TEXAS YOUTH AND GOVERNMENT

William DeNolf

V.

The State of Olympus

2020-2021
APPELLATE COURT CASE

Case Material:

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CASE SPECIFIC RULES AND INFORMATION

(1) **This year's case is again a closed case.** When writing your briefs and arguments you are only allowed to cite to cases that are provided to you in this case packet. (TO BE ADDED BY 10.02.20)

Permitted: The following sources may be referenced in oral argument:

- Any information in the case packet, including in the fact pattern, relevant legislation and case law.
- Any section of the Constitution, including its amendments.
- A direct quotation, rephrasing or summary of a court case not included in the case packet, as long as that quotation, rephrasing or summary appears in the case packet.
- "Common knowledge," defined as information that reasonably intelligent high school senior with no legal expertise would know."

Prohibited: Any other sources may not be referenced in oral argument. These include:

- An excerpt of any legislation or case included in the case packet, if that excerpt is not included in the case packet.
- A concurring or dissenting opinion of a case included in the case packet, if that opinion is not included in the case packet.
- A direct quotation, rephrasing or summary of a court case not included in the case packet, if that quotation, rephrasing or summary does not appear in the case packet.

(2) The attached case law (to be added soon) has been edited to only contain necessary content. Some Supreme Court Opinions are over 100 pages in length. The case author did not find it necessary for you to print all of that content. However, in law school you will be tasked with reading and understanding full, unedited opinions.

IN THE SUPREME COURT
OF THE UNITED STATES

No. 2020-2021

William DeNolf, Petitioner

v.

The State of Olympus, Respondent

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

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ORDER OF THE COURT ON SUBMISSION

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

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

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

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

SUPREME COURT OF THE STATE OF OLYMPUS

No. 2017-2018

MR. WILLIAM DENOLF, PETITIONER

v.

THE STATE OF OLYMPUS, RESPONDENT

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

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

I. Factual Background and Procedural History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Olympus Law and Petitioner's Sentence

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

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

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

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

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

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

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

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

D. Solitary Confinement in the United States

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

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

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

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

E. Conditions of Segregated Confinement at Poseidon Penitentiary

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

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

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

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

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

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

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

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

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

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

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

F. Petitioner's Appeal

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

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

I.

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

Id. at 36.

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

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

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

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

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

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

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

Conviction and sentence of William DeNolf is AFFIRMED.

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

I.

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

Id. at 1236 (internal citations omitted).

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

Id. (internal citations omitted).

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

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

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

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

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

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

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

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

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

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

SELECTED CASE LAW

(Issue One: Fifth Amendment Case)

UNITED STATES SUPREME COURT

Schmerber v. California, 384 U.S. 757 (1966)

JUSTICE BRENNAN delivered the opinion of the Court.

OPINION

Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor. He had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving. [Footnote 2] At the direction of a police officer, a blood sample was then withdrawn from petitioner's body by a physician at the hospital.

The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication, and the report of this analysis was admitted in evidence at the trial. Petitioner objected to receipt of this evidence of the analysis on the ground that the blood had been withdrawn despite his refusal, on the advice of his counsel, to consent to the test. He contended that, in that circumstance, the withdrawal of the blood and the admission of the analysis in evidence denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction. In view of constitutional decisions since we last considered these issues in Breithaupt v. Abram, 352 U. S. 432 -- see Escobedo v. Illinois, 378 U. S. 478; Malloy v. Hogan, 378 U. S. 1, and Mapp v. Ohio, 367 U. S. 643 -- we granted certiorari. 382 U.S. 971. We affirm.

…

II

THE PRIVILEGE AGAINST SELF-INCRIMINATION CLAIM

Breithaupt summarily rejected an argument that the withdrawal of blood and the admission of the analysis report involved in that state case violated the Fifth Amendment privilege of any person not to "be compelled in any criminal case to be a witness against himself," citing Twining v. New Jersey, 211 U. S. 78. But that case, holding that the protections of the Fourteenth Amendment do not embrace this Fifth Amendment privilege, has been succeeded by Malloy v. Hogan, 378 U. S. 1, 378 U. S. 8. We there held that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement --the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."

We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

It could not be denied that, in requiring petitioner to submit to the withdrawal and chemical analysis of his blood, the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege. The critical question, then, is whether petitioner was thus compelled "to be a witness against himself."

If the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated. In Miranda v. Arizona, ante, at 384 U. S. 460, the Court said of the interests protected by the privilege: "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government -- state or federal -- must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to

respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as established by chemical analysis, is evidence of criminal guilt. Compelled submission fails on one view to respect the "inviolability of the human personality." Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused "by its own independent labors."

As the passage in Miranda implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest. History and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through "the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" Ibid.

The leading case in this Court is *Holt v. United States*, 218 U. S. 245. There the question was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument as "based upon an extravagant extension of the Fifth Amendment," and went on to say: "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd v. United States, 116 U. S. 616. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. [Footnote 8] The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. 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. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard." Counselman v. Hitchcock, 142 U. S. 547, 142 U. S. 562.

In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

…

MR. JUSTICE BLACK with whom MR. JUSTICE DOUGLAS joins, dissenting.

I would reverse petitioner's conviction. I agree with the Court that the Fourteenth Amendment made applicable to the States the Fifth Amendment's provision that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." But I disagree with the Court's holding that California did not violate petitioner's constitutional right against self-incrimination when it compelled him, against his will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content, and then used that analysis as evidence to convict petitioner of a crime.

The Court admits that "the State compelled [petitioner] to submit to an attempt to discover evidence [in his blood] that might be [and was] used to prosecute him for a criminal offense."

To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat. The Court, however, overcomes what had seemed to me to be an insuperable obstacle to its conclusion by holding that ". . . the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

I cannot agree that this distinction and reasoning of the Court justify denying petitioner his Bill of Rights' guarantee that he must not be compelled to be a witness against himself.

In the first place, it seems to me that the compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a "testimonial" and a "communicative nature." The sole purpose of this project, which proved to be successful, was to obtain "testimony" from some person to prove that petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly "communicative" in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that petitioner was more or less drunk.

I think it unfortunate that the Court rests so heavily for its very restrictive reading of the Fifth Amendment's privilege against self-incrimination on the words "testimonial" and "communicative." These words are not models of clarity and precision, as the Court's rather labored explication shows. Nor can the Court, so far as I know, find precedent in the former opinions of this Court for using these particular words to limit the scope of the Fifth Amendment's protection. There is a scholarly precedent, however, in the late Professor Wigmore's learned treatise on evidence. He used "testimonial" which, according to the latest edition of his treatise revised by McNaughton, means "communicative" (8 Wigmore, Evidence § 2263 (McNaughton rev. 1961), p. 378), as a key word in his vigorous and extensive campaign designed to keep the privilege against self-incrimination "within limits the strictest possible." 8 Wigmore, Evidence § 2251 (3d ed. 1940), p. 318. Though my admiration for Professor Wigmore's scholarship is great, I regret to see the word he used to narrow the Fifth Amendment's protection play such a major part in any of this Court's opinions.

I am happy that the Court itself refuses to follow Professor Wigmore's implication that the Fifth Amendment goes no further than to bar the use of forced self-incriminating statements coming from a "person's own lips." It concedes, as it must so long as Boyd v. United States, 116 U. S. 616, stands, that the Fifth Amendment bars a State from compelling a person to produce papers he has that might tend to incriminate him. It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content, but proscribes compelled production of his lifeless papers. Certainly there could be few papers that would have any more "testimonial" value to convict a man of drunken driving than would an analysis of the alcoholic content of a human being's blood introduced in evidence at a trial for driving while under the influence of alcohol. In such a situation, blood, of course, is not oral testimony given by an accused, but it can certainly "communicate" to a court and jury the fact of guilt.

The Court itself, at page 384 U. S. 764, expresses its own doubts, if not fears, of its own shadowy distinction between compelling "physical evidence"

like blood which it holds does not amount to compelled self-incrimination, and "eliciting responses which are essentially testimonial." And, in explanation of its fears, the Court goes on to warn that

"To compel a person to submit to testing [by lie detectors, for example] 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. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard.' Counselman v. Hitchcock, 142 U. S. 547, 142 U. S. 562."

A basic error in the Court's holding and opinion is its failure to give the Fifth Amendment's protection against

(Issue One: Fifth Amendment Case)

UNITED STATES SUPREME COURT

Rhode Island v. Innis, 446 U.S. 291 (1980)

JUSTICE STEWART delivered the opinion of the Court.

OPINION

In *Miranda v. Arizona*, 384 U. S. 436, 384 U. S. 474, the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present. The issue in this case is whether the respondent was "interrogated" in violation of the standards promulgated in the *Miranda* opinion.

I

On the night of January 12, 1975, John Mulvaney, a Providence, R.I., taxicab driver, disappeared after being dispatched to pick up a customer. His body was discovered four days later buried in a shallow grave in Coventry, R.I. He had died from a shotgun blast aimed at the back of his head.

On January 17, 1975, shortly after midnight, the Providence police received a telephone call from Gerald Aubin, also a taxicab driver, who reported that he had just been robbed by a man wielding a sawed-off shotgun. Aubin further reported that he had dropped off his assailant near Rhode Island College in a section of Providence known as Mount Pleasant. While at the Providence police station waiting to give a statement, Aubin noticed a picture of his assailant on a bulletin board. Aubin so informed one of the police officers present. The officer prepared a photo array, and again Aubin identified a picture of the same person. That person was the respondent. Shortly thereafter, the Providence police began a search of the Mount Pleasant area.

At approximately 4:30 a.m. on the same date, Patrolman Lovell, while cruising the streets of Mount Pleasant in a patrol car, spotted the respondent standing in the street facing him. When Patrolman Lovell stopped his car, the respondent walked towards it. Patrolman Lovell then arrested the respondent, who was unarmed, and advised him of his so-called Miranda rights. While the two men waited in the patrol car for other police officers to arrive, Patrolman Lovell did not converse with the respondent other than to respond to the latter's request for a cigarette.

Within minutes, Sergeant Sears arrived at the scene of the arrest, and he also gave the respondent the Miranda warnings. Immediately thereafter, Captain Leyden and other police officers arrived. Captain Leyden advised the respondent of his Miranda rights. The respondent stated that he understood those rights and wanted to speak with a lawyer. Captain Leyden then directed that the respondent be placed in a "caged wagon," a four-door police car with a wire screen mesh between the front and rear seats, and be driven to the central police station. Three officers, Patrolmen Gleckman, Williams, and McKenna, were assigned to accompany the respondent to the central station. They placed the respondent in the vehicle and shut the doors. Captain Leyden then instructed the officers not to question the respondent or intimidate or coerce him in any way. The three officers then entered the vehicle, and it departed.

While en route to the central station, Patrolman Gleckman initiated a conversation with Patrolman McKenna concerning the missing shotgun. As Patrolman Gleckman later testified: "At this point, I was talking back and forth with Patrolman McKenna, stating that I frequent this area while on patrol, and [that, because a school for handicapped children is located nearby,] there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."

Patrolman McKenna apparently shared his fellow officer's concern: "I more or less concurred with him [Gleckman] that it was a safety factor, and that we should, you know, continue to search for the weapon and try to find it."

While Patrolman Williams said nothing, he overheard the conversation between the two officers: "He [Gleckman] said it would be too bad if the little -- I believe he said a girl -- would pick up the gun, maybe kill herself."

The respondent then interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. At this point, Patrolman McKenna radioed back to

Captain Leyden that they were returning to the scene of the arrest, and that the respondent would inform them of the location of the gun. At the time the respondent indicated that the officers should turn back, they had traveled no more than a mile, a trip encompassing only a few minutes.

The police vehicle then returned to the scene of the arrest, where a search for the shotgun was in progress. There, Captain Leyden again advised the respondent of his Miranda rights. The respondent replied that he understood those rights, but that he "wanted to get the gun out of the way because of the kids in the area in the school." The respondent then led the police to a nearby field, where he pointed out the shotgun under some rocks by he side of the road.

On March 20, 1975, a grand jury returned an indictment charging the respondent with the kidnaping, robbery, and murder of John Mulvaney. Before trial, the respondent moved to suppress the shotgun and the statements he had made to the police regarding it. After an evidentiary hearing at which the respondent elected not to testify, the trial judge found that the respondent had been "repeatedly and completely advised of his Miranda rights." He further found that it was "entirely understandable that [the officers in the police vehicle] would voice their concern [for the safety of the handicapped children] to each other."

The judge then concluded that the respondent's decision to inform the police of the location of the shotgun was "a waiver, clearly, and on the basis of the evidence that I have heard, and [sic] intelligent waiver, of his [Miranda] right to remain silent." Thus, without passing on whether the police officers had, in fact, "interrogated" the respondent, the trial court sustained the admissibility of the shotgun and testimony related to its discovery. That evidence was later introduced at the respondent's trial, and the jury returned a verdict of guilty on all counts.

On appeal, the Rhode Island Supreme Court, in a 3-2 decision, set aside the respondent's conviction. 120 R.I._ , 391 A.2d 1158. Relying at least in part on this Court's decision in *Brewer v. Williams,* 430 U.S. 387, the court concluded that the respondent had invoked his Miranda right to counsel, and that, contrary to Miranda's mandate that, in the absence of counsel, all custodial interrogation then cease, the police officers in the vehicle had "interrogated" the respondent without a valid waiver of his right to counsel. It was the view of the state appellate court that, even though the police officers may have been genuinely concerned about the public safety, and even though the respondent had not been addressed personally by the police officers, the respondent nonetheless had been subjected to "subtle coercion" that was the equivalent of "interrogation" within the meaning of the Miranda opinion. Moreover, contrary to the holding of the trial court, the appellate court concluded that the evidence was insufficient to support a finding of waiver. Having concluded that both the shotgun and testimony relating to its discovery were obtained in violation of the Miranda standards, and therefore should not have been admitted into evidence, the Rhode Island Supreme Court held that the respondent was entitled to a new trial.

We granted certiorari to address for the first time the meaning of "interrogation" under Miranda v. Arizona, 440 U.S. 934.

II

In its Miranda opinion, the Court concluded that, in the context of "custodial interrogation," certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. More specifically, the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 384 U. S. 444. Those safeguards included the now familiar Miranda warnings -- namely, that the defendant be informed "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires" -- or their equivalent. Id. at 384 U. S. 479.

The Court in the Miranda opinion also outlined in some detail the consequences that would result if a defendant sought to invoke those procedural safeguards. With regard to the right to the presence of counsel, the Court noted: "Once warnings have been given, the subsequent procedure is clear If the

individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent."

In the present case, the parties are in agreement that the respondent was fully informed of his Miranda rights, and that he invoked his Miranda right to counsel when he told Captain Leyden that he wished to consult with a lawyer. It is also uncontested that the respondent was "in custody" while being transported to the police station.

The issue, therefore, is whether the respondent was "interrogated" by the police officers in violation of the respondent's undisputed right under Miranda to remain silent until he had consulted with a lawyer. In resolving this issue, we first define the term "interrogation" under Miranda, before turning to a consideration of the facts of this case.

A

The starting point for defining "interrogation" in this context is, of course, the Court's Miranda opinion. There the Court observed that, "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 384 U. S. 44 (emphasis added). This passage and other references throughout the opinion to "questioning" might suggest that the Miranda rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody.

We do not, however, construe the Miranda opinion so narrowly. The concern of the Court in Miranda was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner," and thereby undermine the privilege against compulsory self-incrimination. Id. at 384 U. S. 457-458. The police practices that evoked this concern included several that did not involve express questioning. For example, one of the practices discussed in Miranda was the use of lineups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was, in fact, guilty as a predicate for further interrogation. Id. at 384 U. S. 453. A variation on this theme discussed in Miranda was the so-called "reverse line-up" in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution. Ibid. The Court in Miranda also included in its survey of interrogation practices the use of psychological ploys, such as to "posi[t]" "the guilt of the subject," to "minimize the moral seriousness of the offense," and "to cast blame on the victim or on society." Id. at 384 U. S. 450. It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation.

This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in Miranda noted: "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. Volunteered statements of any kind are not barred by the Fifth Amendment, and their admissibility is not affected by our holding today." Id. at 384 U. S. 478 (emphasis added). It is clear, therefore, that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation," as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response

from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

B

Turning to the facts of the present case, we conclude that the respondent was not "interrogated" within the meaning of Miranda. It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.

Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.

The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few off-hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

The Rhode Island Supreme Court erred, in short, in equating "subtle compulsion" with interrogation. That the officers' comments struck a responsive chord is readily apparent. Thus, it may be said, as the Rhode Island Supreme Court did say, that the respondent was subjected to "subtle compulsion." But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response. This was not established in the present case.

For the reasons stated, the judgment of the Supreme Court of Rhode Island is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

(Issue One: Fifth Amendment Case)

UNITED STATES SUPREME COURT

Estelle v. Smith, 451 U.S. 454 (1981)

JUSTICE BURGER delivered the opinion of the Court.

OPINION

We granted certiorari to consider whether the prosecution's use of psychiatric testimony at the sentencing phase of respondent's capital murder trial to establish his future dangerousness violated his constitutional rights. 445 U.S. 926 (1980).

I

A

On December 28, 1973, respondent Ernest Benjamin Smith was indicted for murder arising from his participation in the armed robbery of a grocery store during which a clerk was fatally shot, not by Smith, but by his accomplice. In accordance with Art. 1257(b)(2) of the Tex.Penal Code Ann. (Vernon 1974) concerning the punishment for murder with malice aforethought, the State of Texas announced its intention to seek the death penalty. Thereafter, a judge of the 195th Judicial District Court of Dallas County, Texas, informally ordered the State's attorney to arrange a psychiatric examination of Smith by Dr. James P. Grigson to determine Smith's competency to stand trial. See n 5, infra.

Dr. Grigson, who interviewed Smith in jail for approximately 90 minutes, concluded that he was competent to stand trial. In a letter to the trial judge, Dr. Grigson reported his findings: "[I]t is my opinion that Ernest Benjamin Smith, Jr., is aware of the difference between right and wrong and is able to aid an attorney in his defense." This letter was filed with the court's papers in the case. Smith was then tried by a jury and convicted of murder.

In Texas, capital cases require bifurcated proceedings -- a guilt phase and a penalty phase. If the defendant is found guilty, a separate proceeding before the same jury is held to fix the punishment. At the penalty phase, if the jury affirmatively answers three questions on which the State has the burden of proof beyond a reasonable doubt, the judge must impose the death sentence. See Tex.Code Crim.Proc.Ann., Arts. 37.071(c) and (e) (Vernon Supp. 1980). One of the three critical issues to be resolved by the jury is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

In other words, the jury must assess the defendant's future dangerousness.

At the commencement of Smith's sentencing hearing, the State rested "[s]ubject to the right to reopen." App. A-11. Defense counsel called three lay witnesses: Smith's stepmother, his aunt, and the man who owned the gun Smith carried during the robbery. Smith's relatives testified as to his good reputation and character. The owner of the pistol testified as to Smith's knowledge that it would not fire because of a mechanical defect. The State then called Dr. Grigson as a witness.

Defense counsel were aware from the trial court's file of the case that Dr. Grigson had submitted a psychiatric report in the form of a letter advising the court that Smith was competent to stand trial. This report termed Smith "a severe sociopath," but it contained no more specific reference to his future dangerousness. Id. at A-6. Before trial, defense counsel had obtained an order requiring the State to disclose the witnesses it planned to use both at the guilt stage and, if known, at the penalty stage. Subsequently, the trial court had granted a defense motion to bar the testimony during the State's case in chief of any witness whose name did not appear on that list. Dr. Grigson's name was not on the witness list, and defense counsel objected when he was called to the stand at the penalty phase.

In a hearing outside the presence of the jury, Dr. Grigson stated: (a) that he had not obtained permission from Smith's attorneys to examine him; (b) that he had discussed his conclusions and diagnosis with the State's attorney; and (c) that the prosecutor had requested him to testify, and had told him, approximately five days before the sentencing hearing began, that his testimony probably would be needed within the week. Id. at A-1A-16. The trial judge denied a defense motion to exclude Dr. Grigson's testimony on the ground that his name was not on the State's list of witnesses. Although no continuance was requested, the court then recessed

for one hour following an acknowledgment by defense counsel that an hour was "all right." Id. at A-17.

After detailing his professional qualifications by way of foundation, Dr. Grigson testified before the jury on direct examination: (a) that Smith "is a very severe sociopath"; (b) that "he will continue his previous behavior"; (c) that his sociopathic condition will "only get worse"; (d) that he has no "regard for another human being's property or for their life, regardless of who it may be"; (e) that "[t]here is no treatment, no medicine . . . that in any way at all modifies or changes this behavior"; (f) that he "is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so"; and (g) that he "has no remorse or sorrow for what he has done." Id. at A-17 - A-26. Dr. Grigson, whose testimony was based on information derived from his 90-minute "mental status examination" of Smith (i.e., the examination ordered to determine Smith's competency to stand trial), was the State's only witness at the sentencing hearing.

The jury answered the three requisite questions in the affirmative, and, thus, under Texas law, the death penalty for Smith was mandatory. The Texas Court of Criminal Appeals affirmed Smith's conviction and death sentence, Smith v. State, 540 S.W.2d 693 (1976), and we denied certiorari, 430 U.S. 922 (1977).

B

After unsuccessfully seeking a writ of habeas corpus in the Texas state courts, Smith petitioned for such relief in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 2254. The District Court vacated Smith's death sentence because it found constitutional error in the admission of Dr. Grigson's testimony at the penalty phase. 445 F. Supp. 647 (1977). The court based its holding on the failure to advise Smith of his right to remain silent at the pretrial psychiatric examination and the failure to notify defense counsel in advance of the penalty phase that Dr. Grigson would testify. The court concluded that the death penalty had been imposed on Smith in violation of his Fifth and Fourteenth Amendment rights to due process and freedom from compelled self-incrimination, his Sixth Amendment right to the effective assistance of counsel, and his Eighth Amendment right to present complete evidence of mitigating circumstances. Id. at 664.

The United States Court of Appeals for the Fifth Circuit affirmed. 602 F.2d 694 (1979). The court held that Smith's death sentence could not stand, because the State's "surprise" use of Dr. Grigson as a witness, the consequences of which the court described as "devastating," denied Smith due process in that his attorneys were prevented from effectively challenging the psychiatric testimony. Id. at 699. The court went on to hold that, under the Fifth and Sixth Amendments, "Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination." Id. at 709. Because Smith was not accorded these rights, his death sentence was set aside. While "leav[ing] to state authorities any questions that arise about the appropriate way to proceed when the state cannot legally execute a defendant whom it has sentenced to death," the court indicated that "the same testimony from Dr. Grigson, based on the same examination of Smith" could not be used against Smith at any future resentencing proceeding. Id. at 703, n. 13, 709, n. 20.

