat throughout the duration of the test. *Record,* 5 §1. Returning to the broader facial challenge, there is no possible way the FBME could be compelled in every circumstance since there is no evidence that exercising Fifth Amendment rights will result in substantial penalties. Because the FBME is not compelled or testimonial in all circumstances, it does not violate the self-incrimination clause of the Fifth Amendment.

II. PETITIONER'S SENTENCE DOES NOT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT

A. Petitioner's sentence does not inflict unnecessary or wanton pain.

In the 1981 case of *Rhodes v. Chapman*, this Court ruled that, for a punishment to violate the Eighth Amendment, it must involve the "unnecessary or wanton infliction of pain" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). In *Rhodes*, the Court reflected upon the ruling in the case of *Hutto v. Finney*, 437 U.S. 678 (1978), in which the conditions of confinement in two Arkansas prisons rose to the level of an Eighth Amendment violation because they resulted in serious deprivations of basic human needs, and maintained that such conditions that deprive inmates of "the minimal civilized measure of life's necessities" violate contemporary standards of decency and constitute cruel and unusual punishment. *Rhodes*, 452 U.S., 347. For instance, denial of medical care or serious deprivations of basic human needs amount to an Eighth Amendment violation because they can result in pain without any penological purpose. *Rhodes*, 452 U.S., 347.

In the case at bar, the concerns of *Rhodes* and *Hutto* are met because Petitioner is not deprived of life's necessities. The Record makes clear that Petitioner is provided with all of his basic needs. His cell has air conditioning and heating options; water, air quality, and sanitation are all up to industry standards; he is given three meals a day and access to books and mail. *Record* 8, §4. Once a month, Petitioner is let out of his cell and taken to a recreational area where he can hear and talk to other inmates. Petitioner can also request religious counseling, if he feels the need to do so, and he has access to qualified mental health professionals at all times. *Record* 9, §3. Overall, Petitioner's basic needs are met and he is provided with "comfortable accommodations that meet the Restrictive Housing Standards set forth by the American Correctional Association." *Record* 9, §1.

While the conditions of Petitioner's confinement may not be pleasant, they are justified consequences for Petitioner's offense against Ms. Somerville and society at large. This sentiment is expressed by the Court in *Rhodes,* when it elucidates, "to 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." *Rhodes,* 452 U.S., 347. Additionally, it is important to note that Petitioner has not forwarded any injury whatsoever, let alone any injury so serious as to amount to an Eighth Amendment violation. Therefore, any pain, psychological or otherwise, that Petitioner might experience is neither unnecessary nor wanton. Rather, it is a constitutive element of Petitioner's punishment for committing such a heinous crime.

B. The laws and practices of the State of Olympus fall completely within the realm of the narrow proportionality principle set forth in *Ewing v. California*.

In *Ewing v. California*, the Court recognized that the Eighth Amendment contains a narrow proportionality principle when it comes to reviewing non-capital sentencing cases. The narrow proportionality review has four components that all inform the fifth and ultimate principle: "the Eighth Amendment does not require strict proportionality between the crime and sentence…Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Ewing v. California*, 538 U.S. 11, 23 (2003). In evaluating a sentence for gross disproportionality, the Court ruled that the "gravity of the offense must be compared to the harshness of the penalty." *Ewing*, 538 U.S. When evaluating Petitioner's sentence in light of the crime he committed, it becomes clear that his sentence is a far cry from "grossly disproportionate" to his offense.

Petitioner's sentence and the practices of the State of Olympus meet the other components of the narrow proportionality principle prescribed in *Ewing*. With regard to the

variety of penological schemes within the State of Olympus, which is one factor to be considered as part of the narrow proportionality review, Olympus' penological schemes are neither barbaric nor excessive. Sentences such as fifty years-to-life without parole are customary for those convicted of murder. *Record* 6, §2. Furthermore, the majority of convicts found guilty of torture are sentenced to solitary confinement. *Id.* 6, fn. 8. Therefore, Petitioner's punishment is not outside the bounds of the State's usual sentencing schemes. Regarding the primacy of the legislature and the nature of our federal system, two additional components of the narrow proportionality review, states legislatures are given broad constitutional license when delivering sentences. The Courts should only intervene in extreme cases, lest the judiciary infringe upon the rights of the states or risk becoming a super-legislature. With these factors taken into consideration, Petitioner's sentence meets the standard established by the narrow proportionality principle.

C. The overarching interest of public safety provides sufficient penological justification for Petitioner's sentence.

In *Rhodes v. Chapman*, the Court held that among those punishments that involve the unnecessary and wanton infliction of pain are punishments which totally lack penological justification. *Rhodes*, 542 U.S., 346. However, Petitioner's sentence has valid penological justification, therefore it does not qualify as "cruel" under the *Rhodes* standard.

In the case *of Ewing v. California*, the Court held that "a sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State's sentencing scheme" *Ewing*, 538 U.S., 25. In *Ewing*, the Court found that, in enacting a three strikes law, the California Legislature made a judgement that protected the public safety by incapacitating repeat offenders. *Ewing*, 538 U.S., 25. Thus, *Ewing's* sentence to life in prison without the possibility of parole was "justified by the

State's public-safety interest in incapacitating and deterring recidivist felons." *Ewing*, 538 U.S., 29. The Court concluded, the law responded to widespread public concern about crime by targeting the class of offenders who posed the greatest threat to public safety. *Ewing*, 538 U.S., 24.

Similar to the case of *Ewing*, where the State of California advanced their public-safety interest by incarcerating recidivist felons, the State of Olympus in the case at bar has determined that public safety is best served by securing a man who committed a brutal crime by means of solitary confinement. Furthermore, the justifications of retribution and incapacitation provide additional penological purpose for Petitioner's sentence.