II

A

Of the several constitutional issues addressed by the District Court and the Court of Appeals, we turn first to whether the admission of Dr. Grigson's testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination because respondent was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding. Our initial inquiry must be whether the Fifth Amendment privilege is applicable in the circumstances of this case.

(1)

The State argues that respondent was not entitled to the protection of the Fifth Amendment because Dr. Grigson's testimony was used only to determine punishment after conviction, not to establish guilt. In

the State's view, "incrimination is complete once guilt has been adjudicated," and therefore the Fifth Amendment privilege has no relevance to the penalty phase of a capital murder trial. Brief for Petitioner 33-34. We disagree.

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." Culombe v. Connecticut, 367 U. S. 568, 367 U. S. 581-582 (1961) (opinion announcing the judgment) (emphasis added). See also Murphy v. Waterfront Comm'n, 378 U. S. 52, 378 U. S. 55 (1964); E. Griswold, The Fifth Amendment Today 7 (1955).

The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." In re Gault, 387 U. S. 1, 387 U. S. 49 (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made "the deluded instrument of his own conviction,'" Culombe v. Connecticut, supra, at 367 U. S. 581, quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made the "deluded instrument" of his own execution.

We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. [Footnote 6] Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. See Green v. Georgia, 442 U. S. 95, 442 U. S. 97 (1979); Presnell v. Georgia, 439 U. S. 14, 439 U. S. 16 (1978); Gardner v. Florida, 430 U. S. 349, 430 U. S. 357-358 (1977) (plurality opinion). Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment. Yet the State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to Dr. Grigson similarly infringes Fifth Amendment values.

(2)

The State also urges that the Fifth Amendment privilege is inapposite here because respondent's communications to Dr. Grigson were nontestimonial in nature. The State seeks support from our cases holding that the Fifth Amendment is not violated where the evidence given by a defendant is neither related to some communicative act nor used for the testimonial content of what was said. See, e.g., United States v. Dionisio, 410 U. S. 1 (1973) (voice exemplar); Gilbert v. California, 388 U. S. 263 (1967) (handwriting exemplar); United States v. Wade, 388 U. S. 218 (1967) (lineup); Schmerber v. California, 384 U. S. 757 (1966) (blood sample).

However, Dr. Grigson's diagnosis, as detailed in his testimony, was not based simply on his observation of respondent. Rather, Dr. Grigson drew his conclusions largely from respondent's account of the crime during their interview, and he placed particular emphasis on what he considered to be respondent's lack of remorse. See App. A-27 - A-29, A-33 - 34. Dr. Grigson's prognosis as to future dangerousness rested on statements respondent made, and remarks he omitted, in reciting the details of the crime. The Fifth Amendment privilege, therefore, is directly involved here, because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination.

The fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment. See n 6, supra. The state trial judge, sua sponte, ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent. Consequently, the interview with Dr. Grigson cannot be characterized as a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense. Indeed, if the application of Dr. Grigson's findings had been confined to serving that function, no Fifth Amendment issue would have arisen.
Nor was the interview analogous to a sanity

examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist.

Respondent, however, introduced no psychiatric evidence, nor had he indicated that he might do so. Instead, the State offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death. Respondent's future dangerousness was a critical issue at the sentencing hearing, and one on which the State had the burden of proof beyond a reasonable doubt. See Tex.Code Crim.Proc.Ann., Arts. 37.071(b) and(c) (Vernon Supp. 1980). To meet its burden, the State used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty. In these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated.

(3) (3)

In Miranda v. Arizona, 384 U. S. 436, 384 U. S. 467 (1966), the Court acknowledged that "the Fifth Amendment privilege is available outside of criminal court proceedings, and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."

Miranda held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id. at 384 U. S. 444. Thus, absent other fully effective procedures, a person in custody must receive certain warnings before any official interrogation ,including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." Id. at 384 U. S. 467-469. The purpose of these admonitions is to combat what the Court saw as "inherently compelling pressures" at work on the person, and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for "an intelligent decision as to its exercise." Ibid.

The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed, and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system," and was "not in the presence of [a] perso[n] acting solely in his interest." Id. at 384 U. S. 469. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.

The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," Counselman v. Hitchcock, 142 U. S. 547, 142 U. S. 562 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." Malloy v. Hogan, 378 U. S. 1, 378 U. S. 8 (1964). We agree with the Court of Appeals that respondent's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase.

A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the

pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way.

"Volunteered statements . . . are not barred by the Fifth Amendment," but, under Miranda v. Arizona, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. Id. at 384 U. S. 478. These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand.

…

III

Respondent's Fifth and Sixth Amendment rights were abridged by the State's introduction of Dr. Grigson's testimony at the penalty phase, and, as the Court of Appeals concluded, his death sentence must be vacated. Because respondent's underlying conviction has not been challenged and remains undisturbed, the State is free to conduct further proceedings not inconsistent with this opinion. Accordingly, the judgment of the Court of Appeals is

Affirmed.

(Issue One: Fifth Amendment Case)

UNITED STATES SUPREME COURT

Doe v. United States, 487 U.S. 201 (1988)

JUSTICE BLACKMUN delivered the opinion of the Court.

OPINION

This case presents the question whether a court order compelling a target of a grand jury investigation to authorize foreign banks to disclose records of his accounts, without identifying those documents or acknowledging their existence, violates the target's Fifth Amendment privilege against self-incrimination.

I

Petitioner, named here as John Doe, is the target of a federal grand jury investigation into possible federal offenses arising from suspected fraudulent manipulation of oil cargoes and receipt of unreported income. Doe appeared before the grand jury pursuant to a subpoena that directed him to produce records of transactions in accounts at three named banks in the Cayman Islands and Bermuda. Doe produced some bank records and testified that no additional records responsive to the subpoena were in his possession or control. When questioned about the existence or location of additional records, Doe invoked the Fifth Amendment privilege against self-incrimination.

The United States branches of the three foreign banks also were served with subpoenas commanding them to produce records of accounts over which Doe had signatory authority. Citing their governments' bank secrecy laws, which prohibit the disclosure of account records without the customer's consent, the banks refused to comply. See App. to Pet. for Cert. 17a, n. 2. The Government then filed a motion with the United States District Court for the Southern District of Texas that the court order Doe to sign 12 forms consenting to disclosure of any bank records respectively relating to 12 foreign bank accounts over which the Government knew or suspected that Doe had control. The forms indicated the account numbers and described the documents that the Government wished the banks to produce.

The District Court denied the motion, reasoning that, by signing the consent forms, Doe would necessarily be admitting the existence of the accounts. The District Court believed, moreover, that, if the banks delivered records pursuant to the consent forms, those forms would constitute "an admission that [Doe] exercised signatory authority over such accounts." Id. at 20a. The court speculated that the Government, in a subsequent proceeding, then could argue that Doe must have guilty knowledge of the contents of the accounts. Thus, in the court's view, compelling Doe to sign the forms was compelling him "to perform a testimonial act that would entail admission of knowledge of the contents of potentially incriminating documents," id. at 20a, n. 6, and such compulsion was prohibited by the Fifth Amendment. The District Court also noted that Doe had not been indicted, and that his signing of the forms might provide the Government with the incriminating link necessary to obtain an indictment, the kind of "fishing expedition" that the Fifth Amendment was designed to prevent. Id. at 21a.

The Government sought reconsideration. Along with its motion, it submitted to the court a revised proposed consent directive that was substantially the same as that approved by the Eleventh Circuit in United States v. Ghidoni, 732 F.2d 814, cert. denied, 469 U.S. 932 (1984). The form purported to apply to any and all accounts over which Doe had a right of withdrawal, without acknowledging the existence of any such account. The District Court denied this motion also, reasoning that compelling execution of the consent directive might lead to the uncovering and linking of Doe to accounts that the grand jury did not know were in existence. The court concluded that execution of the proposed form would "admit signatory authority over the speculative accounts, [and] would implicitly authenticate any records of the speculative accounts provided by the banks pursuant to the consent."

The Court of Appeals for the Fifth Circuit reversed in an unpublished per curiam opinion, 775 F.2d 300 (1985). Relying on its intervening decision in In re United States Grand Jury Proceedings (Cid), 767 F.2d 1131 (1985), the court held that Doe could not assert his Fifth Amendment privilege as a basis for refusing to sign the consent directive, because the form "did not have testimonial significance," and therefore its compelled execution would not violate Doe's Fifth Amendment rights. App. to Pet. for Cert. 7a.
On remand, the District Court ordered petitioner to

execute the consent directive. He refused. The District Court accordingly found petitioner in civil contempt and ordered that he be confined until he complied with the order. Id. at 2a. The court stayed imposition of sanction pending appeal and application for writ of certiorari. Id. at 2a-3a.

The Fifth Circuit affirmed the contempt order, again in an unpublished per curiam, concluding that its prior ruling constituted the "law of the case," and was dispositive of Doe's appeal. Id. at 3a; judgt. order reported at 812 F.2d 1404 (1987). We granted certiorari, 484 U.S. 813 (1987), to resolve a conflict among the Courts of Appeals as to whether the compelled execution of a consent form directing the disclosure of foreign bank records is inconsistent with the Fifth Amendment. We conclude that a court order compelling the execution of such a directive as is at issue here does not implicate the Amendment.

II

It is undisputed that the contents of the foreign bank records sought by the Government are not privileged under the Fifth Amendment. See Braswell v. United States, ante at 487 U. S. 108-110; United States v. Doe, 465 U. S. 605 (1984); Fisher v. United States, 425 U. S. 391 (1976). There also is no question that the foreign banks cannot invoke the Fifth Amendment in declining to produce the documents; the privilege does not extend to such artificial entities. See Braswell v. United States, ante at 487 U. S. 102-103; Bellis v. United States, 417 U. S. 85, 417 U. S. 89-90 (1974). Similarly, petitioner asserts no Fifth Amendment right to prevent the banks from disclosing the account records, for the Constitution "necessarily does not proscribe incriminating statements elicited from another." Couch v. United States, 409 U. S. 322, 409 U. S. 328 (1973). Petitioner's sole claim is that his execution of the consent forms directing the banks to release records as to which the banks believe he has the right of withdrawal has independent testimonial significance that will incriminate him, and that the Fifth Amendment prohibits governmental compulsion of that act.

The Self-Incrimination Clause of the Fifth Amendment reads: "No person . . . shall be compelled in any criminal case to be a witness against himself." This Court has explained that "the privilege protects a person only against being incriminated by his own compelled testimonial communications." Fisher v. United States, 425 U.S. at 425 U. S. 409, citing Schmerber v. California, 384 U. S. 757 (1966); United States v. Wade, 388 U. S. 218 (1967); and Gilbert v. California, 388 U. S. 263 (1967). The execution of the consent directive at issue in this case obviously would be compelled, and we may assume that its execution would have an incriminating effect. The question on which this case turns is whether the act of executing the form is a "testimonial communication." The parties disagree about both the meaning of "testimonial" and whether the consent directive fits the proposed definitions.

A

Petitioner contends that a compelled statement is testimonial if the Government could use the content of the speech or writing, as opposed to its physical characteristics, to further a criminal investigation of the witness. The second half of petitioner's "testimonial" test is that the statement must be incriminating, which is, of course, already a separate requirement for invoking the privilege. Thus, Doe contends, in essence, that every written and oral statement significant for its content is necessarily testimonial for purposes of the Fifth Amendment. [Footnote 6] Under this view, the consent directive is testimonial, because it is a declarative statement of consent made by Doe to the foreign banks, a statement that the Government will use to persuade the banks to produce potentially incriminating account records that would otherwise be unavailable to the grand jury.

The Government, on the other hand, suggests that a compelled statement is not testimonial for purposes of the privilege unless it implicitly or explicitly relates a factual assertion or otherwise conveys information to the Government. It argues that, under this view, the consent directive is not testimonial, because neither the directive itself nor Doe's execution of the form discloses or communicates facts or information. Petitioner disagrees.

The Government's view of the privilege, apparently accepted by the Courts of Appeals that have considered compelled consent forms, is derived largely from this Court's decisions in Fisher and Doe. The issue presented in those cases was whether the act of producing subpoenaed documents, not itself the making of a statement, might nonetheless have some

protected testimonial aspects. The Court concluded that the act of production could constitute protected testimonial communication, because it might entail implicit statements of fact: by producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic. United States v. Doe, 465 U.S. at 465 U. S. 613, and n. 11; Fisher, 425 U.S. at 425 U. S. 409-410; id. at 425 U. S. 428, 425 U. S. 432 (concurring opinions). See Braswell v. United States, ante at 487 U. S. 104; id. at 487 U. S. 122 (dissenting opinion). Thus, the Court made clear that the Fifth Amendment privilege against self-incrimination applies to acts that imply assertions of fact.

We reject petitioner's argument that this test does not control the determination as to when the privilege applies to oral or written statements. While the Court in Fisher and Doe did not purport to announce a universal test for determining the scope of the privilege, it also did not purport to establish a more narrow boundary applicable to acts alone. To the contrary, the Court applied basic Fifth Amendment principles. An examination of the Court's application of these principles in other cases indicates the Court's recognition that, in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a "witness" against himself.

This understanding is perhaps most clearly revealed in those cases in which the Court has held that certain acts, though incriminating, are not within the privilege. Thus, a suspect may be compelled to furnish a blood sample, Schmerber v. California, 384 U.S. at 384 U. S. 765; to provide a handwriting exemplar, Gilbert v. California, 388 U.S. at 388 U. S. 266-267, or a voice exemplar, United States v. Dionisio, 410 U. S. 1, 410 U. S. 7 (1973); to stand in a lineup, United States v. Wade, 388 U.S. at 388 U. S. 221-222; and to wear particular clothing, Holt v. United States, 218 U. S. 245, 218 U. S. 252-253 (1910). These decisions are grounded on the proposition that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."

Schmerber, 384 U.S. at 384 U. S. 761. The Court accordingly held that the privilege was not implicated in each of those cases, because the suspect was not required "to disclose any knowledge he might have," or "to speak his guilt," Wade, 388 U.S. at 388 U. S. 222-223.

"Unless some attempt is made to secure a communication -- written, oral or otherwise -- upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber -- the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. See Andresen v. Maryland, 427 U. S. 463, 427 U. S. 470-471 (1976); 8 Wigmore § 2250; E. Griswold, The Fifth Amendment Today 2-3 (1955). The major thrust of the policies undergirding the privilege is to prevent such compulsion. The Self-Incrimination Clause reflects "'a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused.'" (Emphasis added.) Ullmann v. United States, 350 U. S. 422, 350 U. S. 427 (1956), quoting Maffie v. United States, 209 F.2d 225, 227 (CA1 1954). The Court in Murphy v. Waterfront Comm'n of New York Harbor, 378 U. S. 52 (1964), explained that the privilege is founded on

"our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt; our preference for an accusatorial, rather than an inquisitorial, system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates"

"a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him, and by requiring the government, in its contest with the individual, to

shoulder the entire load,"

". . . ; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,'

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. . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'"

Id. at 378 U. S. 55 (citations omitted). These policies are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.

We are not persuaded by petitioner's arguments that our articulation of the privilege fundamentally alters the power of the Government to compel an accused to assist in his prosecution. There are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts. The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the privilege. Furthermore, it should be remembered that there are many restrictions on the Government's prosecutorial practices in addition to the Self-Incrimination Clause. Indeed, there are other protections against governmental efforts to compel an unwilling suspect to cooperate in an investigation, including efforts to obtain information from him. We are confident that these provisions, together with the Self-Incrimination Clause, will continue to prevent abusive investigative techniques.

B

The difficult question whether a compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case. Fisher, 425 U.S. at 425 U. S. 410. This case is no exception. We turn, then, to consider whether Doe's execution of the consent directive at issue here would have testimonial significance. We agree with the Court of Appeals that it would not, because neither the form nor its execution communicates any factual assertions, implicit or explicit, or conveys any information to the Government.

The consent directive itself is not "testimonial." It is carefully drafted not to make reference to a specific account, but only to speak in the hypothetical. Thus, the form does not acknowledge that an account in a foreign financial institution is in existence, or that it is controlled by petitioner. Nor does the form indicate whether documents or any other information relating to petitioner are present at the foreign bank, assuming that such an account does exist. Cf. United States v. Ghidoni, 732 F.2d at 818; In re Grand Jury Proceedings (Ranauro), 814 F.2d 791, 793 (CA1 1987); In re Grand Jury Subpoena, 826 F.2d 1166, 1170 (CA2 1987), cert. denied sub nom. Coe v. United States, post p._; In re Grand Jury Proceedings (Cid), 767 F.2d at 1132. The form does not even identify the relevant bank. Although the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence. The Government must locate that evidence "by the independent labor of its officers,'" Estelle v. Smith, 451 U. S. 454, 451 U. S. 462 (1981), quoting Culombe v. Connecticut, 367 U. S. 568, 367 U. S. 582 (1961) (opinion announcing the judgment). As in Fisher, the Government is not relying upon the "`truth-telling'" of Doe's directive to show the existence of, or his control over, foreign bank account records. See 425 U.S. at 425 U. S. 411, quoting 8 Wigmore § 2264, p. 380.

Given the consent directive's phraseology, petitioner's compelled act of executing the form has no testimonial significance either. By signing the form, Doe makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over any such account. Nor would his execution of the form admit the authenticity of any records produced by the bank. Cf. United States v. Ghidoni, 732 F.2d at 818-819; In re Grand Jury Subpoena, 826 F.2d at 1170. Not only does the directive express no view on the issue, but because petitioner did not prepare the document, any statement by Doe to the effect that it is authentic would not establish that the records are genuine. Cf. Fisher, 425 U.S. at 425 U. S. 413. Authentication evidence would have to be provided by bank officials.

Finally, we cannot agree with petitioner's contention

that his execution of the directive admits or asserts Doe's consent. The form does not state that Doe "consents" to the release of bank records. Instead, it states that the directive "shall be construed as consent" with respect to Cayman Islands and Bermuda bank secrecy laws. Because the directive explicitly indicates that it was signed pursuant to a court order, Doe's compelled execution of the form sheds no light on his actual intent or state of mind. The form does "direct" the bank to disclose account information and release any records that "may" exist and for which Doe "may" be a relevant principal. But directing the recipient of a communication to do something is not an assertion of fact or, at least in this context, a disclosure of information. In its testimonial significance, the execution of such a directive is analogous to the production of a handwriting sample or voice exemplar: it is a nontestimonial act. In neither case is the suspect's action compelled to obtain "any knowledge he might have." Wade, 388 U.S. at 388 U. S. 222.

We read the directive as equivalent to a statement by Doe that, although he expresses no opinion about the existence of, or his control over, any such account, he is authorizing the bank to disclose information relating to accounts over which, in the bank's opinion, Doe can exercise the right of withdrawal. Cf. Ghidoni, 732 F.2d at 818, n. 8 (similarly interpreting a nearly identical consent directive). When forwarded to the bank along with a subpoena, the executed directive, if effective under local law, will simply make it possible for the recipient bank to comply with the Government's request to produce such records. As a result, if the Government obtains bank records after Doe signs the directive, the only factual statement made by anyone will be the bank's implicit declaration, by its act of production in response to the subpoena, that it believes the accounts to be petitioner's. Cf. Fisher, 425 U.S. at 425 U. S. 410, 425 U. S. 412-413. The fact that the bank's customer has directed the disclosure of his records "would say nothing about the correctness of the bank's representations." Brief for United States 21-22. Indeed, the Second and Eleventh Circuits have concluded that consent directives virtually identical to the one here are inadmissible as an admission by the signator of either control or existence. In re Grand Jury Subpoena, 826 F.2d at 1171; Ghidoni, 732 F.2d at 818, and n. 9.

III

Because the consent directive is not testimonial in nature, we conclude that the District Court's order compelling petitioner to sign the directive does not violate his Fifth Amendment privilege against self-incrimination. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

(Issue One: Fifth Amendment Case)

UNITED STATES SUPREME COURT

Pennsylvania v. Muniz, 496 U.S. 582 (1990)

JUSTICE BRENNAN delivered the opinion of the Court.

OPINION

We must decide in this case whether various incriminating utterances of a drunk-driving suspect, made while performing a series of sobriety tests, constitute testimonial responses to custodial interrogation for purposes of the Self-Incrimination Clause of the Fifth Amendment.

I

During the early morning hours of November 30, 1986, a patrol officer spotted respondent Inocencio Muniz and a passenger parked in a car on the shoulder of a highway. When the officer inquired whether Muniz needed assistance, Muniz replied that he had stopped the car so he could urinate. The officer smelled alcohol on Muniz's breath and observed that Muniz's eyes were glazed and bloodshot and his face was flushed. The officer then directed Muniz to remain parked until his condition improved, and Muniz gave assurances that he would do so. But as the officer returned to his vehicle, Muniz drove off. After the officer pursued Muniz down the highway and pulled him over, the officer asked Muniz to perform three standard field sobriety tests: a "horizontal gaze nystagmus" test, a "walk and turn" test, and a "one leg stand" test. Muniz performed these tests poorly, and he informed the officer that he had failed the tests because he had been drinking.

The patrol officer arrested Muniz and transported him to the West Shore facility of the Cumberland County Central Booking Center. Following its routine practice for receiving persons suspected of driving while intoxicated, the Booking Center' videotaped the ensuing proceedings. Muniz was informed that his actions and voice were being recorded, but he was not at this time (nor had he been previously) advised of his rights under Miranda v. Arizona, 384 U. S. 436 (1966). Officer Hosterman first asked Muniz his name, address, height, weight, eye color, date of birth, and current age. He responded to each of these questions, stumbling over his address and age. The officer then asked Muniz, "Do you know what the date was of your sixth birthday?" After Muniz offered an inaudible reply, the officer repeated, "When you turned six years old, do you remember what the date was?" Muniz responded, "No, I don't."

Officer Hosterman next requested Muniz to perform each of the three sobriety tests that Muniz had been asked to perform earlier during the initial roadside stop. The videotape reveals that his eyes jerked noticeably during the gaze test, that he did not walk a very straight line, and that he could not balance himself on one leg for more than several seconds. During the latter two tests, he did not complete the requested verbal counts from one to nine and from one to thirty. Moreover, while performing these tests, Muniz "attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform." 377 Pa.Super. 382, 390, 547 A.2d 419, 423 (1988).

Finally, Officer Deyo asked Muniz to submit to a breathalyzer test designed to measure the alcohol content of his expelled breath. Officer Deyo read to Muniz the Commonwealth's Implied Consent Law, 75 Pa.Cons.Stat. § 1547 (1987), and explained that, under the law, his refusal to take the test would result in automatic suspension of his drivers' license for one year. Muniz asked a number of questions about the law, commenting in the process about his state of inebriation. Muniz ultimately refused to take the breath test. At this point, Muniz was for the first time advised of his Miranda rights. Muniz then signed a statement waiving his rights and admitted in response to further questioning that he had been driving while intoxicated.

Both the video and audio portions of the videotape were admitted into evidence at Muniz' bench trial, along with the arresting officer's testimony that Muniz failed the roadside sobriety tests and made incriminating remarks at that time. Muniz was convicted of driving under the influence of alcohol in violation of 75 Pa.Cons.Stat. § 3731(a)(1) (1987). Muniz filed a motion for a new trial, contending that the court should have excluded the testimony relating to the field sobriety tests and the videotape taken at the Booking Center "because they were incriminating and completed prior to [Muniz's] receiving his Miranda warnings." App. to Pet. for Cert. C5-C6. The trial court denied the motion, holding that "requesting

a driver, suspected of driving under the influence of alcohol, to perform physical tests or take a breath analysis does not violate [his] privilege against self-incrimination because [the] evidence procured is of a physical nature rather than testimonial, and therefore no Miranda warnings are required." id. at C6, quoting Commonwealth v. Benson, 280 Pa.Super. 20, 29, 421 A.2d 383, 387 (1980).

On appeal, the Superior Court of Pennsylvania reversed. The appellate court agreed that when Muniz was asked "to submit to a field sobriety test, and later perform these tests before the videotape camera, no Miranda warnings were required" because such sobriety tests elicit physical rather than testimonial evidence within the meaning of the Fifth Amendment. 377 Pa.Super. at 387, 547 A.2d at 422. The court concluded, however, that "when the physical nature of the tests begins to yield testimonial and communicative statements . . . the protections afforded by Miranda are invoked." Ibid.

The court explained that Muniz's answer to the question regarding his sixth birthday and the statements and inquiries he made while performing the physical dexterity tests and discussing the breathalyzer test "are precisely the sort of testimonial evidence that we expressly protected in [previous cases]," id. at 390, 547 A.2d at 423, because they "reveal[ed] his thought processes." Id. at 389, 547 A.2d at 423. The court further explained: "[N]one of Muniz's utterances were spontaneous, voluntary verbalizations. Rather, they were clearly compelled by the questions and instructions presented to him during his detention at the Booking Center. Since the . . . responses and communications were elicited before Muniz received his Miranda warnings, they should have been excluded as evidence." Id. at 390, 547 A.2d at 423.

Concluding that the audio portion of the videotape should have been suppressed in its entirety, the court reversed Muniz's conviction and remanded the case for a new trial. [Footnote 4] After the Pennsylvania Supreme Court denied the Commonwealth's application for review, 522 Pa. 575, 559 A.2d 36 (1989), we granted certiorari. 493 U.S. 916 (1989).

II

The Self-Incrimination Clause of the Fifth Amendment provides that no "person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5. Although the text does not delineate the ways in which a person might be made a "witness against himself," cf. Schmerber v. California, 384 U. S. 757, 384 U. S. 761-762, n. 6 (1966), we have long held that the privilege does not protect a suspect from being compelled by the State to produce "real or physical evidence." Id. at 384 U. S. 764. Rather, the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." Id. at 384 U. S. 761.

"[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." Doe v. United States, 487 U. S. 201, 487 U. S. 210 (1988).

In Miranda v. Arizona, 384 U. S. 436 (1966), we reaffirmed our previous understanding that the privilege against self-incrimination protects individuals not only from legal compulsion to testify in a criminal courtroom but also from "informal compulsion exerted by law-enforcement officers during in-custody questioning." Id. at 384 U. S. 461. Of course, voluntary statements offered to police officers "remain a proper element in law enforcement." Id. at 384 U. S. 478.

But "without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Id. at 384 U. S. 467. Accordingly, we held that protection of the privilege against self-incrimination during pretrial questioning requires application of special "procedural safeguards." Id. at 384 U. S. 444.

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

Ibid. Unless a suspect "voluntarily, knowingly and intelligently" waives these rights, ibid., any incriminating responses to questioning may not be

introduced into evidence in the prosecution's case in chief in a subsequent criminal proceeding.

This case implicates both the "testimonial" and "compulsion" components of the privilege against self-incrimination in the context of pretrial questioning. Because Muniz was not advised of his Miranda rights until after the videotaped proceedings at the Booking Center were completed, any verbal statements that were both testimonial in nature and elicited during custodial interrogation should have been suppressed. We focus first on Muniz's responses to the initial informational questions, then on his questions and utterances while performing the physical dexterity and balancing tests, and finally on his questions and utterances surrounding the breathalyzer test.

III

In the initial phase of the recorded proceedings, Officer Hosterman asked Muniz his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. Both the delivery and content of Muniz's answers were incriminating. As the state court found, "Muniz's videotaped responses . . . certainly led the finder of fact to infer that his confusion and failure to speak clearly indicated a state of drunkenness that prohibited him from safely operating his vehicle." 377 Pa.Super. at 390, 547 A.2d at 423. The Commonwealth argues, however, that admission of Muniz's answers to these questions does not contravene Fifth Amendment principles because Muniz's statement regarding his sixth birthday was not "testimonial" and his answers to the prior questions were not elicited by custodial interrogation. We consider these arguments in turn.

A

We agree with the Commonwealth's contention that Muniz's answers are not rendered inadmissible by Miranda merely because the slurred nature of his speech was incriminating. The physical inability to articulate words in a clear manner due to "the lack of muscular coordination of his tongue and mouth," Brief for Petitioner 16, is not itself a testimonial component of Muniz's responses to Officer Hosterman's introductory questions. In Schmerber v. California, supra, we drew a distinction between "testimonial" and "real or physical evidence" for purposes of the privilege against self-incrimination. We noted that, in Holt v. United States, 218 U. S. 245, 218 U. S. 252-253 (1910), Justice Holmes had written for the Court that "[t]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." 384 U.S. at 384 U. S. 763. We also acknowledged that "both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." Id. at 384 U. S. 764. Embracing this view of the privilege's contours, we held that "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." Ibid. Using this "helpful framework for analysis," ibid., we held that a person suspected of driving while intoxicated could be forced to provide a blood sample, because that sample was "real or physical evidence" outside the scope of the privilege and the sample was obtained in manner by which "[p]etitioner's testimonial capacities were in no way implicated." Id. at 384 U. S. 765.

We have since applied the distinction between "real or physical" and "testimonial" evidence in other contexts where the evidence could be produced only through some volitional act on the part of the suspect. In United States v. Wade, 388 U. S. 218 (1967), we held that a suspect could be compelled to participate in a lineup and to repeat a phrase provided by the police so that witnesses could view him and listen to his voice. We explained that requiring his presence and speech at a lineup reflected "compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." Id. at 388 U. S. 222; see id. at 388 U. S. 222-223 (suspect was "required to use his voice as an identifying physical characteristic"). In Gilbert v. California, 388 U. S. 263 (1967), we held that a suspect could be compelled to provide a handwriting exemplar, explaining that such an exemplar, "in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection." Id. at 388 U. S. 266-267. And in United States v. Dionisio, 410 U. S. 1 (1973), we held that suspects could be compelled to read a transcript in order to

provide a voice exemplar, explaining that the "voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said."

Under Schmerber and its progeny, we agree with the Commonwealth that any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, see Dionisio, supra, does not, without more, compel him to provide a "testimonial" response for purposes of the privilege.

B

This does not end our inquiry, for Muniz's answer to the sixth birthday question was incriminating, not just because of his delivery, but also because of his answer's content; the trier of fact could infer from Muniz's answer (that he did not know the proper date) that his mental state was confused.

The Commonwealth and United States as amicus curiae, argue that this incriminating inference does not trigger the protections of the Fifth Amendment privilege because the inference concerns "the physiological functioning of [Muniz's] brain," Brief for Petitioner 21, which is asserted to be every bit as "real or physical" as the physiological makeup of his blood and the timbre of his voice.

But this characterization addresses the wrong question; that the "fact" to be inferred might be said to concern the physical status of Muniz's brain merely describes the way in which the inference is incriminating. The correct question for present purposes is whether the incriminating inference of mental confusion is drawn from a testimonial act or from physical evidence. In Schmerber, for example, we held that the police could compel a suspect to provide a blood sample in order to determine the physical makeup of his blood, and thereby draw an inference about whether he was intoxicated. This compulsion was outside of the Fifth Amendment's protection, not simply because the evidence concerned the suspect's physical body, but rather because the evidence was obtained in a manner that did not entail any testimonial act on the part of the suspect: "[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis." 384 U.S. at 384 U. S. 765. In contrast, had the police instead asked the suspect directly whether his blood contained a high concentration of alcohol, his affirmative response would have been testimonial even though it would have been used to draw the same inference concerning his physiology. See ibid. ("[T]he blood test evidence . . . was neither [suspect's] testimony nor evidence relating to some communicative act"). In this case, the question is not whether a suspect's "impaired mental faculties" can fairly be characterized as an aspect of his physiology, but rather whether Muniz's response to the sixth birthday question that gave rise to the inference of such an impairment was testimonial in nature.

We recently explained in Doe v. United States, 487 U. S. 201 (1988), that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." Id. at 487 U. S. 210. We reached this conclusion after addressing our reasoning in Schmerber, supra, and its progeny: "The Court accordingly held that the privilege was not implicated in [the line of cases beginning with Schmerber] because the suspect was not required 'to disclose any knowledge he might have,' or 'to speak his guilt.' Wade, 388 U.S. at 388 U. S. 222-223. See Dionisio, 410 U.S. at 410 U. S. 7; Gilbert, 388 U.S. at 388 U. S. 266-267. It is the 'extortion of information from the accused,' Couch v. United States, 409 U.S. [322] at 409 U. S. 328, the attempt to force him 'to disclose the contents of his own mind,' Curcio v. United States, 354 U. S. 118, 354 U. S. 128 (1957), that implicates the Self-Incrimination Clause. . . . 'Unless some attempt is made to secure a communication -- written, oral or otherwise -- upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one.' 8 Wigmore § 2265, p. 386." 487 U.S. at 487 U. S. 210-211. After canvassing the purposes of the privilege recognized in prior cases, we concluded that "[t]hese policies are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government. [Footnote

9]" Id. at 487 U. S. 213.

This definition of testimonial evidence reflects an awareness of the historical abuses against which the privilege against self-incrimination was aimed.

"Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber -- the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. The major thrust of the policies undergirding the privilege is to prevent such compulsion." Id. at 487 U. S. 212 (citations omitted); see also Andresen v. Maryland, 427 U. S. 463, 427 U. S. 470-471 (1976). At its core, the privilege reflects our fierce "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt,'" Doe, supra, at 487 U. S. 212 (citation omitted), that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury. See United States v. Nobles, 422 U. S. 225, 422 U. S. 233 (1975) ("The Fifth Amendment privilege against compulsory self-incrimination . . . protects `a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation'") (quoting Couch v. United States, 409 U. S. 322, 409 U. S. 327 (1973)).

We need not explore the outer boundaries of what is "testimonial" today, for our decision flows from the concept's core meaning. Because the privilege was designed primarily to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality," Ullmann v. United States, 350 U. S. 422, 350 U. S. 428 (1956), it is evident that a suspect is "compelled . . . to be a witness against himself" at least whenever he must face the modern-day analog of the historic trilemma -- either during a criminal trial where a sworn witness faces the identical three choices or during custodial interrogation where, as we explained in Miranda, the choices are analogous and hence raise similar concerns. [Footnote 10] Whatever else it may include, therefore, the definition of "testimonial" evidence articulated in Doe must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the "cruel trilemma." This conclusion is consistent with our recognition in Doe that "[t]he vast majority of verbal statements thus will be testimonial" because "[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts." 487 U.S. at 487 U. S. 213. Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the "trilemma" of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.

This approach accords with each of our post-Schmerber cases finding that a particular oral or written response to express or implied questioning was nontestimonial; the questions presented in these cases did not confront the suspects with this trilemma. As we noted in Doe, 487 U.S. at 487 U. S. 210-211, the cases upholding compelled writing and voice exemplars did not involve situations in which suspects were asked to communicate any personal beliefs or knowledge of facts, and therefore the suspects were not forced to choose between truthfully or falsely revealing their thoughts. We carefully noted in Gilbert v. California, 388 U. S. 263 (1967), for example, that a "mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection." Id. at 388 U. S. 266-267 (emphasis added). Had the suspect been asked to provide a writing sample of his own composition, the content of the writing would have reflected his assertion of facts or beliefs, and hence would have been testimonial; but in Gilbert, "[n]o claim [was] made that the content of the exemplars was testimonial or communicative matter." Id. at 388 U. S. 267. [Footnote 12] And in Doe, the suspect was asked merely to sign a consent form waiving a privacy interest in foreign bank records. Because the consent form spoke in the hypothetical and did not identify any particular banks, accounts, or private records, the form neither "communicate[d] any factual assertions, implicit or explicit, [n]or convey[ed] any information to the Government." 487 U.S. at 487 U. S. 215. We concluded, therefore, that compelled execution of the consent directive did not "forc[e] [the suspect] to express the contents of his mind," id. at 487 U. S. 210, n. 9, but rather forced the suspect only to make a "nonfactual statement." Id. at 487 U. S. 213, n. 11.

In contrast, the sixth birthday question in this case required a testimonial response. When Officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, he was confronted with the trilemma. By hypothesis, the inherently coercive environment created by the custodial interrogation precluded the option of remaining silent, see n 10, supra. Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was [correct date]) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response.

The state court held that the sixth birthday question constituted an unwarned interrogation for purposes of the privilege against self-incrimination, 377 Pa.Super. at 390, 547 A.2d at 423, and that Muniz's answer was incriminating. Ibid. The Commonwealth does not question either conclusion. Therefore, because we conclude that Muniz's response to the sixth birthday question was testimonial, the response should have been suppressed.

C

The Commonwealth argues that the seven questions asked by Officer Hosterman just prior to the sixth birthday question -- regarding Muniz's name, address, height, weight, eye color, date of birth, and current age -- did not constitute custodial interrogation as we have defined the term in Miranda and subsequent cases. In Miranda, the Court referred to "interrogation" as actual "questioning initiated by law enforcement officers." 384 U.S. at 384 U. S. 444. We have since clarified that definition, finding that the

"goals of the Miranda safeguards could be effectuated if those safeguards extended not only to express questioning, but also to 'its functional equivalent.'"

Arizona v. Mauro, 481 U. S. 520, 481 U. S. 526 (1987). In Rhode Island v. Innis, 446 U. S. 291 (1980), the Court defined the phrase "functional equivalent" of express questioning to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." Id. at 446 U. S. 301 (footnotes omitted); see also Illinois v. Perkins, ante at 496 U. S. 296. However, "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining" what the police reasonably should have known. Innis, supra, 446 U.S. at 446 U. S. 302, n. 8. Thus, custodial interrogation for purposes of Miranda includes both express questioning and also words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to "have . . . the force of a question on the accused," Harryman v. Estelle, 616 F.2d 870, 874 (CA5 1980), and therefore be reasonably likely to elicit an incriminating response.

We disagree with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation as we defined the term in Innis, supra, merely because the questions were not intended to elicit information for investigatory purposes. As explained above, the Innis test focuses primarily upon "the perspective of the suspect." Perkins, ante, at 496 U. S. 296. We agree with amicus United States, however, that Muniz's answers to these first seven questions are nonetheless admissible because the questions fall within a "routine booking question" exception which exempts from Miranda's coverage questions to secure the "biographical data necessary to complete booking or pretrial services." Brief for the United States as Amicus Curiae 12, quoting United States v. Horton, 873 F.2d 180, 181, n. 2 (CA8 1989). The state court found that the first seven questions were "requested for recordkeeping purposes only," App. B16, and therefore the questions appear reasonably related to the police's administrative concerns. In this context, therefore, the first seven questions asked at the Booking Center fall outside the protections of Miranda and the answers

thereto need not be suppressed.

IV

During the second phase of the videotaped proceedings, Officer Hosterman asked Muniz to perform the same three sobriety tests that he had earlier performed at roadside prior to his arrest: the "horizontal gaze nystagmus" test, the "walk and turn" test, and the "one leg stand" test. While Muniz was attempting to comprehend Officer Hosterman's instructions and then perform the requested sobriety tests, Muniz made several audible and incriminating statements. [Footnote 15] Muniz argued to the state court that both the videotaped performance of the physical tests themselves and the audiorecorded verbal statements were introduced in violation of Miranda.

The court refused to suppress the videotaped evidence of Muniz's paltry performance on the physical sobriety tests, reasoning that "[r]equiring a driver to perform physical [sobriety] tests . . . does not violate the privilege against self-incrimination because the evidence procured is of a physical nature rather than testimonial." 377 Pa.Super. at 387, 547 A.2d at 422 (quoting Commonwealth v. Benson, 280 Pa.Super. at 29, 421 A.2d at 387). [Footnote 16] With respect to Muniz's verbal statements, however, the court concluded that "none of Muniz's utterances were spontaneous, voluntary verbalizations," 377 Pa.Super. at 390, 547 A.2d at 423, and because they were "elicited before Muniz received his Miranda warnings, they should have been excluded as evidence." Ibid.

We disagree. Officer Hosterman's dialogue with Muniz concerning the physical sobriety tests consisted primarily of carefully scripted instructions as to how the tests were to be performed. These instructions were not likely to be perceived as calling for any verbal response, and therefore were not "words or actions" constituting custodial interrogation, with two narrow exceptions not relevant here. The dialogue also contained limited and carefully worded inquiries as to whether Muniz understood those instructions, but these focused inquiries were necessarily "attendant to" the police procedure held by the court to be legitimate. Hence, Muniz's incriminating utterances during this phase of the videotaped proceedings were "voluntary" in the sense that they were not elicited in response to custodial interrogation. See South Dakota v. Neville, 459 U. S. 553, 459 U. S. 564, n. 15 (1983) (drawing analogy to "police request to submit to fingerprinting or photography" and holding that police inquiry whether suspect would submit to blood-alcohol test was not "interrogation within the meaning of Miranda").

Similarly, we conclude that Miranda does not require suppression of the statements Muniz made when asked to submit to a breathalyzer examination. Officer Deyo read Muniz a prepared script explaining how the test worked, the nature of Pennsylvania's Implied Consent Law, and the legal consequences that would ensue should he refuse. Officer Deyo then asked Muniz whether he understood the nature of the test and the law and whether he would like to submit to the test. Muniz asked Officer Deyo several questions concerning the legal consequences of refusal, which Deyo answered directly, and Muniz then commented upon his state of inebriation. 377 Pa.Super. at 387, 547 A.2d at 422. After offering to take the test only after waiting a couple of hours or drinking some water, Muniz ultimately refused.

We believe that Muniz's statements were not prompted by an interrogation within the meaning of Miranda, and therefore the absence of Miranda warnings does not require suppression of these statements at trial. As did Officer Hosterman when administering the three physical sobriety tests, see supra, at 496 U. S. 603-604, Officer Deyo carefully limited her role to providing Muniz with relevant information about the breathalyzer test and the implied consent law. She questioned Muniz only as to whether he understood her instructions and wished to submit to the test. These limited and focused inquiries were necessarily "attendant to" the legitimate police procedure, see Neville, supra, at 496 U. S. 564, n. 15, and were not likely to be perceived as calling for any incriminating response.

V

We agree with the state court's conclusion that Miranda requires suppression of Muniz's response to the question regarding the date of his sixth birthday, but we do not agree that the entire audio portion of the videotape must be suppressed. Accordingly, the court's judgment reversing Muniz's conviction is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

(Issue One: Fifth Amendment Case)

UNITED STATES SUPREME COURT

Kyllo v. United States, 533 U.S. 27 (2001)

JUSTICE SCALIA delivered the opinion of the Court.

OPINION

This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment.

I

In 1991 Agent William Elliott of the United States Department of the Interior came to suspect that marijuana was being grown in the home belonging to petitioner Danny Kyllo, part of a triplex on Rhododendron Drive in Florence, Oregon. Indoor marijuana growth typically requires highintensity lamps. In order to determine whether an amount of heat was emanating from petitioner's home consistent with the use of such lamps, at 3:20 a.m. on January 16, 1992, Agent Elliott and Dan Haas used an Agema Thermovision 210 thermal imager to scan the triplex. Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth-black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of Agent Elliott's vehicle across the street from the front of the house and also from the street in back of the house. The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was. Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner's home, and the agents found an indoor growing operation involving more than 100 plants. Petitioner was indicted on one count of manufacturing marijuana, in violation of 21 U. s. C. § 841(a)(1). He unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea.

The Court of Appeals for the Ninth Circuit remanded the case for an evidentiary hearing regarding the intrusiveness of thermal imaging. On remand the District Court found that the Agema 210 "is a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house"; it "did not show any people or activity within the walls of the structure"; "[t]he device used cannot penetrate walls or windows to reveal conversations or human activities"; and "[n]o intimate details of the home were observed." Supp. App. to Pet. for Cert. 39-40. Based on these findings, the District Court upheld the validity of the warrant that relied in part upon the thermal imaging, and reaffirmed its denial of the motion to suppress. A divided Court of Appeals initially reversed, 140 F.3d 1249 (1998), but that opinion was withdrawn and the panel (after a change in composition) affirmed, 190 F.3d 1041 (1999), with Judge Noonan dissenting. The court held that petitioner had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home, id., at 1046, and even if he had, there was no objectively reasonable expectation of privacy because the imager "did not expose any intimate details of Kyllo's life," only "amorphous 'hot spots' on the roof and exterior wall," id., at 1047. We granted certiorari. 530 U. S. 1305 (2000).

II

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U. S. 505, 511 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See Illinois v. Rodriguez, 497 U. S. 177, 181 (1990); Payton v. New York, 445 U. S. 573, 586 (1980).

On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not

so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass. See, e. g., Goldman v. United States, 316 U. S. 129, 134-136 (1942); Olmstead v. United States, 277 U. S. 438, 464-466 (1928). Cf. Silverman v. United States, supra, at 510-512 (technical trespass not necessary for Fourth Amendment violation; it suffices if there is "actual intrusion into a constitutionally protected area"). Visual surveillance was unquestionably lawful because" 'the eye cannot by the laws of England be guilty of a trespass.'" Boyd v. United States, 116 U. S. 616, 628 (1886) (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765)). We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property, see Rakas v. III inois, 439 U. S. 128, 143 (1978), but the lawfulness of warrantless visual surveillance of a home has still been preserved. As we observed in California v. Ciraolo, 476 U. S. 207, 213 (1986), "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."

One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a "search" 1 despite the absence of trespass, is not an "unreasonable" one under the Fourth Amendment. See Minnesota v. Carter, 525 U. S. 83, 104 (1998) (BREYER, J., concurring in judgment). But in fact we have held that visual observation is no "search" at allperhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional. See Dow Chemical Co. v. United States, 476 U. S. 227, 234-235, 239 (1986). In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in Katz v. United States, 389 U. S. 347 (1967). Katz involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth-a location not within the catalog ("persons, houses, papers, and effects") that the Fourth Amendment protects against unreasonable searches. We held that the

1 When the Fourth Amendment was adopted, as now, to "search" meant "[tJo look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief." N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989).