In the 1980 case of *Rummel v. Estelle,* 445 US 263 (1980), the defendant was unable to bring his conduct within the social norms prescribed by the criminal law of the State of Texas, and, thus, the State had an unquestionably legitimate interest in seeking retribution in the form of life in prison without parole. *Ewing,* 538 U.S., 21. Similarly, the Petitioner was unable to bring his conduct within the social and moral norms prescribed by Olympus criminal law. Therefore, the State has an indisputable interest in seeking retribution for this abhorrent felony. The penological interest of retribution is therefore served by incarcerating DeNolf. Additionally, the solitary component of Petitioner's sentence is further justified by the interest of incapacitation. The State has an interest in segregating DeNolf not only from the public, but from the general prison population. The Record elucidates that the reason for the direct sentencing of gang members to solitary confinement is due to fears that they will pose a threat to other inmates and prison officials. *Record* 7, §2. DeNolf has demonstrated a clear capacity for brutality and violence. Due to the repugnant nature of his offense, the State has reason to believe that he poses

a threat to the prison community, similar to that of gang member. This belief is sufficient enough to justify incapacitation by means of extended solitary confinement.

The State of Olympus is within its rights to make this judgement, as per this Court's decision in *Harmelin v. Michigan*. In *Harmelin*, the majority concluded, "Some state will always bear the distinction of treating particular offenders more severely than any other state. Diversity…in the means of implementing policy…is the very raison d'être of the federal system." *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991). In *Harmelin*, the Court held that the State of Michigan was justified in imposing a particularly harsh sentence for cocaine possession due to the State's belief that the possession of large amounts of cocaine posed a significant threat to society. Similarly, the State of Olympus has determined that the brutal torture and murder of a young woman warrants a particularly harsh sentence, as violent crimes of this nature pose an unquestionable threat to society. Even if Petitioner would not have received this sentence in any other state, the Olympus Legislature is not constitutionally required to conform to other states' sentencing schemes. Rather, the diversity of sentencing schemes across the nation is a hallmark of our federal system.

Lastly, in Justice O'Connor's majority opinion in *Ewing*, she writes, "it is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences…'advance the goals of [its] criminal justice system in any substantial way.'" *Ewing*, 538 U.S., 28. The State of Olympus has a reasonable basis for believing that DeNolf's sentence substantially enhances the interests of retribution, incapacitation, and, ultimately, public safety. For these reasons, Petitioner's sentence has sufficient penological justification, and we respectfully ask the Court to find that Petitioner's sentence does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.

CONCLUSION

This is the wrong case to make a sweeping judgement about the constitutionality of the FBME. The Petitioner did not utilize his Fifth Amendment rights and thus under this Court's precedent in *Miranda* he cannot be afforded its protections. Ruling for Petitioner would set a dangerous precedent wherein suspects could retroactively claim Fifth Amendment privileges and dismiss valid evidence. The FBME was conducted with intense concern for due process. At no point were the detectives deceptive in their intentions, they made clear that they were police officers in an ongoing investigation and politely requested Petitioner accompany them to the testing facility. Despite being explained the nature of the exam, Petitioner participated with the FBME in the unfettered exercise of his own free will.

The Fifth Amendment claim is without merit, as Petitioner participated willingly with investigators and chose not to exercise his rights, however even if this Court evaluates the facial challenge, the FBME remains a valid evidence gathering tool. Since the FBME is not testimonial evidence, it does not implicate the Fifth Amendment. The FBME is a test that primarily relies of physical reactions which makes it more similar to a blood test or voice exemplar. In addition, the results of the FBME are nothing without other testimony to put it into context. The main factor that led to Petitioners conviction was not the fact that he had seen the room but rather the fact that he had lied about seeing the room. The FBME merely showed that his previous testimony had been false. This fact makes the FMBE fundamentally different from verbal or written testimony.

The FBME cannot be facially compelled. A facial challenge requires that the FBME be compelled in every possible circumstance. Compulsion requires this Court to evaluate the circumstances surrounding the FBME rather than the test itself. This Court has never found a piece of technology to be inherently compulsory. To consider the FBME under such a pretense

would be a misunderstanding of what compulsion entails in the context of the Fifth Amendment. Compulsion requires the presence of substantial penalties that rob an individual of the ability to reasonably express their rights. There is no evidence in the record that any suspect will be punished for refusing the FBME and even the Petitioner in the case at bar had numerous opportunities to express his rights. Ruling in favor of Petitioner would be an extravagant extension of the Fifth Amendment and would set a dangerous precedent wherein even physical evidence gathered with concern for due process is unconstitutional.

Petitioner's sentence does not violate the Eighth Amendment because it is neither cruel nor unusual. All of DeNolf's basic needs are met, and he is provided with perfectly acceptable accommodations that meet the Restrictive Housing Standards set forth by the American Correctional Association. In line with the Court's ruling in *Rhodes v. Chapman*, any discomfort that Petitioner may experience is a justified consequence of his offense against Ms. Somerville and society at large. Additionally, the laws and practices of the State of Olympus meet the standard established by the narrow proportionality principle, as set forth in *Ewing v. California*. DeNolf's sentence is adequately proportionate to the crime he committed, and his punishment is not outside the bounds of the State's usual sentencing schemes. Lastly, the interest of public safety and the justifications of retribution and incapacitation provide sufficient penological purpose for Petitioner's sentence, as per the Court's ruling in *Ewing*. DeNolf has demonstrated a disturbing capacity for brutality and violence, and thus the State is justified in securing him from the public and the general prison population by means of extended solitary confinement.

Respectfully Submitted,

Counsel for the State of Olympus