Fourth Amendment nonetheless protected Katz from the warrantless eavesdropping because he "justifiably relied" upon the privacy of the telephone booth. Id., at 353. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. See id., at 361. We have subsequently applied this principle to hold that a Fourth Amendment search does not occur-even when the explicitly protected location of a house is concerned-unless "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." Ciraolo, supra, at 211. We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, Smith v. Maryland, 442 U. S. 735, 743744 (1979), and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search, Ciraolo, supra; Florida v. Riley, 488 U. S. 445 (1989).

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in Dow Chemical, we noted that we found "it important that this is not an area immediately adjacent to a private home, where privacy expectations are most heightened," 476 U. S., at 237, n. 4 (emphasis in original).

III

It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. For example, as the cases discussed above make clear, the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. See

Ciraolo, supra, at 215. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.

The Katz test-whether the individual has an expectation of privacy that society is prepared to recognize as reasonable-has often been criticized as circular, and hence subjective and unpredictable. See 1 W. LaFave, Search and Seizure § 2.1(d), pp. 393-394 (3d ed. 1996); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173, 188; Carter, supra, at 97 (SCALIA, J., concurring). But see Rakas, supra, at 143-144, n.12. While it may be difficult to refine Katz when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes-the prototypical and hence most commonly litigated area of protected privacythere is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by senseenhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," Silverman, 365 U. S., at 512, constitutes a searchat least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

The Government maintains, however, that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house," Brief for United States 26. The dissent makes this its leading point, see post, at 41, contending that there is a fundamental difference between what it calls "off-the-wall" observations and "through-the- wall surveillance." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house-and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in Katz, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technologyincluding imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.3 The dissent's reliance on the distinction between "off-the-wall" and "through-the-wall" observation is entirely incompatible with the dissent's belief, which we discuss below, that thermal-imaging observations of the intimate details of a home are impermissible. The most sophisticated thermal-imaging devices continue to measure heat "off-the-wall" rather than "through-the-wall"; the dissent's disapproval of those more sophisticated thermalimaging devices, see post, at 49, is an acknowledgment that there is no substance to this distinction. As for the dissent's extraordinary assertion that anything learned through "an inference" cannot be a search, see post, at 44, that would validate even the "through-the-wall" technologies that the dissent purports to disapprove. Surely the dissent does not believe that the through-the-wall radar or ultrasound technology produces an 8-by-10 Kodak glossy that needs no analysis (i. e., the making of inferences). And, of course, the novel proposition that inference insulates a search is blatantly contrary to United States v. Karo, 468 U. S. 705 (1984), where the police "inferred" from the activation of a beeper that a certain can of ether was in the home. The police activity was held to be a search, and the search was held unlawfu1.

The Government also contends that the thermal imaging was constitutional because it did not "detect private activities occurring in private areas," Brief for United States 22. It points out that in Dow Chemical we observed that the enhanced aerial photography did not reveal any "intimate details." 476 U. S., at 238. Dow Chemical, however, involved enhanced aerial photography of an industrial complex, which does not share the Fourth Amendment sanctity of the home. The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In Silverman, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, 365 U. S., at 512, and there is

certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes. Thus, in Karo, supra, the only thing detected was a can of ether in the home; and in Arizona v. Hicks, 480 U. S. 321 (1987), the only thing detected by a physical search that went beyond what officers lawfully present could observe in "plain view" was the registration number of a phonograph turntable. These were intimate details because they were details of the home, just as was the detail of how warm-or even how relatively warm-Kyllo was heating his residence.

Limiting the prohibition of thermal imaging to "intimate details" would not only be wrong in principle; it would be impractical in application, failing to provide "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment," Oliver v. United States, 466 U. S. 170, 181 (1984). To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the "intimacy" of the details that it observes-which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath-a detail that many would consider "intimate"; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which home activities are "intimate" and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know in advance whether his through-the-wall surveillance picks up "intimate" detailsand thus would be unable to know in advance whether it is constitutional.

The dissent's proposed standard-whether the technology offers the "functional equivalent of actual presence in the area being searched," post, at 47-would seem quite similar to our own at first blush. The dissent concludes that Katz was such a case, but then inexplicably asserts that if the same listening device only revealed the volume of the conversation, the surveillance would be permissible, post, at 49-50. Yet if, without technology, the police could not discern volume without being actually present in the phone booth, JUSTICE STEVENS should conclude a search has occurred. Cf. Karo, 468 U. S., at 735 (STEVENS, J., concurring in part and dissenting in part). The same should hold for the interior heat of the home if only a person present in the home could discern the heat. Thus the driving force of the dissent, despite its recitation of the above standard, appears to be a distinction among different types of information-whether the "homeowner would even care if anybody noticed," post, at 50. The dissent offers no practical guidance for the application of this standard, and for reasons already discussed, we believe there can be none. The people in their houses, as well as the police, deserve more precision.

We have said that the Fourth Amendment draws "a firm line at the entrance to the house," Payton, 445 U. S., at 590. That line, we think, must be not only firm but also brightwhich requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause-and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.

The judgment of the Court of Appeals is reversed; the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

(Issue One: Fifth Amendment Case)

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

United States v. Henry, 451 F.3d 552 (2006)

JUSTICE BERZON delivered the opinion of the Court.

OPINION

Plethysmograph testing is a procedure that involves placing a imaging device around a man's waist area, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring responses through the device. Although one would expect to find a description of such a procedure gracing the pages of a George Orwell novel rather than the Federal Reporter, plethysmograph testing has become routine in the treatment of sexual offenders and is often imposed as a condition of supervised release. We address the procedures that must be followed before a district judge may impose such a requirement on a criminal defendant.

I.

In May of 2001, an electronics store technician discovered several images of child pornography on the hard drive of a computer that the defendant, Matthew Henry Weber, had brought in for repairs. The manager of the store informed the Los Angeles Police Department of the images, which contacted the FBI. When Weber arrived to pick up his computer, he was interviewed by an FBI agent about the images. Weber claimed to be unaware of the child pornography images on his computer. The FBI seized Weber's computer and conducted a full forensic examination of the hard drive, uncovering hundreds of images depicting children engaged in sexually explicit activity.

On January 17, 2003, a grand jury in the Central District of California returned a one-count indictment charging Weber with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Weber subsequently pleaded guilty to the single count in the indictment, pursuant to a plea agreement with the U.S. Attorney's Office. On March 4, 2005, the district court sentenced the defendant to twenty-seven months imprisonment and three years of supervised release.

In preparing the presentence report (PSR), the Probation Office proposed that twenty special conditions be imposed as specific terms of Weber's supervised release. Among them was Condition Nine, the requirement that Weber participate in a psychological/psychiatric counseling, which may include inpatient treatment, as approved and directed by the Probation Officer. The defendant shall abide by all rules, requirements, and conditions, of such program, including submission to risk assessment evaluation(s), and physiological testing, such as polygraph, plethysmograph, and Abel testing, and shall take all prescribed medication.

As justification for the proposed conditions of supervised release, the PSR stated: "During the period of supervised release, it is imperative that the defendant, who has mental health issue [sic], continue to receive mental health treatment and counseling. Further, it is recommended that the defendant continue sex offender treatment, and to be subject to intensive supervision to monitor the defendant's progress. Meanwhile, these special conditions are necessary to protect the public as the defendant undergoes treatment Conditions Nos. 3 to 5, and 8 to 19 have been recommended as a result of the instant offense involving the possession of child pornography, which was collected and stored using his computer, and the history and characteristics of the defendant."

In his written objections to the PSR and orally at the sentencing hearing, Weber objected to only one aspect of his supervised release — the requirement that he submit to plethysmograph testing. The district court declined to strike that condition, stating: "Now, in terms of [Condition] number nine, the particular testing, what I — if you felt for whatever reason and could support those reasons that whatever test was requested was medically not necessary, you could certainly ask — express that to the probation officer and ask for a hearing, but I intend to keep the condition; but you certainly, as in any condition, probation — or for supervised release, you would have the ability to request a modification.

The district court overruled Weber's objection and incorporated all of the proposed conditions into the judgment and commitment order. Weber timely

appealed.

…

IV.

In light of these governing principles, we turn our attention to the specifics of penile plethysmograph testing. Weber argues that the requirement that he submit to plethysmograph testing should be vacated because such testing (1) is not reasonably related to the purposes of deterrence, rehabilitation, or protection of the public, and (2) even if it does satisfy one of the above purposes, the testing requirement results in a greater deprivation of liberty than is reasonably necessary. To properly assess these claims, we consider both the nature of the testing at issue and the reception it has received among courts, psychologists, and academics.

A. The Nature of Plethysmograph Testing

As noted at the outset, plethysmograph is a test designed to measure a man's sexual response to various visual and auditory stimuli.

Initially developed by Czech psychiatrist Kurt Freund as a means to study sexual deviance, plethysmograph testing was also at one time used by the Czechoslovakian government to identify and "cure" homosexuals. DAVID M. FRIEDMAN, A MIND OF ITS OWN: A CULTURAL HISTORY OF THE PENIS 232 (2001). Today, plethysmograph testing has become rather routine in adult sexual offender treatment programs, with one survey noting that approximately one-quarter of adult sex offender programs employ the procedure. Odeshoo, *supra,* at 8. Another survey has placed the relative incidence of the test among adult sexual offender programs at fifteen percent, a somewhat lower, yet still considerable, level. *See* D. Richard Laws, *Penile Plethysmography: Will We Ever Get It Right?, in* SEXUAL DEVIANCE: ISSUES AND CONTROVERSIES 82, 97 (Tony Ward et al. eds., 2003).

B. The Significance of the Liberty Interest

Courts have previously recognized that plethysmograph testing "can [be] help[ful] in the treatment and monitoring of sex offenders." *Glanzer,* 232 F.3d at 1266. At the same time, the First Circuit has noted, putting it mildly, that plethysmograph testing is likely to "strike most people as especially unpleasant and offensive." *Berthiaume,* 142 F.3d at 16. Although we agree that "there are plenty of ordinary medical procedures that are disagreeable or upsetting to the

patient," *id.*, this test is not a run-of-the-mill medical procedure. Plethysmograph testing not only encompasses a physical intrusion but a mental one.

Moreover, plethysmograph testing is exceptionally intrusive in nature and duration. As one commentator has noted: “It is true that cavity searches and strip searches are deeply invasive, but [plethysmograph testing] is substantially more invasive. Nor do such searches last anywhere near the two or three hours required for plethysmography exams.” *Id.* (footnote omitted).

We note also that "[t]he degree of privacy afforded to subjects during the procedure varies considerably." *Id.* at 8. Sometimes the test is conducted by placing the patient in a private room away from the clinician, other times the two are separated by a curtain or one-way mirror. *Id.*

As these descriptions of plethysmograph testing indicate, the procedure implicates a particularly significant liberty interest. In reaching this conclusion, we follow the reasoning of the First Circuit in *Harrington v. Almy*, **977 F.2d 37**, 44 (1st Cir.1992). *Harrington* determined that a government employee had raised sufficient questions as to his due process interest in refusing his employer's demand that he submit to plethysmograph testing to warrant a jury trial on the question whether the requirement violated substantive due process. *Id.*

Harrington considered the strength of the plaintiff's liberty interest claim in refusing to submit to plethysmograph testing in light of *Rochin v. California*, **342 U.S. 165**, 72 S.Ct. 205, 96 L.Ed. 183
(1952), and *Winston v. Lee*, **470 U.S. 753**, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), cases in which the Supreme Court considered the constitutional interest inherent in avoiding "unwanted bodily intrusions or manipulations." *Harrington*, 977 F.2d at 43-44. As the First Circuit observed in *Harrington*, the governing case law indicates that "nonroutine manipulative intrusions on bodily integrity will be subject to heightened scrutiny to determine, *inter alia*, whether there are less intrusive alternatives

available." *Id.* at 44. Applying that standard, the First Circuit concluded: "A reasonable finder of fact could conclude that requiring the plethysmograph involves a substantive due process violation. The procedure, from all that appears, is hardly routine. The procedure involves bodily manipulation of the most intimate sort. There has been no showing regarding the procedure's reliability and, in light of other psychological evaluative tools available, there has been no demonstration that other less intrusive means of obtaining the relevant information are not sufficient. *Id.*

Although, given the supervised release context, we are not considering the same substantive due process question at issue in *Harrington, Harrington* rests on the premise that the strong liberty interest in one's own bodily integrity is impaired by the plethysmograph procedure. We find the First Circuit's analysis persuasive in this regard.

Similarly, *Coleman v. Dretke,* **395 F.3d 216**, 223 & n. 28 (5th Cir.2004), *cert. denied*_ U.S.__, 126 S.Ct. 427, 163 L.Ed.2d 325 (2005), supports the conclusion that plethysmograph testing implicates a particularly significant liberty interest. In that case, the Fifth Circuit considered a sex offender treatment program which included plethysmograph testing and was imposed by Texas on criminal defendants released on mandatory supervision or parole. *Id.* Referring specifically to plethysmograph testing and citing *Harrington, Coleman* held that "due to its highly invasive nature, Texas's sex offender therapy program is `qualitatively different' from other conditions which may attend an inmate's release" and that the Due Process Clause "provides [an individual] with a liberty interest in freedom from the stigma and compelled treatment on which his parole was conditioned" sufficient to require especially stringent procedural protections. *Id.* at 223.

C. Reactions to Plethysmograph Testing

Our concerns with plethysmograph testing do not rest solely on the invasive nature of the test itself. In addition, the accuracy and reliability of plethysmograph testing have been severely questioned. The American Psychiatric Association has expressed reservations about the procedure, observing: "The reliability and validity of this procedure in clinical assessment have not been well established, and clinical experience suggests that subjects can stimulate response by manipulating mental images." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR 567 (4th ed.2000); *see also* W.L. Marshall & Yolanda M. Fernandez, *Phallometric Testing with Sexual Offenders: Limits to Its Value,* 20 CLINICAL PSYCHOL. REV. 807, 810-13 (2000).

A predominant concern with plethysmograph testing is its susceptibility to manipulation via faking. According to one source, "[s]everal studies have shown that normal subjects can significantly inhibit test results by using mental activities to distract themselves, despite a clear indication that they were attending to the stimuli." Marshall & Fernandez, *supra,* at 810. Because "it appears virtually impossible to prevent or detect dissimulation . . . faking will always constitute some undetermined degree of threat to the validity of the assessments." *Id.* at 811; *see also* Walter T. Simon & Peter G.W. Schouten, *The Plethysmograph Reconsidered: Comments on Barker and Howell,* 21 BULL. AM. ACAD. PSYCHIATRY & L. 505, 510 (1993) ("The vulnerability of the plethysmograph to voluntary control has been widely documented and is a major concern in the use of the test with offenders.").

Plethysmograph testing has also been sharply criticized as lacking "uniform administration and scoring guidelines." *See* Simon & Schouten, *supra,* at 510; *see also* Odeshoo, *supra,* at 12-13 (noting a lack of standardization in administration of plethysmograph testing). One researcher noted well over a dozen potential sources of variation among different assessments, including the type of measuring device and stimuli that are used, the characteristics of the test, and the setting in which it is conducted. *See* Laws, *supra,* at 87-88. The lack of standard procedures governing plethysmograph testing has led one pair of commentators to conclude that "research data as well as individual findings derived by plethysmograph must be considered idiosyncratic[and] unamenable to normative comparisons, if not impossible to interpret from a traditional psychometric perspective." Simon & Schouten, *supra,* at 511. The lack of uniform standards is compounded by reports that indicate a lack of formal training for clinicians administering the test. *See* Laws, *supra,* at 87 (characterizing as "truly appalling" one survey's findings that seventy-

six percent of plethysmograph technicians received one week or less of training and eighteen percent received no training whatsoever).

The supporters of plethysmograph testing acknowledge its limitations. *See* Barker & Howell, *supra,* at 13, 22-23 (noting that while some research supports the notion that plethysmograph testing "is a reliable and valid method of objectively measuring and assessing the response in male sexual offenders," the propensity for faking and lack of standards poses a challenge to accurate use of such testing). In addition, at least one former advocate of the procedure has since changed his tune. *See* Laws, *supra,* at 82-84, 99 (explaining the author's account of why his former faith in plethysmograph testing has subsequently been "seriously eroded").

Despite these criticisms, plethysmograph testing has been recognized by some psychologists and researchers as a useful technique in the *treatment* of sexual offenders. "The ideal application for the plethysmograph is the assessment and treatment of known sex offenders." Barker & Howell, *supra,* at 18. Its role in a treatment program is to aid in identifying whether an individual exhibits a sexual response to deviant stimuli and determining whether a prescribed course of behavior modification therapy is effective in promoting "non-deviant arousal." *Id.* In particular: "The plethysmograph can help in identifying offenders who manifest high levels of arousal to stimuli depicting inappropriate sexual activity, or those showing very low levels of arousal to stimuli that would be considered portraying appropriate sexual activity. The plethysmograph can help determine and enhance specialized behavior therapy for these offenders and evaluate therapeutic efficacy without the normal distortion evident in the subject's self-report. *Id.*

D. Plethysmograph Testing as a Condition of Supervised Release

In light of these observations by courts and commentators alike, we cannot say categorically that, despite the questions of reliability, plethysmograph testing can never reasonably promote at least one, if not all three, of the relevant goals laid out in § 3553(a)(2) — namely, deterrence, public protection, and rehabilitation. As the Fourth Circuit, the only circuit to address the permissibility of plethysmograph testing as a condition of supervised release, has held, plethysmograph testing is regarded as "useful for treatment of sex offenders" in appropriate circumstances and thus can be "reasonably related" to "treatment, fostering deterrence, and protecting the public." *United States v. Dotson*, **324 F.3d 256**, 261 (4th Cir.2003) (internal quotation marks omitted) (quoting *United States v. Powers*, **59 F.3d 1460**, 1471 (4th Cir.1995)); *see also Walrath v. United States*, 830 F.Supp. 444, 446-47 (N.D. Ill.1993) (upholding plethysmograph testing as a condition of parole against Fourth and Fifth Amendment challenges, concluding that "[t]he fact that two recommended institutions require the plethysmograph as an evaluative tool suggests that it serves a useful function in the treatment of sexual deviance"); *State v. Riles*, 135 Wash.2d 326, 957 P.2d 655, 668 (1998) (upholding plethysmograph testing as part of a treatment program for a sexual offender in light of the observation that such testing is "an effective method for diagnosing and treating sex offenders").

To so conclude, however, is not the end of the story. First, although we recognize that plethysmograph testing *can* reasonably promote the goals of supervised release, the question of whether it *will* promote those goals in a particular case must be an individualized determination. Section 3583(d)(1) requires that conditions of supervised release be "reasonably related" to "the nature and circumstances of the offense and the history and characteristics of the defendant." *See* §§ 3583(d)(1), 3553(a)(1). This tailoring requirement is all the more important in cases such as this, where a particularly strong liberty interest is at stake. To satisfy the standard that a supervised release condition be "reasonably related" to the statutory goals in the particular circumstances, a district court must consider whether, given the level of intrusion required by the test, its noted flaws, and its downsides, plethysmograph testing is sufficiently likely, given a defendant's specific characteristics, to yield sufficiently useful results. Only a finding that plethysmograph testing is likely given the defendant's characteristics and criminal background to reap its intended benefits can justify the intrusion into a defendant's significant liberty interest in his own bodily integrity.

Second, conditions of supervised release must also

"involve `no greater deprivation of liberty than is reasonably necessary for the purposes' of supervised release." *T.M.*, 330 F.3d at 1240 (quoting § 3583(d)(2)). There are alternatives available in the treatment of sexual offenders that are considerably less intrusive than plethysmograph testing and may be sufficiently accurate. *See* Laws, *supra*, at 99; Marshall & Fernandez, *supra*, at 817; Odeshoo, *supra*, at 13-16.

For example, sexual offenders are often treated through self-reporting interviews, during which the subject is asked about his sexual preferences. Odeshoo, *supra*, at 14. Other sexual offender programs rely on a card-sorting test, which involves asking the individual to sort cards depicting sexual images into deviant and non-deviant categories. *Id.* Although these techniques have been criticized for their susceptibility to faking on the part of the subject, *see id.*, plethysmograph testing, as we have observed, is not immune from this criticism. The effectiveness of these procedures in the treatment of sexual offenders is disputed among the experts, with one commentator noting that "some researchers believe that basic self-reporting . . . is as effective as [plethysmograph testing] or other techniques," *id.*, and another study concluding that "the psychometric data on these alternative approaches is far less satisfactory than for phallometrics," Marshall & Fernandez, *supra*, at 817.

Another non-physiological test which also appears to enjoy routine use in sexual offender programs is Abel testing. Abel testing, which was also required in this case but is not challenged by Weber, involves exhibiting photographs to an individual and measuring the length of time he looks at each picture. *See* Odeshoo, *supra*, at 13. This procedure is much less intrusive into the body and somewhat less intrusive into the mind of a defendant than plethysmograph testing. Much like plethysmography, the effectiveness and reliability of Abel testing is the subject of some debate. *See id.* at 14; Marshall & Fernandez, *supra*, at 817. One researcher, however, has deemed Abel testing to be a "promising development." Laws, *supra*, at 99. Given that Abel testing is not properly before us, we do not set forth any opinion as to its propriety in this, or any other case. We discuss the procedure only to point out the existence of a less intrusive alternative to plethysmograph testing that enjoys similar, if not more, support among researchers. The appropriateness of Abel testing in a particular case should, of course, be left to the district court judge and probation officer, with appropriate expert consultation.

Ordinary polygraph testing is another possible viable alternative to plethysmograph testing that can be considered by district courts as they fashion supervised release conditions. Already more common in sexual offender treatment programs than plethysmograph testing, polygraph testing is much less costly to administer and "appears to be at least as valid and reliable as the plethysmograph (if not more so)." Odeshoo, *supra*, at 14-15. Most importantly, a polygraph examination "may well be preferable by virtue of its less intrusive and controversial character." *id.* at 16.[17]

The existence of non-physiological, less intrusive alternatives to plethysmograph testing, including interviews, card-sorting, and Abel and polygraph testing, is, self-evidently, highly relevant to the question of whether plethysmograph testing "involves no greater deprivation of liberty than is reasonably necessary" to serve the purposes of supervised release. § 3583(d)(2); *see also T.M.*, 330 F.3d at 1240. As we have indicated, imposing such testing as a condition of supervised release implicates a liberty interest sufficiently weighty to trigger the enhanced procedural requirements established in *Williams*. When viable and effective alternatives exist to plethysmograph testing, a procedure that involves intrusion on an especially significant liberty interest, a district court should be hesitant to impose that procedure as a supervised release condition and may do so only after explaining on the record why the alternatives are inadequate.

E. Conclusion

We conclude that, just as the particularly significant liberty interest at stake in *Williams* meant that "a thorough inquiry is required" before a district court may impose forced medication as a condition of supervised release, including "on-the-record medically-grounded findings," *Williams*, 356 F.3d at 1055-57, so the particularly significant liberty interest in being free from plethysmograph testing requires a thorough, on-the-record inquiry into whether the degree of intrusion caused by such testing is reasonably necessary "to accomplish one or more of the factors listed in § 3583(d)(1)" and "involves no

greater deprivation of liberty than is reasonably necessary," given the available alternatives. *Id.* at 1057.

One critical determination that must guide a district court's inquiry as to whether the government has met its burden to show that plethysmograph testing is a necessary condition of a defendant's supervised release is whether such testing is reasonably necessary *in that particular case* to promote the goals "of deterrence, protection of the public, or rehabilitation of the offender." *T.M.*, 330 F.3d at 1240. Making such a determination requires consideration of evidence that plethysmograph testing is reasonably necessary for the *particular* defendant based upon his specific psychological profile. We expect that the probation officer or the district court will ordinarily consult the views of a psychologist or other expert as to the propriety of plethysmograph testing for the particular defendant, although there may be circumstances in which it is not necessary to do so. *Cf. Williams*, 356 F.3d at 1056 (requiring findings based on a "medically-informed record" before antipsychotic medication could be required as a term of supervised release).

Additionally, when engaging in this inquiry the district court must consider the particular sexual offenses committed by the defendant, as well as related offenses likely to be committed if he is not treated. Weber objects to the imposition of plethysmograph testing on the ground that his crime, possession of child pornography, does not warrant such a procedure, contending that plethysmograph testing is appropriate only for individuals who have committed, or attempted to commit, sexual acts directly against children. The district court is not, however, restricted to the crime of conviction in applying the "reasonably related" standard. Still, a generalized assessment based on the class of sex offenders generally, rather than on the particular sex offenses a defendant has committed or related offenses he is likely to commit if not treated, cannot fulfill the mandate that a term of supervised release satisfy the "reasonably related" standard.

In response to Weber's objection to the plethysmograph testing requirement, the district court noted that if, in the future, Weber thought that such testing "was medically not necessary," he could "ask for a hearing" or "request a modification." As we have explained, however, the burden is on the government, not the defendant, to establish at the time of sentencing that plethysmograph testing is both reasonably necessary "to accomplish one or more of the factors listed in § 3583(d)(1)" and "involves no greater deprivation of liberty than is reasonably necessary." *Williams*, 356 F.3d at 1057 (internal quotation marks omitted). On remand, if the government continues to seek submission to plethysmograph testing as a condition of supervised release, then it must meet its burden of justifying the requirement, and the district court must make on-the-record findings that it has done so.

We note that our holding does not displace *Rearden's* general rule that, so long as the PSR adequately explains the relationship between proposed conditions of supervised release and the purposes those conditions are designed to serve, a district court usually need not specifically articulate those reasons on the record. As we noted in *Williams*, however, that general rule is subject to limited exceptions. Today, we recognize that the imposition of plethysmograph testing implicates a sufficiently significant liberty interest to require heightened procedural protections similar to those established in *Williams*. Again, as in *Williams* with regard to forced medication, we are not holding that a district court may *never* impose plethysmograph testing as a condition of supervised release, only that "a thorough inquiry is required" before a court may do so. 356 F.3d at 1055.

V.

The requirement that Weber submit to plethysmograph testing as part of his sex offender treatment program was imposed without the necessary evidentiary record, justification, and findings we now hold are required. Accordingly, we vacate the condition and remand for further proceedings consistent with this opinion.

VACATED and REMANDED.

(Issue One: Fifth Amendment Case)

SUPREME COURT OF PENNSYLVANIA

Commonwealth v. Knoble, 42 A.3d 976 (Pa. 2012)

JUSTICE EAKIN delivered the opinion of the Court.

OPINION

In February, 2005, appellee David Knoble entered an open guilty plea to charges of endangering the welfare of a child, corruption of minors, and criminal conspiracy to commit statutory sexual assault against a minor. He was sentenced to an aggregate term of one to two years imprisonment followed by four years probation and was ordered to comply with any special probation conditions imposed by the Pennsylvania Board of Probation and Parole.

After serving the sentence of imprisonment, Knoble was placed on probation; he signed an Acceptance for State Supervision form agreeing to abide by the special probation conditions imposed by the court and the supervising probation staff. One condition required successful completion of a outpatient program; Knoble was advised that termination from or unsuccessful completion of the program would constitute a probation violation. He began attending a specialized high-risk weekly counseling group. Six months into his probationary term, Knoble was terminated from the program for dishonesty during his polygraph tests and was arrested for violating his probation.

At Knoble's Gagnon II hearing, Jon Welsh, a certified treatment specialist in charge of Knoble's counseling group, testified that one of the primary stages of treatment is for an individual to take a sexual history therapeutic polygraph in order to objectively assess a participant's self-reported sexual history. After failing the polygraph, Knoble admitted during group treatment that he had been dishonest. Knoble took a second polygraph, and again disclosed during a subsequent group therapy session that he had been deceptive. Knoble admitted he had victimized other minors, and accepted responsibility for a sexual offense against a minor for which he had previously been acquitted. Due to his continued dishonesty, Knoble was released from the program.

Following the hearing, the court revoked Knoble's probation, determining the treatment was a reasonable special probation condition which Knoble violated by not completing the program; the court sentenced Knoble on his underlying offenses.

The Superior Court reversed, concluding the questions posed during the polygraph tests improperly required Knoble to answer incriminating questions that would result in the divulgence of previously unreported criminal behavior. Commonwealth v. Knoble, No. 1883 EDA 2008, unpublished memorandum at 12 (Pa.Super. filed June 24, 2009). The court relied on Commonwealth v. Shrawder, 940 A.2d 436, 443 (Pa.Super.2007), which determined therapeutic polygraph tests were a proper element in the treatment program and did not violate the Fifth Amendment protection against self-incrimination so long as the inquiries related to the underlying sentenced offense and did not compel the participant to provide information which could be used against him in a subsequent criminal trial. The court also noted Shrawder's holding that if a probationer is asked to answer incriminating polygraph questions, he remains free to assert his Fifth Amendment privilege against self-incrimination. Knoble, at 9–10 (citing Shrawder, at 443).

The Superior Court found Knoble was repetitively asked about and often told to provide information regarding his sexual history and conduct unrelated to the underlying offense, and Knoble was discharged from the program when he admitted his dishonesty in answering those questions. Id., at 12. Applying Shrawder, the Superior Court held such inquiries violated Knoble's Fifth Amendment rights, and the trial court erred in finding Knoble violated his probation. Id., at 12–13.

We granted allocatur to determine "[w]hether the Superior Court erred in concluding a probationer may invoke his Fifth Amendment right against self-incrimination for an unrelated offense, regardless of whether the information will be used in subsequent criminal proceedings, and whether such invocation must be made at the time of interrogation." Commonwealth v. Knoble, 605 Pa. 256, 988 A.2d 1288 (Pa.2010) (per curiam). As this issue involves a pure question of law, our standard of review is de novo and our review is plenary. Commonwealth v. Patton, 604 Pa. 307, 985 A.2d 1283, 1286 (Pa.2009).

The Fifth Amendment provides "no person shall be compelled in any criminal case to be a witness against himself." U .S. Const. amend. V. This prohibition not only permits the refusal to testify against one's self when a defendant in a criminal trial, but "in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [the speaker] in future criminal proceedings." Minnesota v. Murphy, 465 U.S. 420, 426, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (citation omitted).2

The Fifth Amendment privilege is not self-executing, and answers are generally not considered compelled "within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege." Id., at 427. "[I]n 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." Id. (quoting Garner v. United States, 424 U.S. 648, 654, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976)).

The Commonwealth contends there was no Fifth Amendment violation because Knoble's statements were not used against him at the probation revocation hearing or in any subsequent criminal case. It argues the constitutional right against self-incrimination only occurs if one has been compelled to act as a witness against himself in a criminal proceeding, and a probation revocation hearing does not constitute such a proceeding. See Gagnon, at 782 (probation revocation not part of criminal prosecution). The Commonwealth concedes Knoble may dispute the statement's use in subsequent criminal proceedings other than those for which he has been convicted, but claims he has no constitutional right to preclude their use at the revocation hearing.

The Commonwealth also argues no Fifth Amendment violation occurred because Knoble failed to invoke his rights during sex offender therapy. It contends the right against self-incrimination is not self-executing, and Knoble's failure to raise the privilege during the polygraph examinations and interviews precludes his challenge to the statements at the revocation hearing. Thus, no Fifth Amendment violation occurred because Knoble was not compelled to answer over a valid claim of privilege.

Knoble contends the polygraph examinations should be deemed per se unconstitutional because the questions sought information regarding uncharged criminal conduct, which is impermissible under Shrawder. He argues he was compelled to answer the polygraph questions within the meaning of the Fifth Amendment because his probation would be revoked if he did not participate and pass the examination. He believes his failure to raise the privilege should be excused due to his belief that he would be returned to prison if he did not answer the questions.

Knoble argues the information obtained from the examination need not be used against him in order for the polygraph to be considered unconstitutional, as the information sought could lead to the disclosure of facts that would establish guilt or provide an essential link by which guilt could be established. See Commonwealth v. Saranchak, 581 Pa. 490, 866 A.2d 292, 303 (Pa.2005) (Fifth Amendment privilege applies not only to disclosure of facts which would alone establish guilt, but to any fact which may provide essential evidentiary link by which guilt could be established). He also claims the information gained from the polygraph examination has been used against him as a means of probation violation, as a basis for new criminal charges raised against him, and could be used to establish a modus operandi permitting his prosecution in cases where he did not even know the victim.

The United States Supreme Court addressed the issue of Fifth Amendment application to probationers in Murphy, a factually similar case to the one before us. As part of his probation, Murphy was required to participate in a sex offender treatment program, report to his probation officer as required, and be completely honest with the officer in all matters. Murphy, at 422. At some point, the probation officer was advised that during the course of treatment, Murphy admitted to a previous rape and murder. Id., at 423. The officer set up a meeting with Murphy, and Murphy admitted to the previous rape and murder. Id., at 424. The officer informed Murphy she had a duty to inform the authorities of the conduct; Murphy was eventually arrested and charged with first degree murder. Id., at 424–25.

The Court granted certiorari to consider whether "a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding." Id., at 425. The Court noted the Fifth Amendment privilege speaks to compulsion and does not preclude voluntary

testimony regarding incriminatory matters; therefore, if a speaker desires the privilege's protection, he must claim it, or his statement will not be considered "compelled" within the meaning of the Constitution. Id., at 427 (citing United States v. Monia, 317 U.S. 424, 427, 63 S.Ct. 409, 87 L.Ed. 376 (1943)). The Court believed the general requirement to appear and truthfully answer questions did not convert otherwise voluntary statements into compelled ones unless one is required to answer over a valid claim of privilege. Id. Thus, if a speaker is confronted with questions the government should reasonably expect to elicit incriminating evidence, he must generally assert the privilege rather than answer the question if he wishes to avoid self-incrimination. Id., at 429.

The Court noted, while there are well-defined exceptions to this general rule, the exceptions involve some "identifiable factor" which effectively denies the witness the option to admit, deny, or refuse to answer. Id. (citing Garner, at 657). The Court found no such factor present, and specifically found Murphy's meeting with his probation officer did not amount to a custodial interrogation requiring Miranda warnings. Id., at 429–30; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Thus, as Murphy did not assert his privilege, the probation officer's testimony regarding the incriminating statements was admissible. Murphy, at 440.

The current situation appears to us even less imposing than that in Murphy. Knoble agreed to enter and regularly attend outpatient treatment. Special Conditions of Parole, 5/23/07, at 2. He acknowledged by signature that he would be required to take polygraph examinations as part of the treatment to determine his involvement in criminal sexual activity and that unsuccessful completion of the program would constitute a direct probation violation, which could result in probation revocation. Id. Importantly, he was aware he could challenge the special conditions if he felt them inappropriate or a violation of his rights. Id., at 3; see also Conditions Governing Special Probation/Parole, 11/26/06, at 2.

Knoble was clearly not in custody at the time of the polygraph so as to warrant Miranda warnings. There was no police supervision during his therapy; the treatment was out-patient in nature, and Knoble arrived and attended the sessions independently. Knoble knew he was able to challenge the conditions of his probation; thus, he was aware he could challenge the polygraph test, which he knew he would have to submit to as a probation condition. Knoble cannot pretend he never expected to be asked about his past criminal endeavors while on probation as "the nature of probation is such that probationers should expect to be questioned on a wide range of topics relating to their past criminality." Murphy, at 432. There is no suggestion Knoble was in some way misled by any expectation of confidentiality at any point, as he knew his probation officer would be privy to the information disclosed and in fact signed a limited confidentiality waiver, consenting to unrestricted communication between the program staff and his probation officer. Acknowledgment of Limited Confidentiality and Waiver, 5/29/07, at 1; Sexual Offender Treatment Contract, 5/29/07, at 1–2. In sum, one can hardly suggest Knoble was "compelled" within the meaning of the Fifth Amendment, when he knew the terms of his probation, was aware of his ability to challenge the terms prior to beginning his treatment, and failed to raise any such challenge either before or during questioning.

Knoble argues he was compelled to answer the questions within the meaning of the Fifth Amendment, because his probation would be revoked if he did not pass the polygraph, and his failure to raise the privilege should be excused due to his belief he would be returned to prison if he did not fully participate. Essentially, Knoble argues his situation falls within an exception to the general rule requiring a witness to raise his Fifth Amendment privilege, such that the protection against self-incrimination is self-executing.

The Murphy Court addressed and rejected a similar argument. The Court noted an exception to the general requirement of raising the privilege exists if assertion of the privilege is penalized, such that it precludes the witness's free choice to maintain his silence. Murphy, at 434; see Lefkowitz v. Cunningham, 431 U.S. 801, 805, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977) ("when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution."). The Court found a probation condition requiring a defendant to appear and be completely honest with his probation officer or face

revocation did not imply he would be punished with revocation for invoking his right against self-incrimination. Murphy, at 436–37. If, however, the government in any way asserts that a probationer's claiming of the privilege would lead to probation revocation, the privilege is self-executing, and the incriminating statements are deemed compelled and excluded from a criminal trial. Id., at 435.

The Court noted Murphy was only required to be truthful, and no probation condition indicated his probation was conditional upon his waiving his Fifth Amendment rights with respect to future prosecution. Id., at 437. Accordingly, because the probation conditions did not require Murphy to choose between making incriminating statements and jeopardizing his conditional liberty, the Court found the Fifth Amendment privilege was not self-executing. Id., at 436.

Here, as in Murphy, nothing in the record suggests Knoble's probation would have been revoked if he raised his Fifth Amendment privilege, either in challenging the terms of his probation or during the polygraph examination itself. In fact, the option of challenging the terms was clearly open and available to him. Furthermore, if his probation was revoked, his probation violation would result in a hearing, at which point he could argue the probation condition was unreasonable, the violation was excusable, and the need for confinement did not outweigh governing probation policies. See 42 Pa.C.S. 9771 (revocation of probation order requires hearing and proof of violation). In short, the probation condition did not require Knoble to choose between incriminating himself and jeopardizing his liberty. Therefore, the privilege was not self-executing, and Knoble's failure to raise his Fifth Amendment protection cannot be excused.

In any event, Knoble's admissions were not the basis for the eventual revocation; rather, he was dismissed for his continued dishonesty in the program. See Discharge Letter, 11/30/07, at 1 (“Knoble's unsuccessful discharge is secondary to a pattern of deceit in his treatment, which he himself has acknowledged . in direct violation of his signed sexual offender treatment contract ., which states that he will ‘actively and honestly participate in the therapy process, self-disclose.’ ”). At Knoble's resentencing, the court stated he was

being sentenced for the technical [probation] violation not being sentenced for [prior sexual offenses]. That conduct was before he was initially sentenced and is not a violation of probation and is not charged as such . [Further,] [p]erjury is not a violation of probation, it was not listed as a violation of probation, and he has not been convicted of perjury. As I have indicated, he is being sentenced for failing to complete the treatment program. N.T. Sentencing, 5/29/08, at 44 (emphasis added). As the revocation was independent of the incriminating content of Knoble's admissions, and would have occurred regardless of whether his incriminating statements were revealed at the hearing, the Fifth Amendment is not implicated.

With these facts in mind, we find therapeutic polygraphs containing inquiries asking a participant to provide information that could be used against him in a subsequent criminal trial do not inherently violate the Fifth Amendment. Participation in a therapeutic polygraph examination does not fall within the exception to the general rule that the Fifth Amendment protection must be raised or waived. Accordingly, a probationer who agrees to submit to such an exam as a condition of his probation may raise his Fifth Amendment privilege prior to submitting to the examination or when answering polygraph questions regarding uncharged criminal actions; however, the probationer waives his right to such protection if he does not invoke it upon questioning.

As Knoble failed to raise his Fifth Amendment privilege, his statements given during his therapy may be used against him. Moreover, as his probation was revoked, not for admission of his prior behavior, but because he violated his special probation conditions, no Fifth Amendment violation occurred.

The Superior Court's order is reversed, and the case is remanded for reinstatement of the trial court's sentencing order.

(Issue One: Fifth Amendment Case)

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

United States v. Von Behren, 822 F.3d 1139 (10th Cir. 2016)

JUSTICE BRISCOE delivered the opinion of the Court.

OPINION

Brian Von Behren is serving a three-year term of supervised release stemming from a 2005 conviction for distribution of child pornography. One of the conditions of his supervised release was modified to require that he successfully complete a treatment program, including a sexual history polygraph requiring him to answer four questions regarding whether he had committed sexual crimes for which he was never charged. The treatment program required him to sign an agreement instructing the treatment provider to report any discovered sexual crimes to appropriate authorities. Mr. Von Behren contended that the polygraph condition violates his Fifth Amendment privilege against self-incrimination. The district court disagreed and held that the polygraph exam questions do not pose a danger of incrimination in the constitutional sense. Mr. Von Behren refused to answer the sexual history questions, thereby requiring the treatment provider to expel him from the program and subjecting him to potential revocation of his supervised release for violating the condition of supervision. The district court denied Mr. Von Behren's request to stay further proceedings pending appeal, but this court granted a stay. We reverse on the Fifth Amendment issue.

I
BACKGROUND

In March 2005, Mr. Von Behren was sentenced to 121 months in prison and three years of supervised release for receipt and distribution of child pornography. In March 2014, as he neared release, the probation office petitioned to modify his release conditions. The petition requested several new and revised conditions, among which was a requirement that Mr. Von Behren not only participate in but also successfully complete an approved treatment program. These new conditions were necessary for Mr. Von Behren to be accepted into a program that complied with standards mandated by the Colorado Sex Offender Management Board (SOMB).

Created in 1992, SOMB is a regulatory board tasked with developing and implementing statewide standards for the assessment, evaluation, treatment, and behavioral monitoring of adult sex offenders. See Colo.Rev.Stat. § 16–11.7–103(1), (4). Compliance with SOMB standards is imperative to the continued operation of Colorado sexual treatment providers. See Colo.Rev.Stat. § 16–11.7–106(1) (neither a state agency nor judicial department may contract with any non-certified treatment provider to provide sex offender treatment). One such standard is that each treatment program must conduct sexual history polygraphs. SOMB Guidelines § 6.120. Failure to comply with SOMB standards can lead to removal from the state's list of approved providers. Id. § 8.010; Colo.Rev.Stat. § 16–11.7–106(7)(b)(I). Treatment providers thus have a large incentive to ensure that every patient they treat complies with SOMB requirements. As a result, certified providers will not accept an offender or allow the offender to continue in treatment if the offender refuses to undergo the sexual history polygraphs required by SOMB.

Mr. Von Behren was assigned to a SOMB certified treatment provider named RSA, which stands for Redirecting Sexual Aggression. Due to SOMB Guidelines requiring a written contract between the treatment provider and the sex offender, SOMB Guidelines §§ 3.310, 3.410, RSA presented Mr. Von Behren with a non-negotiable treatment agreement. The agreement required Mr. Von Behren to complete a non-deceptive sexual history polygraph in order to advance through the program. Failure to complete the sexual history polygraph would result in removal from the program. Moreover, the agreement contained the following provision concerning information gained by RSA regarding any crimes committed by Mr. Von Behren: "I hereby instruct RSA, Inc. to report to any appropriate authority or authorities any occurrence or potential occurrence of any sexual offense on my part regardless of how RSA, Inc. gains knowledge of such occurrence or potential occurrence. "Appropriate authority or authorities" as used in this and subsequent revisions may include, but is not limited to, County Human Services Departments, law enforcement agencies, probation or parole personnel, victims or potential victims,

parents, spouses, school personnel, and employers." Rec., vol. 1 at 174 (emphasis added).

Mr. Von Behren objected to probation's supervised release modifications, claiming, among other things, that the requirement to complete a sexual history polygraph violated his Fifth Amendment right against self-incrimination. In its first order, on August 26, 2014, the district court addressed the RSA contract and held that because successful completion of sex offender treatment was a new condition of Mr. Von Behren's supervised release, and because compliance with the terms of the RSA agreement was required for participation in and successful completion of the RSA program, the requirements of the RSA agreement were, in effect, conditions of Mr. Von Behren's supervised release. The court ultimately sustained Mr. Von Behren's objection on the basis of the Fifth Amendment. Without knowing the exact questions Mr. Von Behren would be asked, the court modified Mr. Von Behren's release conditions to exclude any requirement that he admit to a criminal offense other than his offense of conviction.

A few months later, despite the district court's pronouncement, RSA informed Mr. Von Behren that he would need to submit to a sexual history polygraph or leave the program. RSA told Mr. Von Behren that the polygraph examination would include four mandatory questions:

1. After the age of 18, did you engage in sexual activity with anyone under the age of 15?
2. Have you had sexual contact with a family member or relative?
3. Have you ever physically forced or threatened anyone to engage in sexual contact with you?
4. Have you ever had sexual contact with someone who was physically asleep or unconscious?

Id. at 172. An affirmative answer to any one of the questions would trigger a mandatory follow-up question asking "how many" times? Id. at 172–73. Among these four questions, Mr. Von Behren would be permitted to refuse to answer one.

Due to RSA's apparent violation of the district court's initial order, Mr. Von Behren, on December 23, 2014, filed an emergency motion to block the exam. On January 27, 2015, upon seeing the particular questions that RSA would ask, the district court reconsidered its earlier decision, denied Mr. Von Behren's motion, and ordered him to complete RSA's sexual history polygraph. The court held that the mandatory questions "d[id] not present a real and appreciable risk of incrimination to Mr. Von Behren." Id. at 179. Specifically, the court noted that Mr. Von Behren's answers would not "specify the time, the place, the identity of any victim, or other people involved." Id. at 180. The court did not address compulsion, reasoning that "[a]bsent a risk of incrimination, it [was] not necessary to consider the issue of compulsion." Id. at 183.

Mr. Von Behren filed an immediate notice of appeal, as well as a written request asking the district court to stay its ruling. In the meantime, RSA informed Mr. Von Behren that his polygraph examination was scheduled for February 11. On February 4 in its response to Mr. Von Behren's motion for stay, the government stated that RSA would terminate Mr. Von Behren from treatment should he refuse to take the February 11 polygraph examination. Gov't Response to Stay, Dist. Ct. Doc. 104, at 6 n. 2. The government also declared its opposition to any scenario whereby Mr. Von Behren would be permitted to stay in the community without treatment, and asserted that it would seek remand to prison if Mr. Von Behren did not receive sex-offender specific treatment. Id. at 7.

The district court issued its order denying Mr. Von Behren's stay on the afternoon of February 10, less than twenty-four hours before the scheduled exam time. Just before midnight on February 10, Mr. Von Behren filed a motion with this court asking us to stay the district court's order pending direct appeal. The next day, while Mr. Von Behren was in the examiner's parking lot, we granted his emergency stay of the polygraph pending appeal.

II
THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF–INCRIMINATION

Mr. Von Behren contends the district court erred when it held that one of his conditions of supervised release, a sexual polygraph examination with four mandatory questions, did not violate the Fifth Amendment's privilege against self-incrimination. "Our review of matters of constitutional law is de novo." United States v. Rivas–Macias, 537 F.3d 1271, 1276 (10th Cir.2008). Accordingly, we will take a " 'fresh, independent' look at the question at

bar." Id. (quoting Timmons v. White, 314 F.3d 1229, 1234 (10th Cir.2003)).

The Fifth Amendment to the United States Constitution states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment's privilege against self-incrimination applies not only to persons who refuse to testify against themselves at a criminal trial in which they are the defendant, "but also 'privileges [them] not to answer official questions put to [them] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [them] in future criminal proceedings." Minnesota v. Murphy, 465 U.S. 420, 426, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973)). Significantly, "[a]defendant does not lose this protection by reason of his conviction of a crime[.]" Id.

"To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 542 U.S. 177, 189, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004) (citing United States v. Hubbell, 530 U.S. 27, 34–38, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000)). There is no doubt that answering questions during a polygraph examination involves a communicative act which is testimonial. See Schmerber v. California, 384 U.S. 757, 761, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (holding privilege protects only communicative acts). But the elements of incrimination and compulsion are less certain and, accordingly, are the focus of this case. We address each in turn.

A. Incrimination

B.

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. Maness v. Meyers, 419 U.S. 449, 461, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975); see also Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); Rivas–Macias, 537 F.3d at 1278. Accordingly, "[t]he protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." Maness, 419 U.S. at 461 (citing Hoffman, 341 U.S. at 486).

The Fifth Amendment privilege is only properly invoked when the danger of self-incrimination is "real and appreciable," as opposed to "imaginary and unsubstantial," Brown v. Walker, 161 U.S. 591, 599, 16 S.Ct. 644, 40 L.Ed. 819 (1896), and "this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." Hoffman, 341 U.S. at 486. But we have explained that "[n]ot much is required . to show an individual faces some authentic danger of self-incrimination, [ ] as the privilege 'extends to admissions that may only tend to incriminate.' " Rivas–Macias, 537 F.3d at 1278 (citation omitted) (quoting Emspak v. United States, 349 U.S. 190, 197, 75 S.Ct. 687, 99 L.Ed. 997 (1955)). Accordingly, "we will uphold an individual's invocation of the privilege against self-incrimination unless it is 'perfectly clear, from a careful consideration of all the circumstances in the case,' that the witness 'is mistaken' and his answers could not 'possibly have' a 'tendency to incriminate.' " Id. at 1278–79 (quoting Hoffman, 341 U.S. at 488). Determining whether an individual has properly invoked the privilege "is a question of law, which we review de novo." Id. at 1278 (citing United States v. Bautista, 145 F.3d 1140, 1149 (10th Cir.1998)).

In this case, the district court held that the mandatory questions, along with each of their follow-up questions, do not present a real and appreciable risk of incrimination. It was convinced that the questions would only produce general answers and would not require Mr. Von Behren to specify the time or location of any incident, the identity of any victims, or the names of other people involved, concluding that the four "questions present at worst, 'an extraordinary and barely possible contingency' of incrimination and prosecution." Rec., vol. 1 at 181 (quoting Brown, 161 U.S. at 599). We disagree.

We start with the questions. Three of RSA's mandatory questions ask for the admission of a felony: (1) "After the age of 18, did you engage in sexual activity with anyone under the age of 15?";[2] (2) "Have you ever physically forced or threatened anyone to engage in sexual contact with you?";[3] and (3) "Have you ever had sexual contact

with someone who was physically asleep or unconscious?"[4] The fourth mandatory question asks about sexual contact with a family member, which acts to limit the possible pool of victims.[5] Given his reluctance to submit to the polygraph, we infer that Mr. Von Behren's answers to these questions would reveal past sex crimes. See, e.g., United States v. Antelope, 395 F.3d 1128, 1135 (9th Cir.2005) ("Based on the nature of this [sexual polygraph] requirement and Antelope's steadfast refusal to comply, it seems only fair to infer that his sexual autobiography would, in fact, reveal past sex crimes.").

An affirmative answer to any one of these questions could not support a conviction on its own, but that is not the test. The Fifth Amendment is triggered when a statement would provide a "lead" or "a link in the chain of evidence needed to prosecute the" speaker, see, e.g., United States v. Powe, 591 F.2d 833, 845 n. 36 (D.C.Cir.1978), and affirmative answers to these questions would do just that. If there were presently an investigation looking into the commission of a sex crime, and if Mr. Von Behren were a suspect, an affirmative answer to these questions would allow the police to focus the investigation on him. Moreover, investigators would certainly look at Mr. Von Behren differently if they were made aware that he had physically forced someone to engage in sexual relations with him.

The government, relying on Zicarelli v. New Jersey Commission of Investigation, 406 U.S. 472, 478–79, 479 n. 17, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972), argues that when the answer to a question would present only a remote and speculative possibility of incrimination, and would therefore merely confirm the operating assumption of law enforcement, there is no new link in the chain of evidence. But when the witness in Zicarelli was subpoenaed to testify in front of the New Jersey Commission of Investigation concerning organized crime, he refused to answer any questions even after being provided immunity. Id. at 473–74. Despite the immunity, the witness claimed he feared foreign prosecution. Id. at 478–79. One of the questions he objected to asked him if he was a member of the Cosa Nostra. Id. at 479, n. 17. The Court stated that an answer to that question would only confirm the assumptions of law enforcement. Id. Mr. Von Behren's case is far different. The witness in Zicarelli was a well-known member of organized crime, and the committee questioning him, with a grant of immunity, was simply asking him to confirm the fact. Id. at 473–74. Here, Mr. Von Behren is being asked to admit that he committed uncharged sexual crimes. There is no evidence the police have a working assumption that Mr. Von Behren committed such crimes and, even if they did, they could not force a witness to admit to a general crime because it merely confirms what they "already know."

Furthermore, an affirmative answer could potentially be used against Mr. Von Behren if he were ever charged with a sex crime. For instance, if Mr. Von Behren were to answer yes to the underage sex question or the physical force question, those answers could be used against him to show he has a propensity to commit such bad acts. See Fed.R.Evid. 413, 414 (Rule 413(a) allows the introduction of character evidence in sexual assault cases to show a propensity toward committing such crimes, and Rule 414(a) allows the same thing in child molestation cases.). As we recognized in United States v. Nance, 767 F.3d 1037 (10th Cir.2014), "[a]lthough '[t]he rules of evidence generally prohibit the admission of evidence for the purpose of showing a defendant's propensity to commit bad acts,' Rule 414(a) 'provides an exception to this general rule' by allowing the jury in a prosecution for child molestation to consider the fact that the defendant has committed other acts of child molestation as evidence that the defendant committed the charged offense." Id. at 1041 (quoting United States v. Sturm, 673 F.3d 1274, 1282 (10th Cir.2012)).[6] And while the government argues that a trial court could exclude such evidence under Fed.R.Evid. 403, the evidentiary rule that commands trial courts to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect, we do not think the Fifth Amendment privilege should be submitted to an evidentiary balancing test.

The district court based part of its conclusion on the fact that Mr. Von Behren's polygraph examiner does not act as a criminal investigator, but rather as a medical professional merely tasked with gathering relevant information to serve the goal of treatment. The court noted that Mr. Von Behren's scheduled polygrapher had conducted about 47,000 polygraphs since 1978 and had never been contacted by law enforcement regarding the results of a polygraph. This may be true, but "[o]nce the court determines that the answers requested would tend to incriminate the witness, it should not attempt to speculate whether

the witness will in fact be prosecuted." United States v. Jones, 703 F.2d 473, 478 (10th Cir.1983) (citing cases). The district court mistakenly assumed that an assurance from the government was a substitute for immunity. See United States v. Bahr, 730 F.3d 963, 966 n. 2 (9th Cir.2013) ("The privilege is concerned with threat of incrimination; it does not look to whether the government mercifully chooses not to capitalize on the constitutional violations it orchestrated.").

Notably, there is a provision in Mr. Von Behren's contract with RSA that instructs RSA "to report to any appropriate authority or authorities any occurrence or potential occurrence of any sexual offense." Rec., vol. 1 at 174. This provision, which specifically authorizes his examiner to report his admissions to the police, undoubtedly adds to Mr. Von Behren's apprehension in regard to answering the four questions. Because the answers to the four mandatory questions could focus an investigation— otherwise ignorant of his past sex crimes—on Mr. Von Behren, and also because his confession to these past crimes could potentially be used against him at trial under Fed.R.Evid. 413 and 414, we conclude that Mr. Von Behren faces at least some authentic danger of self-incrimination by answering three of the four mandatory questions in the RSA's sexual history polygraph.

B. Compulsion

After concluding in its final order that RSA's sexual polygraph questions do not pose a real and appreciable risk of incrimination to Mr. Von Behren, the district court saw no need to consider whether there was compulsion. Having disagreed with the district court on the incrimination issue, we turn to the issue of compulsion.

"[T]he touchstone of the Fifth Amendment is compulsion." Lefkowitz v. Cunningham, 431 U.S. 801, 806, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977). The privilege's prohibition against compulsion prevents the state from threatening to impose "substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." Id. at 805. This is so because "the privilege against compelled self-incrimination could not abide any 'attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers.' " Id. at 805–06 (quoting Gardner v. Broderick, 392 U.S. 273, 279, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968)) (emphasis added). Relying on Cunningham, the district court determined in its initial order finding a risk of incrimination, that the penalty of potential "revocation of supervised release and concomitant incarceration . is sufficiently severe to constitute compulsion." Rec., vol. 1 at 114. We agree with that conclusion.

The Fifth Amendment's text "does not prohibit all penalties levied in response to a person's refusal to incriminate himself." McKune v. Lile, 536 U.S. 24, 49, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (O'Connor, J., concurring). Rather, only "some penalties are so great as to 'compe[l]' [incriminating] testimony, while others do not rise to that level." Id. (first alteration in original). The Court in McKune considered whether a prison inmate was unconstitutionally compelled to incriminate himself when the state threatened a reduction in his prison privileges and housing accommodations if he refused to admit past offenses in response to sexual polygraph questions. Id. at 31. Justice O'Connor agreed in her concurring opinion with the plurality's conclusion that the state's threat to reduce prison privileges did not rise to the level of compulsion. See id. at 48–54 (O'Connor, J., concurring). But she did "not agree with the suggestion in the plurality opinion that these penalties could permissibly rise to the level of those . [like] longer incarceration . [that] are far greater than those we have already held to constitute unconstitutional compulsion in the [so-called] penalty cases." Id. at 52.[7] See id. at 49–50 (citing penalty cases including Lefkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977), and Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973)).

While the holding in McKune sheds light on what penalties rise to the level of compulsion in the context of prison inmates, Mr. Von Behren is on supervised release, not in prison. As the Supreme Court made clear in Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), "[t]hough the State properly subjects [a parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." The Court in Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), has spoken directly on the issue of Fifth Amendment compulsion in the analogous probation context. The Court's decision in Murphy, and the prior penalty cases it relies on, leads us to conclude that the

government's threat to revoke Mr. Von Behren's supervised release for his failure to answer potentially incriminating questions rises to the level of unconstitutional compulsion.

Murphy involved a man who was sentenced to three years' probation after pleading guilty to false imprisonment, a reduced charge that arose from criminal sexual conduct. Id. at 422. The terms of his probation required him to participate in a sex offender treatment program, "report to his probation officer as directed, and be truthful with the probation officer 'in all matters.' " Id. After Mr. Murphy stopped attending his treatment meetings, his treatment counselor informed his probation officer that Mr. Murphy had admitted to committing a rape and murder in 1974. Id. at 423. The probation officer confronted Mr. Murphy about the rape and murder, and he admitted he had in fact committed both crimes. Id. at 423–24. When Mr. Murphy refused the probation officer's admonition to turn himself in, the officer procured an arrest order.

Mr. Murphy was eventually charged with first-degree murder. Id. at 424–25. He sought to suppress his "confession on the ground[ ] that it was obtained in violation of the Fifth and Fourteenth Amendments." Id. at 425. The trial court found he was not in custody at the time and his testimony was therefore not compelled. Id. The Minnesota Supreme Court reversed, reasoning that the compulsory nature of the meeting constituted compulsion under the Fifth Amendment, even though Mr. Murphy failed to claim the privilege while being questioned. Id. The Supreme Court granted certiorari and reversed. Although the Court held that Mr. Murphy was not constitutionally compelled to give incriminating testimony, the Court's reasoning settles the compulsion issue in this case.

The Court started its analysis by noting that the Fifth Amendment privilege is normally not self-executing, meaning that a witness must affirmatively claim it to realize its protections. Id. at 427–29. Although Mr. Murphy did not affirmatively claim the privilege, he argued that he fell within an exception to the general rule. Id. at 434–39. The Court addressed the first exception, confessions obtained from suspects in police custody, see Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and concluded that the pressure felt by suspects during a custodial interrogation was markedly different than the relaxed environment of a meeting between a probationer and his probation officer. See id. at 433.

The Court next turned to the exception for penalty cases, a line of cases in which the state "sought to induce [a witness] to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids,' " id. at 434 (quoting Cunningham, 431 U.S. at 806). The Court explained the central theme throughout most of the penalty cases was that "a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." Id. (quoting Cunningham, 431 U.S. at 805). Notably, the Court cited cases where it had held that the state had "sought to induce [an individual] to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.' " Id. (emphasis added) (citing Turley, 414 U.S. at 79–84).

But unlike many of the witnesses in the penalty cases, Mr. Murphy had not asserted his privilege. Id. at 434–35. Accordingly the Court discussed cases where "an individual succumb[s] to the pressure placed upon him, fail[s] to assert the privilege, and disclose[s] incriminating information, which the state later [seeks] to use against him in a criminal prosecution." Id. at 434 (citing Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967)). In Garrity, 385 U.S. at 498–99, the Court held that an individual who was threatened with losing his job if he refused to answer incriminating questions did not waive his Fifth Amendment privilege by responding to those questions "rather than standing on his right to remain silent." Murphy, 465 U.S. at 435. Relying on Garrity, the Court declared: "There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." Murphy, id. at 435 (emphasis added).

The Court ultimately held that this flagship rule of Fifth Amendment jurisprudence did not apply to Mr. Murphy because his probation officer neither affirmatively stated nor implied that Mr. Murphy's assertion of the privilege would result in the revocation of his probation. Id. at 437–38. In other

words, there was no threat. The Court noted that even though Mr. Murphy's terms of probation required him to be truthful when talking to his probation officer, the terms said "nothing about his freedom to decline to answer particular questions and . contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution." Id. at 437. The Fifth Amendment privilege was not available to Mr. Murphy because he did not claim it.[8] Id. at 438. Although the Court in Murphy concluded that no unconstitutional compulsion was threatened in Mr. Murphy's case, its analysis makes clear that the opposite is true in this case.

Murphy makes this case an easy one. It recognizes that a threat to revoke one's probation for properly invoking his Fifth Amendment privilege is the type of compulsion the state may not constitutionally impose. 465 U.S. at 426. The government asserted here that it would seek Mr. Von Behren's remand to prison if he refused to answer incriminating sexual polygraph questions because that refusal would (and did) ultimately result in his termination from the sex offender treatment program. The government's threat constituted unconstitutional compulsion within the meaning of the Fifth Amendment. See United States v. York, 357 F.3d 14, 24–25 (1st Cir.2004) (recognizing it "would be constitutionally problematic" if supervised release provision requiring sex offender treatment "require[d] York to submit to polygraph testing . so that York's refusal to answer any questions—even on valid Fifth Amendment grounds—could constitute a basis for revocation"). The solution to this problem was suggested in Murphy over thirty years ago: "[A] state may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." Id. at 435 n. 7; see also Turley, 414 U.S. at 84–85 (state may compel waiver of Fifth Amendment privilege only by grant of immunity from prosecution).

The government counters that there was no unconstitutional compulsion because RSA terminated Mr. Murphy from treatment for not completing the polygraph exam and the government would be seeking a remand to prison for Mr. Von Behren's failure to complete treatment, not for his refusal to incriminate himself. We are not persuaded by this argument. Mr. Von Behren was not permitted to complete treatment solely and directly as a result of invoking his Fifth Amendment privilege and refusing to answer incriminating questions.[9] The government's argument is a distinction without a difference.

The government also contends it is unclear whether the district court would revoke Mr. Von Behren's supervised release for the legitimate invocation of the Fifth Amendment privilege against self-incrimination. If the court would not send Mr. Von Behren to prison based on his termination from treatment for invoking his Fifth Amendment privilege, the government argues, then the necessary element of compulsion does not exist. The government is wrong. Imagine the following scenario: Mr. Von Behren is sitting in an RSA exam room and the polygraph examiner starts asking him a host of incriminating questions. Mr. Von Behren feels uncomfortable and says, "I don't know if I should answer that." The examiner responds by saying, "you can plead the Fifth if you want, but if you do, we will end your treatment." Mr. Von Behren asks to consult with probation and is told that if he gets thrown out of treatment for failing to answer the sexual polygraph questions, the government will seek revocation of his supervised release. Subsequently, Mr. Von Behren confesses to a crime, and the polygraph examiner reports his confession to the authorities. The police then find, arrest, and charge Mr. Von Behren for the crime. At a hearing to consider his motion to suppress the confession, Mr. Von Behren argues that the confession should be inadmissible because it violated his Fifth Amendment privilege against self-incrimination. The result is a virtual certainty: the confession will be thrown out. The court would quickly dispose of the state's argument by relying on Garrity, 385 U.S. at 499–500 (holding confessions of two police officers were inadmissible at trial because they were obtained by telling officers they would lose jobs if they invoked their Fifth Amendment privilege), and Murphy, 465 U.S. at 435.

The government's position is that by changing one fact in the above hypothetical—instead of confessing, Mr. Von Behren asserts his right to remain silent and says nothing—the moment at which there is a constitutional violation changes as well. The government argues that in this latter scenario, there is no constitutional violation until a judge actually revokes Mr. Von Behren's supervised release. The government cites no authority for this bifurcated

approach. A witness is compelled under the Fifth Amendment as soon as the government threatens him with a substantial penalty—it makes no difference whether he proceeds with answering or stands on his right. See Turley, 444 U.S. at 320–22 (holding state statute unconstitutional under Fifth Amendment because it threatened state contractors with cancellation of existing contracts, plus five-year disqualification for future contracts, for refusing to answer incriminating questions); Bahr, 730 F.3d at 966 ("When the government conditions continued supervised release on compliance with a treatment program requiring full disclosure of past sexual misconduct, with no provision of immunity for disclosed conduct, it unconstitutionally compels self-incrimination.").

In sum, we hold that the government compelled Mr. Von Behren to be a witness against himself. For the reasons set forth above, we REVERSE.

(Issue Two: Eighth Amendment Case)

UNITED STATES SUPREME COURT

Rhodes v. Chapman, 452 U.S. 337 (1981)

JUSTICE POWELL delivered the opinion of the Court.

OPINION

The question presented is whether the housing of two inmates in a single cell at the Southern Ohio Correctional Facility is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.

I

Respondents Kelly Chapman and Richard Jaworski are inmates at the Southern Ohio Correctional Facility (SOCF), maximum security state prison in Lucasville, Ohio. They were housed in the same cell when they brought this action in the District Court for the Southern District of Ohio on behalf of themselves and all inmates similarly situated at SOCF. Asserting a cause of action under 42 U.S.C. § 1983, they contended that "double celling" at SOCF violated the Constitution. The gravamen of their complaint was that double celling confined cellmates too closely. It also was blamed for overcrowding at SOCF, said to have overwhelmed the prison's facilities and staff. [Footnote 1] As relief, respondents sought an injunction barring petitioners, who are Ohio officials responsible for the administration of SOCF, from housing more than one inmate in a cell, except as a temporary measure.

The District Court made extensive findings of fact about SOCF on the basis of evidence presented at trial and the court's own observations during an inspection that it conducted without advance notice. 434 F. Supp. 1007 (1977). These findings describe the physical plant, inmate population, and effects of double celling. Neither party contends that these findings are erroneous.

SOCF was built in the early 1970's. In addition to 1,620 cells, it has gymnasiums, workshops, schoolrooms, "dayrooms," two chapels, a hospital ward, commissary, barbershop, and library. Outdoors, SOCF has a recreation field, visitation area, and garden. The District Court described this physical plant as "unquestionably a top-flight, first-class facility." Id. at 1009.

Each cell at SOCF measures approximately 63 square feet. Each contains a bed measuring 36 by 80 inches, a cabinet-type night stand, a wall-mounted sink with hot and cold running water, and a toilet that the inmate can flush from inside the cell. Cells housing two inmates have a two-tiered bunk bed. Every cell has a heating and air circulation vent near the ceiling, and 96% of the cells have a window that inmates can open and close. All of the cells have a cabinet, shelf, and radio built into one of the walls, and in all of the cells one wall consists of bars through which the inmates can be seen.

The "dayrooms" are located adjacent to the cellblocks, and are open to inmates between 6:30 a. m. and 9:30 p. m. According to the District Court, "[t]he day rooms are in a sense part of the cells, and they are designed to furnish that type of recreation or occupation which an ordinary citizen would seek in his living room or den." Id. at 1012. Each dayroom contains a wall-mounted television, card tables, and chairs. Inmates can pass between their cells and the dayrooms during a 10-minute period each hour, on the hour, when the doors to the dayrooms and cells are opened.

As to the inmate population, the District Court found that SOCF began receiving inmates in late 1972 and double celling them in 1975 because of an increase in Ohio's statewide prison population. At the time of trial, SOCF housed 2,300 inmates, 67% of whom were serving life or other long-term sentences for first-degree felonies. Approximately 1,400 inmates were double celled. Of these, about 75% had the choice of spending much of their waking hours outside their cells, in the dayrooms, school, workshops, library, visits, meals, or showers. The other double celled inmates spent more time locked in their cells because of a restrictive classification.

The remaining findings by the District Court addressed respondents' allegation that overcrowding created by double celling overwhelmed SOCF's facilities and staff. The food was "adequate in every respect," and respondents adduced no evidence "whatsoever that prisoners have been underfed or that the food facilities have been taxed by the prison population." Id. at 1014. The air ventilation system

was adequate, the cells were substantially free of offensive odor, the temperature in the cellblocks was well controlled, and the noise in the cellblocks was not excessive. Double celling had not reduced significantly the availability of space in the dayrooms or visitation facilities, nor had it rendered inadequate the resources of the library or schoolrooms. Although there were isolated incidents of failure to provide medical or dental care, there was no evidence of indifference by the SOCF staff to inmates' medical or dental needs. As to violence, the court found that the number of acts of violence at SOCF had increased with the prison population, but only in proportion to the increase in population. Respondents failed to produce evidence establishing that double celling itself caused greater violence, and the ratio of guards to inmates at SOCF satisfied the standard of acceptability offered by respondents' expert witness. Finally, the court did find that the SOCF administration, faced with more inmates than jobs, had "water[ed] down" jobs by assigning more inmates to each job than necessary and by reducing the number of hours that each inmate worked, id. at 1015; it also found that SOCF had not increased its staff of psychiatrists and social workers since double celling had begun.

Despite these generally favorable findings, the District Court concluded that double celling at SOCF was cruel and unusual punishment. The court rested its conclusion on five considerations. One, inmates at SOCF are serving long-terms of imprisonment. In the court's view, that fact "can only accent[uate] the problems of close confinement and overcrowding." Id. at 1020. Two, SOCF housed 38% more inmates at the time of trial than its "design capacity." In reference to this, the court asserted: "Overcrowding necessarily involves excess limitation of general movement, as well as physical and mental injury from long exposure." Ibid. Three, the court accepted as contemporary standards of decency several studies recommending that each person in an institution have at least 50-55 square feet of living quarters. [Footnote 7] In contrast, double celled inmates at SOCF share 63 square feet. Four, the court asserted that, "[a]t the best, a prisoner who is double celled will spend most of his time in the cell with his cellmate." Id. at 1021. Five, SOCF has made double celling a practice; it is not a temporary condition.

On appeal to the Court of Appeals for the Sixth Circuit, petitioners argued that the District Court's conclusion must be read, in light of its findings, as holding that double celling is per se unconstitutional. The Court of Appeals disagreed; it viewed the District Court's opinion as holding only that double celling is cruel and unusual punishment under the circumstances at SOCF. It affirmed, without further opinion, on the ground that the District Court's findings were not clearly erroneous, its conclusions of law were "permissible from the findings," and its remedy was a reasonable response to the violations found.

We granted the petition for certiorari because of the importance of the question to prison administration. 449 U.S. 951 (1980). We now reverse.

II

We consider here for the first time the limitation that the Eighth Amendment, which is applicable to the States through the Fourteenth Amendment, Robinson v. California, 370 U. S. 660 (1962), imposes upon the conditions in which a State may confine those convicted of crimes. It is unquestioned that "[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards." Hutto v. Finney, 437 U. S. 678, 437 U. S. 685 (1978); see Ingraham v. Wright, 430 U. S. 651, 430 U. S. 669 (1977); cf. Bell v. Wolfish, 441 U. S. 520 (1979). But, until this case, we have not considered a disputed contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment. Nor have we had an occasion to consider specifically the principles relevant to assessing claims that conditions of confinement violate the Eighth Amendment. We look, first, to the Eighth Amendment precedents for the general principles that are relevant to a State's authority to impose punishment for criminal conduct.

A

The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be "cruel and unusual." The Court has interpreted these words "in a flexible and dynamic manner," Gregg v. Georgia, 428 U. S. 153, 428 U. S. 171 (1976) (joint opinion), and has extended the Amendment's reach beyond the barbarous physical punishments at issue in the Court's earliest cases. 99 U. S. S. 346 v. Utah, 99 U. S. 130 (1879); In re Kemmler, 136 U. S. 436 (1890). Today the Eighth

Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, supra, at 428 U. S. 173, or are grossly disproportionate to the severity of the crime, Coker v. Georgia, 433 U. S. 584, 433 U. S. 592 (1977) (plurality opinion); Weems v. United States, 217 U. S. 349 (1910), Among "unnecessary and wanton" inflictions of pain are those that are "totally without penological justification." Gregg v. Georgia, supra, at 428 U. S. 183; Estelle v. Gamble, 429 U. S. 97, 429 U. S. 103 (1976).

No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "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, 356 U. S. 101 (1958) (plurality opinion). The Court has held, however, that "Eighth Amendment judgments should neither be nor appear to be merely the subjective views" of judges. Rummel v. Estelle, 445 U. S. 263, 445 U. S. 275 (1980). To be sure, "the Constitution contemplates that, in the end, [a court's] own judgment will be brought to bear on the question of the acceptability" of a given punishment. Coker v. Georgia, supra, at 433 U. S. 597 (plurality opinion); Gregg v. Georgia, supra, at 428 U. S. 182 (joint opinion). But such "judgment[s] should be informed by objective factors to the maximum possible extent.'" Rummel v. Estelle, supra, at 445 U. S. 274-275, quoting Coker v. Georgia, supra, at 433 U. S. 592 (plurality opinion). For example, when the question was whether capital punishment for certain crimes violated contemporary values, the Court looked for "objective indicia" derived from history, the action of state legislatures; and the sentencing by juries. Gregg v. Georgia, supra, at 428 U. S. 176-187; Coker v. Georgia, supra, at 433 U. S. 593-596. Our conclusion in Estelle v. Gamble, supra, that deliberate indifference to an inmate's medical needs is cruel and unusual punishment rested on the fact, recognized by the common law and state legislatures, that "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." 429 U.S. at 429 U. S. 103.

These principles apply when the conditions of confinement compose the punishment at issue. Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. In Estelle v. Gamble, supra, we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. 429 U.S. at 429 U. S. 103. In Hutto v. Finney, supra, the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivations of basic human needs. Conditions other than those in Gamble and Hutto, alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in Gamble, supra, at 429 U. S. 103-104. But conditions that cannot be said to be cruel and unusual under contemporary standards a.re not unconstitutional. 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.

B

In view of the District Court's findings of fact, its conclusion that double celling at SOCF constitutes cruel and unusual punishment is insupportable. Virtually every one of the court's findings tends to refute respondents' claim. The double celling made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement. 434 F. Supp. at 1018. Although job and educational opportunities diminished marginally as a result of double celling, limited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments. We would have to wrench the Eighth Amendment from its language and history to hold that delay of these desirable aids to rehabilitation violates the Constitution.

The five considerations on which the District Court relied also are insufficient to support its constitutional conclusion. The court relied on the long-terms of imprisonment served by inmates at SOCF; the fact that SOCF housed 38% more inmates than its "design capacity"; the recommendation of several studies that

each inmate have at least 50-55 square feet of living quarters; the suggestion that double celled inmates spend most of their time in their cells with their cellmates; and the fact that double celling at SOCF was not a temporary condition. Supra at 452 U. S. 343-344. These general considerations fall far short in themselves of proving cruel and unusual punishment, for there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment. At most, these considerations amount to a theory that double celling inflicts pain. Perhaps they reflect an aspiration toward an ideal environment for long-term confinement. But the Constitution does not mandate comfortable prisons, and prisons of SOCF's type, which house persons convicted of serious crimes, cannot be free of discomfort. Thus, these considerations properly are weighed by the legislature and prison administration, rather than a court. There being no constitutional violation, the District Court had no authority to consider whether double celling in light of these considerations was the best response to the increase in Ohio's statewide prison population.

III

This Court must proceed cautiously in making an Eighth Amendment judgment, because, unless we reverse it, "[a] decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment," and, thus, "[r]evisions cannot be made in the light of further experience." Gregg v. Georgia, 428 U.S. at 428 U. S. 176. In assessing claims that conditions of confinement are cruel and unusual, courts must bear in mind that their inquiries "spring from constitutional requirements and that judicial answers to them must reflect that fact, rather than a court's idea of how best to operate a detention facility." Bell v. Wolfish, 441 U.S. at 441 U. S. 539.

Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly ben described as "deplorable" and "sordid." Bell v. Wolfish, supra, at 441 U. S. 562. [Footnote 17] When conditions of confinement amount to cruel and unusual punishment, "federal courts will discharge their duty to protect constitutional rights." Procunier v. Martinez, 416 U. S. 396, 416 U. S. 405-406 (1974); see Cruz v. Beto, 405 U. S. 319, 405 U. S. 321 (1972) (per curiam). In discharging this oversight responsibility, however, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens.

In this case, the question before us is whether the conditions of confinement at SOCF are cruel and unusual. As we find that they are not, the judgment of the Court of Appeals is reversed.

It is so ordered.

(Issue Two: Eighth Amendment Case)

UNITED STATES SUPREME COURT

Trop v. Dulles, 356 U.S. 86 (1958)

JUSTICE WARREN delivered the opinion of the Court.

OPINION

The petitioner in this case, a native-born American, is declared to have lost his United States citizenship and become stateless by reason of his conviction by court-martial for wartime desertion. As in Perez v. Brownell, ante p. 356 U. S. 44, the issue before us is whether this forfeiture of citizenship comports with the Constitution.

The facts are not in dispute. In 1944, petitioner was a private in the United States Army, serving in French Morocco. On May 22, he escaped from a stockade at Casablanca, where he had been confined following a previous breach of discipline. The next day, petitioner and a companion were walking along a road towards Rabat, in the general direction back to Casablanca, when an Army truck approached and stopped. A witness testified that petitioner boarded the truck willingly, and that no words were spoken. In Rabat, petitioner was turned over to military police. Thus, ended petitioner's "desertion." He had been gone less than a day, and had willingly surrendered to an officer on an Army vehicle while he was walking back towards his base. He testified that, at the time he and his companion were picked up by the Army truck, "we had decided to return to the stockade. The going was tough. We had no money to speak of, and at the time, we were on foot and we were getting cold and hungry."

A general court-martial convicted petitioner of desertion and sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge.

In 1952, petitioner applied for a passport. His application was denied on the ground that, under the provisions of Section 401(g) of the Nationality Act of 1940, as amended, [Footnote 1] he had lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion. In 1955, petitioner commenced this action in the District Court, seeking a declaratory judgment that he is a citizen. The Government's motion for summary judgment was granted, and the Court of Appeals for the Second Circuit affirmed, Chief Judge Clark dissenting. 239 F.2d 527. We granted certiorari. 352 U.S. 1023.

Section 401(g), the statute that decrees the forfeiture of this petitioner's citizenship, is based directly on a Civil War statute, which provided that a deserter would lose his "rights of citizenship." The meaning of this phrase was not clear. When the 1940 codification and revision of the nationality laws was prepared, the Civil War statute was amended to make it certain that what a convicted deserter would lose was nationality itself.

In 1944, the statute was further amended to provide that a convicted deserter would lose his citizenship only if he was dismissed from the service or dishonorably discharged. At the same time, it was provided that citizenship could be regained if the deserter was restored to active duty in wartime with the permission of the military authorities.

Though these amendments were added to ameliorate the harshness of the statute, their combined effect produces a result that poses far graver problems than the ones that were sought to be solved. Section 401(g), as amended, now gives the military authorities complete discretion to decide who among convicted deserters shall continue to be Americans and who shall be stateless. By deciding whether to issue and execute a dishonorable discharge and whether to allow a deserter to reenter the armed forces, the military becomes the arbiter of citizenship. And the domain given to it by Congress is not as narrow as might be supposed. Though the crime of desertion is one of the most serious in military law, it is by no no means a rare event for a soldier to be convicted of this crime. The elements of desertion are simply absence from duty plus the intention not to return.

Into this category falls a great range of conduct, which may be prompted by a variety of motives -- fear, laziness, hysteria or any emotional imbalance. The offense may occur not only in combat, but also in training camps for draftees in this country. The Solicitor General informed the Court that, during World War II, according to Army estimates, approximately 21,000 soldiers and airmen were

convicted of desertion and given dishonorable discharges by the sentencing courts-martial, and that about 7,000 of these were actually separated from the service, and thus rendered stateless when the reviewing authorities refused to remit their dishonorable discharges. Over this group of men, enlarged by whatever the corresponding figures may be for the Navy and Marines, the military has been given the power to grant or withhold citizenship. And the number of youths subject to this power could easily be enlarged simply by expanding the statute to cover crimes other than desertion. For instance, a dishonorable discharge itself might in the future be declared to be sufficient to justify forfeiture of citizenship.

Three times in the past three years, we have been confronted with cases presenting important questions bearing on the proper relationship between civilian and military authority in this country. [Footnote 9] A statute such as Section 401(g) raises serious issues in this area, but, in our view of this case, it is unnecessary to deal with those problems. We conclude that the judgment in this case must be reversed for the following reasons.

I

In Perez v. Brownell, supra, I expressed the principles that I believe govern the constitutional status of United States citizenship. It is my conviction that citizenship is not subject to the general powers of the National Government, and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship.

Under these principles, this petitioner has not lost his citizenship. Desertion in wartime, though it may merit the ultimate penalty, does not necessarily signify allegiance to a foreign state. Section 401(g) is not limited to cases of desertion to the enemy, and there is no such element in this case. This soldier committed a crime for which he should be and was punished, but he did not involve himself in any way with a foreign state. There was no dilution of his allegiance to this country. The fact that the desertion occurred on foreign soil is of no consequence. The Solicitor General acknowledged that forfeiture of citizenship would have occurred if the entire incident had transpired in this country.

Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and wellbeing of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war, the citizen's duties include not only the military defense of the Nation, but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone, the judgment in this case should be reversed.

II

…

Section 401(g) is a penal law, and we must face the question whether the Constitution permits the Congress to take away citizenship as a punishment for crime. If it is assumed that the power of Congress extends to divestment of citizenship, the problem still remains as to this statute whether denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment. Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment -- and they are forceful -- the death penalty has been employed

throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that 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.

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. Weems v. United States, 217 U. S. 349. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

We believe, as did Chief Judge Clark in the court below, that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is, instead, the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights and, presumably, as long as he remained in this country, he would enjoy the limited rights of an alien, no country need do so, because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. [Footnote 35] It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. [Footnote 37] Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country, the Eighth Amendment forbids this to be done.

In concluding, as we do, that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that, in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours. This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes, but neither can they sanction as being merely unwise that which the Constitution forbids.

We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established, it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case.

The judgment of the Court of Appeals for the Second Circuit is reversed, and the cause is remanded to the District Court for appropriate proceedings.

Reversed aid remanded.

(Issue Two: Eighth Amendment Case)

UNITED STATES SUPREME COURT

Hutto v. Finney, 437 U.S. 678 (1978)

JUSTICE STEVENS delivered the opinion of the Court.

OPINION

After finding that conditions in the Arkansas penal system constituted cruel and unusual punishment, the District Court entered a series of detailed remedial orders. On appeal to the United States Court of Appeals for the Eighth Circuit, petitioners [Footnote 1] challenged two aspects of that relief: (1) an order placing a maximum limit of 30 days on confinement in punitive isolation; and (2) an award of attorney's fees to be paid out of Department of Correction funds. The Court of Appeals affirmed and assessed an additional attorney's fee to cover services on appeal. 548 F.2d 740 (1977). We granted certiorari, 434 U.S. 901, and now affirm.

This litigation began in 1969; it is a sequel to two earlier cases holding that conditions in the Arkansas prison system violated the Eighth and Fourteenth Amendments. Only a brief summary of the facts is necessary to explain the basis for the remedial orders.

The routine conditions that the ordinary Arkansas convict had to endure were characterized by the District Court as "a dark and evil world completely alien to the free world." Holt v. Sarver, 309 F. Supp. 362, 381 (ED Ark.1970) (Holt II). That characterization was amply supported by the evidence.

The punishments for misconduct not serious enough to result in punitive isolation were cruel, unusual, and unpredictable. It is the discipline known as "punitive isolation" that is most relevant for present purposes.

Confinement in punitive isolation was for an indeterminate period of time. An average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8' x 10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell. Holt v. Sarver, 300 F Supp. 825, 831-832 (ED Ark.1969) (Holt I). At night, the prisoners were given mattresses to spread on the floor. Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening. Id. at 832. Prisoners in isolation received fewer than 1,000 calories a day; their meals consisted primarily of 4-inch squares of "grue," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan. Ibid.

After finding the conditions of confinement unconstitutional, the District Court did not immediately impose a detailed remedy of its own. Instead, it directed the Department of Correction to "make a substantial start" on improving conditions and to file reports on its progress. Holt I, supra, at 833-834. When the Department's progress proved unsatisfactory, a second hearing was held. The District Court found some improvements, but concluded that prison conditions remained unconstitutional. Holt II, 309 F. Supp. at 383. Again the court offered prison administrators an opportunity to devise a plan of their own for remedying the constitutional violations, but this time the court issued guidelines, identifying four areas of change that would cure the worst evils: improving conditions in the isolation cells, increasing inmate safety, eliminating the barracks sleeping arrangements, and putting an end to the trusty system. Id. at 385. The Department was ordered to move as rapidly as funds became available. Ibid.

After this order was affirmed on appeal, Holt v. Sarver, 442 F.2d 304 (CA8 1971), more hearings were held in 1972 and 1973 to review the Department's progress. Finding substantial improvements, the District Court concluded that continuing supervision was no longer necessary. The court held, however, that its prior decrees would remain in effect, and noted that sanctions, as well as an award of costs and attorney's fees, would be imposed if violations occurred. Holt v. Hutto, 363 F. Supp. 194, 217 (ED Ark. 1973) (Holt III).

The Court of Appeals reversed the District Court's decision to withdraw its supervisory jurisdiction, Finney v. Arkansas Board of Correction, 505 F.2d 194 (CA8 1974), and the District Court held a fourth set of hearings. 410 F. Supp. 251 (ED Ark.1976). It found that, in some respects, conditions had seriously deteriorated since 1973, when the court had

withdrawn its supervisory jurisdiction. Cummins Farm, which the court had condemned as overcrowded in 1970 because it housed 1,000 inmates, now had a population of about 1,500. Id. at 254-255. The situation in the punitive isolation cells was particularly disturbing. The court concluded that either it had misjudged conditions in these cells in 1973 or conditions had become much worse since then. Id. at 275. There were twice as many prisoners as beds in some cells. And because inmates in punitive isolation are often violently antisocial, overcrowding led to persecution of the weaker prisoners. The "grue" diet was still in use, and practically all inmates were losing weight on it. The cells had been vandalized to a "very substantial" extent. Id. at 276. Because of their inadequate numbers, guards assigned to the punitive isolation cells frequently resorted to physical violence, using nightsticks and Mace in their efforts to maintain order. Prisoners were sometimes left in isolation for months, their release depending on "their attitudes as appraised by prison personnel." Id. at 275.

The court concluded that the constitutional violations identified earlier had not been cured. It entered an order that placed limits on the number of men that could be confined in one cell, required that each have a bunk, discontinued the "grue" diet, and set 30 days as the maximum isolation sentence. The District Court gave detailed consideration to the matter of fees and expenses, made an express finding that petitioners had acted in bad faith, and awarded counsel "a fee of $20,000.00 to be paid out of Department of Correction funds." Id. at 285. The Court of Appeals affirmed, and assessed an additional $2,500 to cover fees and expenses on appeal. 548 F.2d at 743.

I

The Eighth Amendment's ban on inflicting cruel and unusual punishments, made applicable to the States by the Fourteenth Amendment, "procribe[s] more than physically barbarous punishments." Estelle v. Gamble, 429 U. S. 97, 429 U. S. 102. It prohibits penalties that are grossly disproportionate to the offense, Weems v. United States, 217 U. S. 349, 217 U. S. 367, as well as those that transgress today's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'" Estelle v. Gamble, supra at 429 U. S. 102, quoting Jackson v. Bishop, 404 F.2d 571, 579 (CA8 1968). Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards. Petitioners do not challenge this proposition; nor do they disagree with the District Court's original conclusion that conditions in Arkansas' prisons, including its punitive isolation cells, constituted cruel and unusual punishment. Rather, petitioners single out that portion of the District Court's most recent order that forbids the Department to sentence inmates to more than 30 days in punitive isolation. Petitioners assume that the District Court held that indeterminate sentences to punitive isolation always constitute cruel and unusual punishment. This assumption misreads the District Court's holding.

Read in its entirety, the District Court's opinion makes it abundantly clear that the length of isolation sentences was not considered in a vacuum. In the court's words, punitive isolation "is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof." 410 F. Supp. at 275.8 It is perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual. If new conditions of confinement are not materially different from those affecting other prisoners, a transfer for the duration of a prisoner's sentence might be completely unobjectionable, and well within the authority of the prison administrator. Cf. Meachum v. Fanow, 427 U. S. 215. It is equally plain, however, that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of "grue" might be tolerable for a few days and intolerably cruel for weeks or months.

The question before the trial court was whether past constitutional violations had been remedied. The court was entitled to consider the severity of those violations in assessing the constitutionality of conditions in the isolation cells. The court took note of the inmates' diet, the continued overcrowding, the rampant violence, the vandalized cells, and the "lack of professionalism and good judgment on the part of maximum security personnel." 410 F. Supp. at 277 and 278. The length of time each inmate spent in isolation was simply one consideration among many. We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual

punishment.

In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation. The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions in the isolation cells. If petitioners had fully complied with the court's earlier orders, the present time limit might well have been unnecessary. But taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.

The order is supported by the interdependence of the conditions producing the violation. The vandalized cells and the atmosphere of violence were attributable, in part, to overcrowding and to deep-seated enmities growing out of months of constant daily friction. [Footnote 10] The 30-day limit will help to correct these conditions. [Footnote 11] Moreover, the limit presents little danger of interference with prison administration, for the Commissioner of Correction himself stated that prisoners should not ordinarily be held in punitive isolation for more than 14 days. Id. at 278. Finally, the exercise of discretion in this case is entitled to special deference because of the trial judge's years of experience with the problem at hand and his recognition of the limits on a federal court's authority in a case of this kind. Like the Court of Appeals, we find no error in the inclusion of a 30-day limitation on sentences to punitive isolation as a part of the District Court's comprehensive remedy.

…

MR. JUSTICE REHNQUIST, dissenting.

The Court's affirmance of a District Court's injunction against a prison practice which has not been shown to violate the Constitution can only be considered an aberration in light of decisions as recently as last Term carefully defining the remedial discretion of the federal courts. Dayton Board of Education v. Brinkman, 433 U. S. 406 (1977); Milliken v. Bradley, 433 U. S. 267 (1977) (Milliken II). … Accordingly, I dissent.

I

No person of ordinary feeling could fail to be moved by the Court's recitation of the conditions formerly prevailing in the Arkansas prison system. Yet I fear that the Court has allowed itself to be moved beyond the well established bounds limiting the exercise of remedial authority by the federal district courts. The purpose and extent of that discretion in another context were carefully defined by the Court's opinion last Term in Milliken II, supra at 437 U. S. 280-281:

"In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. [1,] 402 U. S. 16 [(1971)]. The remedy must therefore be related to 'the condition alleged to offend the Constitution. . . .' Milliken \[v. Bradley\], 418 U.S. [717,] 418 U. S. 738 [(1974)]. Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' Id. at 418 U. S. 746. Third, the federal courts, in devising a remedy, must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."

The District Court's order limiting the maximum period of punitive isolation to 30 days in no way relates to any condition found offensive to the Constitution. It is, when stripped of descriptive verbiage, a prophylactic rule, doubtless well designed to assure a more humane prison system in Arkansas, but not complying with the limitations set forth in Milliken II, supra. Petitioners do not dispute the District Court's conclusion that the overcrowded conditions and the inadequate diet provided for those prisoners in punitive isolation offended the Constitution, but the District Court has ordered a cessation of those practices. The District Court found that the confinement of two prisoners in a single cell on a restricted diet for 30 days did not violate the Eighth Amendment. 410 F. Supp. 251, 278 (ED Ark.1976). While the Court today remarks that "the length of confinement cannot be ignored," ante at 437 U. S. 686, it does not find that confinement under the conditions described by the District Court becomes unconstitutional on the 31st day. It must seek other justifications for its affirmance of that portion of the District Court's order.

Certainly the provision is not remedial in the sense that it "restore[s] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Milliken v. Bradley, 418 U. S. 717, 418 U. S. 746 (1974) (Milliken I). The sole effect of the provision is to grant future offenders against prison discipline greater benefits than the Constitution requires; it does nothing to remedy the plight of past victims of conditions which may well have been unconstitutional. A prison is unlike a school system, in which students in the later grades may receive special instruction to compensate for discrimination to which they were subjected in the earlier grades. Milliken II, supra at 433 U. S. 281-283. Nor has it been shown that petitioners' conduct had any collateral effect upon private actions for which the District Court may seek to compensate so as to eliminate the continuing effect of past unconstitutional conduct. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 402 U. S. 28 (1971). Even where such remedial relief is justified, a district court may go no further than is necessary to eliminate the consequences of official unconstitutional conduct. Dayton, supra at 433 U. S. 419-420; Pasadena Board of Education v. Spangler, 427 U. S. 424, 427 U. S. 435-437 (1976); Swann, supra at 402 U. S. 31-32.

The Court's only asserted justification for its affirmance of the decree, despite its dissimilarity to remedial decrees in other contexts, is that it is "a mechanical -- and therefore an easily enforced -- method of minimizing overcrowding." Ante at 437 U. S. 688 n. 11. This conclusion fails adequately to take into account the third consideration cited in Milliken II: "the interests of state and local authorities in managing their own affairs, consistent with the Constitution." 433 U.S. at 433 U. S. 281. The prohibition against extended punitive isolation, a practice which has not been shown to be inconsistent with the Constitution, can only be defended because of the difficulty of policing the District Court's explicit injunction against the overcrowding and inadequate diet which have been found to be violative of the Constitution. But even if such an expansion of remedial authority could be justified in a case where the defendants had been repeatedly contumacious, this is not such a case. The District Court's dissatisfaction with petitioners' performance under its earlier direction to "make a substantial start," Holt v. Sarver, 300 F. Supp. 825, 833 (ED Ark.1969), on alleviating unconstitutional conditions cannot support an inference that petitioners are prepared to defy the specific orders now laid down by the District Court and not challenged by the petitioners. A proper respect for "the interests of state and local authorities in managing their own

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affairs," Milliken II, 433 U.S. at 433 U. S. 281, requires the opposite conclusion. [Footnote 4/2]

The District Court's order enjoins a practice which has not been found inconsistent with the Constitution. The only ground for the injunction, therefore, is the prophylactic one of assuring that no unconstitutional conduct will occur in the future. In a unitary system of prison management, there would be much to be said for such a rule, but neither this Court nor any other federal court is entrusted with such a management role under the Constitution.

…

(Issue Two: Eighth Amendment Case)

UNITED STATES SUPREME COURT

Harmelin v. Michigan, 501 U.S. 957 (1991)

JUSTICE SCALIA delivered the opinion of the Court.

OPINION

Petitioner was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole. The Michigan Court of Appeals initially reversed his conviction because evidence supporting it had been obtained in violation of the Michigan Constitution. 176 Mich.App. 524, 440 N.W.2d 75 (1989). On petition for rehearing, the Court of Appeals vacated its prior decision and affirmed petitioner's sentence, rejecting his argument that the sentence was "cruel and unusual" within the meaning of the Eighth Amendment. Id. at 535, 440 N.W.2d at 80. The Michigan Supreme Court denied leave to appeal, 434 Mich. 863 (1990), and we granted certiorari. 495 U.S. 956 (1990).

Petitioner claims that his sentence is unconstitutionally "cruel and unusual" for two reasons: first, because it is "significantly disproportionate" to the crime he committed; second, because the sentencing judge was statutorily required to impose it, without taking into account the particularized circumstances of the crime and of the criminal.

The Eighth Amendment, which applies against the States by virtue of the Fourteenth Amendment, see Robinson v. California, 370 U. S. 660 (1962), provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In Rummel v. Estelle, 445 U. S. 263 (1980), we held that it did not constitute "cruel and unusual punishment" to impose a life sentence, under a recidivist statute, upon a defendant who had been convicted, successively, of fraudulent use of a credit card to obtain $80 worth of goods or services, passing a forged check in the amount of $28.36, and obtaining $120.75 by false pretenses. We said that "one could argue without fear of contradiction by any decision of this Court that, for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." Id. at 445 U. S. 274. We specifically rejected the proposition asserted by the dissent, id. at 445 U. S. 295 (opinion of Powell, J.), that unconstitutional disproportionality could be established by weighing three factors: (1) gravity of the offense compared to severity of the penalty, (2) penalties imposed within the same jurisdiction for similar crimes, and (3) penalties imposed in other jurisdictions for the same offense. Id. at 445 U. S. 281-282, and n. 27. A footnote in the opinion, however, said: "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, . . . if a legislature made overtime parking a felony punishable by life imprisonment." Id. at 445 U. S. 274, n. 11.

Two years later, in Hutto v. Davis, 454 U. S. 370 (1982), we similarly rejected an Eighth Amendment challenge to a prison term of 40 years and fine of $20,000 for possession and distribution of approximately nine ounces of marijuana. We thought that result so clear in light of Rummel that our per curiam opinion said the Fourth Circuit, in sustaining the constitutional challenge, "could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system," which could not be tolerated "unless we wish anarchy to prevail," 454 U.S. at 454 U. S. 374-375. And we again explicitly rejected application of the three factors discussed in the Rummel dissent. See 454 U.S. at 454 U. S. 373-374, and n. 2. However, whereas in Rummel we had said that successful proportionality challenges outside the context of capital punishment "have been exceedingly rare," 445 U.S. at 445 U. S. 272 (discussing as the solitary example Weems v. United States, 217 U. S. 349 (1910), which we explained as involving punishment of a "unique nature," 445 U.S. at 445 U. S. 274), in Davis we misdescribed Rummel as having said that "successful challenges . . .' should be `exceedingly rare,'" 454 U.S. at 454 U. S. 374 (emphasis added), and at that point inserted a reference to, and description of, the Rummel "overtime parking" footnote, 454 U.S. at 454 U. S. 374, n. 3. The content of that footnote was imperceptibly (but, in the event, ominously) expanded: Rummel's "not [saying] that a proportionality principle would not come into play" in the fanciful parking example, 445 U.S. at 445 U. S.

274, n. 11, became "not[ing] . . . that there could be situations in which the proportionality principle would come into play, such as" the fanciful parking example, Davis, supra at 454 U. S. 374, n. 3 (emphasis added). This combination of expanded text plus expanded footnote permitted the inference that gross disproportionality was an example of the "exceedingly rare" situations in which Eighth Amendment challenges "should be" successful. Indeed, one might say that it positively invited that inference, were that not incompatible with the sharp per curiam reversal of the Fourth Circuit's finding that 40 years for possession and distribution of nine ounces of marijuana was grossly disproportionate, and therefore unconstitutional.

A year and a half after Davis, we uttered what has been our last word on this subject to date. Solem v. Helm, 463 U. S. 277 (1983), set aside under the Eighth Amendment, because it was disproportionate, a sentence of life imprisonment without possibility of parole, imposed under a South Dakota recividist statute for successive offenses that included three convictions of third-degree burglary, one of obtaining money by false pretenses, one of grand larceny, one of third-offense driving while intoxicated, and one of writing a "no account" check with intent to defraud. In the Solem account, Weems no longer involved punishment of a "unique nature," Rummel, supra at 445 U. S. 274, but was the "leading case," Solem, 463 U.S. at 463 U. S. 287, exemplifying the "general principle of proportionality," id. at 463 U. S. 288, which was "deeply rooted and frequently repeated in common law jurisprudence," id. at 463 U. S. 284, had been embodied in the English Bill of Rights "in language that was later adopted in the Eighth Amendment," id. at 463 U. S. 285, and had been "recognized explicitly in this Court for almost a century," id. at 463 U. S. 286. The most recent of those "recognitions" were the "overtime parking" footnotes in Rummel and Davis, 463 U.S. at 463 U. S. 288. As for the statement in Rummel that "one could argue without fear of contradiction by any decision of this Court that, for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative," Rummel, supra at 445 U. S. 274: according to Solem, the really important words in that passage were "one could argue,'" 463 U.S. at 463 U. S. 288, n. 14 (emphasis added in Solem). "The Court [in Rummel] . . . merely recognized that the argument was possible. To the extent that the State . . makes this argument here, we find it meritless." Id. at 463 U. S. 289, n. 14. (Of course Rummel had not said merely "one could argue," but "one could argue without fear of contradiction by any decision of this Court." (Emphasis added.)) Having decreed that a general principle of disproportionality exists, the Court used as the criterion for its application the three-factor test that had been explicitly rejected in both Rummel and Davis. 463 U.S. at 463 U. S. 291-292. Those cases, the Court said, merely "indicated [that] no one factor will be dispositive in a given case," id. at 463 U. S. 291, n. 17 -- though Davis had expressly, approvingly, and quite correctly described Rummel as having "disapproved each of [the] objective factors," 454 U.S. at 454 U. S. 373 (emphasis added). See Rummel, 445 U.S. at 445 U. S. 281-282, and n. 27.

It should be apparent from the above discussion that our 5-to-4 decision eight years ago in Solem was scarcely the expression of clear and well accepted constitutional law. We have long recognized, of course, that the doctrine of stare decisis is less rigid in its application to constitutional precedents, see Payne v. Tennessee, ante at 501 U. S. 828; Smith v. Allwright, 321 U. S. 649, 321 U. S. 665, and n. 10 (1944); Mitchell v. W. T. Grant Co., 416 U. S. 600, 416 U. S. 627-628 (1974) (Powell, J., concurring); Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 285 U. S. 406-408 (1932) (Brandeis, J., dissenting), and we think that to be especially true of a constitutional precedent that is both recent and in apparent tension with other decisions. Accordingly, we have addressed anew, and in greater detail, the question whether the Eighth Amendment contains a proportionality guarantee -- with particular attention to the background of the Eighth Amendment (which Solem discussed in only two pages, see 463 U.S. at 463 U. S. 284-286) and to the understanding of the Eighth Amendment before the end of the 19th century (which Solem discussed not at all). We conclude from this examination that Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee.

…

C

Unless one accepts the notion of a blind incorporation, however, the ultimate question is not what "cruell and unusuall punishments" meant in the Declaration of Rights, but what its meaning was to the

Americans who adopted the Eighth Amendment. Even if one assumes that the Founders knew the precise meaning of that English antecedent, but see Granucci, supra at 860-865, a direct transplant of the English meaning to the soil of American constitutionalism would, in any case, have been impossible. There were no common law punishments in the federal system, See United States v. Hudson, 7 Cranch 32 (1812), so that the provision must have been meant as a check not upon judges, but upon the Legislature. See, e.g., In re Kemmler, 136 U. S. 436, 136 U. S. 446-447 (1890).

Wrenched out of its common law context, and applied to the actions of a legislature, the word "unusual" could hardly mean "contrary to law." But it continued to mean (as it continues to mean today) "such as [does not] occu[r] in ordinary practice," Webster's American Dictionary (1828), "[s]uch as is [not] in common use," Webster's Second International Dictionary 2807 (1954). According to its terms, then, by forbidding "cruel and unusual punishments," see Stanford v. Kentucky, 492 U. S. 361, 492 U. S. 378 (1989) (plurality opinion); In re Kemmler, supra at 136 U. S. 446-447, the Clause disables the Legislature from authorizing particular forms or "modes" of punishment -- specifically, cruel methods of punishment that are not regularly or customarily employed. E.g., Louisiana ex rel. Francis v. Resweber, 329 U. S. 459, 329 U. S. 464 (1947) (plurality opinion); In re Kemmler, supra at 136 U. S. 446-447. See also United States v. Collins, 25 F.Cas. (No. 14,836) 545 (CC R.I. 1854) (Curtis, J.).

The language bears the construction, however -- and here we come to the point crucial to resolution of the present case -- that "cruelty and unusualness" are to be determined not solely with reference to the punishment at issue ("Is life imprisonment a cruel and unusual punishment?"), but with reference to the crime for which it is imposed, as well ("Is life imprisonment cruel and unusual punishment for possession of unlawful drugs?"). The latter interpretation would make the provision a form of proportionality guarantee. The arguments against it, however, seem to us conclusive.

First of all, to use the phrase "cruel and unusual punishment" to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly. The notion of "proportionality" was not a novelty (though then, as now, there was little agreement over what it entailed). In 1778, for example, the Virginia Legislature narrowly rejected a comprehensive "Bill for Proportioning Punishments" introduced by Thomas Jefferson. See 4 W. Blackstone, Commentaries 18 (H. Tucker ed. 1803) (discussing efforts at reform); 1 Writings of Thomas Jefferson 218-239 (A. Lipscomb ed.1903). Proportionality provisions had been included in several state constitutions. See, e.g., Pa.Const., § 38 (1776) (punishments should be, "in general, more proportionate to the crimes"); S.C.Const., Art. XL (1778) (same); N.H.Bill of Rights, Art. XVIII (1784) ("[A]ll penalties ought to be proportioned to the nature of the offence"). There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions, yet chose not to replicate them. Both the New Hampshire Constitution, adopted 8 years before ratification of the Eighth Amendment, and the Ohio Constitution, adopted 12 years after, contain, in separate provisions, a prohibition of "cruel and unusual punishments" ("cruel or unusual," in New Hampshire's case) and a requirement that “all penalties ought to be proportioned to the nature of the offence." N.H. Bill of Rights, Arts. XVIII, XXXIII (1784). Ohio Const., Art. VIII, §§ 13, 14 (1802).

Secondly, it would seem quite peculiar to refer to cruelty and unusualness for the offense in question, in a provision having application only to a new government that had never before defined offenses, and that would be defining new and peculiarly national ones. Finally, and most conclusively, as we proceed to discuss, the fact that what was "cruel and unusual" under the Eighth Amendment was to be determined without reference to the particular offense is confirmed by all available evidence of contemporary understanding.

The Eighth Amendment received little attention during the proposal and adoption of the Federal Bill of Rights. However, what evidence exists from debates at the state ratifying conventions that prompted the Bill of Rights, as well as the floor debates in the First Congress which proposed it, "confirm[s] the view that the cruel and unusual punishments clause was directed at prohibiting certain methods of punishment." Granucci, 57 Calif.L.Rev. at 842 (emphasis added). See Schwartz, Eighth Amendment Proportionality Analysis and the

Compelling Case of William Rummel, 71 J.Crim.L. & Criminology 378, 378-382 (1980); Welling & Hipfner, Cruel and Unusual?: Capital Punishment in Canada, 26 U.Toronto L.J. 55, 61 (1976).

In the January, 1788, Massachusetts Convention, for example, the objection was raised that Congress was "nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on [it], but that racks and gibbets may be amongst the most mild instruments of [its] discipline." 2 J. Elliot, Debates on the Federal Constitution 111 (2d ed. 1854) (emphasis added).

In the Virginia Convention, Patrick Henry decried the absence of a bill of rights, stating: "What says our [Virginia] Bill of Rights? -- 'that excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' . . ."

"In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? -- That they would not admit of tortures, or cruel and barbarous punishment." 3 id. at 447.

The actions of the First Congress, which are, of course, persuasive evidence of what the Constitution means, Marsh v. Chambers, 463 U. S. 783, 463 U. S. 788-790 (1983); Carroll v. United States, 267 U. S. 132, 267 U. S. 150-152 (1925); cf. 17 U. S. Maryland, 4 Wheat. 316, 17 U. S. 401-402 (1819), belie any doctrine of proportionality. Shortly after this Congress proposed the Bill of Rights, it promulgated the Nation's first Penal Code. See 1 Stat. 112-119 (1790). As the then-extant New Hampshire Constitution's proportionality provision didactically observed, "[n]o wise legislature" -- that is, no legislature attuned to the principle of proportionality -- "will afix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason," N.H. Const., Pt. I, Art. XVIII (1784). Jefferson's Bill For Proportioning Crimes and Punishments punished murder and treason by death; counterfeiting of public securities by forfeiture of property plus six years at hard labor, and "run[ning] away with any sea-vessel or goods laden on board thereof" by treble damages to the victim and five years at hard labor. See 1 Writings of Thomas Jefferson at 220-222, 229-231 (footnote omitted). Shortly after proposing the Bill of Rights, the First Congress ignored these teachings. It punished forgery of United States securities, "run[ning] away with [a] ship or vessel, or any goods or merchandise to the value of fifty dollars," treason, and murder on the high seas with the same penalty: death by hanging. 1 Stat. 114. The law books of the time are devoid of indication that anyone considered these newly enacted penalties unconstitutional by virtue of their disproportionality. Cf. United States v. Tully, 28 F.Cas. (No. 16,545) 226 (CC Mass. 1812) (Story and Davis, JJ.) (Force or threat thereof not an element of "run[n]ing away with [a] ship or vessel").

The early commentary on the Clause contains no reference to disproportionate or excessive sentences, and again indicates that it was designed to outlaw particular modes of punishment. One commentator wrote:

"The prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion."

J. Bayard, A Brief Exposition of the Constitution of the United States 154 (2d ed. 1840). Another commentator, after explaining (in somewhat convoluted fashion) that the "spirit" of the Excessive Bail and Excessive Fines Clauses forbade excessive imprisonments, went on to add:

"Under the [Eighth] amendment, the infliction of cruel and unusual punishments is also prohibited. The various barbarous and cruel punishments inflicted under the laws of some other countries, and which profess not to be behind the most enlightened nations on earth in civilization and refinement, furnish sufficient reasons for this express prohibition. Breaking on the wheel, flaying alive, rending assunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death, are wholly alien to the spirit of our humane general constitution." B. Oliver, The Rights of An American Citizen 186 (1832).

Chancellor Kent; in a paragraph of his Commentaries arguing that capital punishment "ought to be confined

to the few cases of the most atrocious character," does not suggest that the "Cruel and Unusual Punishments" Clauses of State or Federal Constitutions require such proportionality -- even though the very paragraph in question begins with the statement that "cruel and unusual punishments are universally condemned." 2 J. Kent, Commentaries on American Law 10-11 (1827). And Justice Story had this to say:

"The provision [the Eighth Amendment] would seem wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct. It was, however, adopted as an admonition to all departments of the national government to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts."

3 J. Story, Commentaries on the Constitution of the United States § 1896 (1833). Many other Americans apparently agreed that the Clause only outlawed certain modes of punishment: during the 19th century, several States ratified constitutions that prohibited "cruel and unusual," "cruel or unusual," or simply "cruel" punishments and required all punishments to be proportioned to the offense. Ohio Const., Art. VIII, §§ 13, 14 (1802); Ind.Const., Art. I, §§ 15-16 (1816); Me.Const., Art. I, § 9 (1819); R.I.Const., Art. I, § 8 (1842); W.Va.Const., Art. II, § 2 (1861-1863); Ga.Const., Art. I, §§ 16, 21 (1868).

Perhaps the most persuasive evidence of what "cruel and unusual" meant, however, is found in early judicial constructions of the Eighth Amendment and its state counterparts. An early (perhaps the earliest) judicial construction of the federal provision is illustrative. In Barker v. People, 20 Johns. *457 (N.Y.Sup.Ct. 1823), aff'd, 3 Cow. 686 (N.Y. 1824), the defendant, upon conviction of challenging another to a duel, had been disenfranchised. Chief Justice Spencer assumed that the Eighth Amendment applied to the States, and, in finding that it had not been violated, considered the proportionality of the punishment irrelevant. "The disenfranchisement of a citizen," he said, "is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences." Barker v People, supra at *459.

Throughout the 19th century, state courts interpreting state constitutional provisions with identical or more expansive wording (i.e., "cruel or unusual") concluded that these provisions did not proscribe disproportionality, but only certain modes of punishment. For example, in Aldridge v. Commonwealth, 4 Va. 447 (1824), the General Court of Virginia had occasion to interpret the cruel and unusual punishments clause that was the direct ancestor of our federal provision, see supra at 501 U. S. 966. In rejecting the defendant's claim that a sentence of so many as 39 stripes violated the Virginia Constitution, the court said:

"As to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case. That provision was never designed to control the Legislative right to determine ad libitum upon the adequacy of punishment, but is merely applicable to the modes of punishment [T]he best heads and hearts of the land of our ancestors had long and loudly declaimed against the wanton cruelty of many of the punishments practised in other countries, and this section in the Bill of Rights was framed effectually to exclude these, so that no future Legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment."

4 Va. at 449-450 (emphasis in original). Accord, Commonwealth v. Hitchings, 71 Mass. 482, 486 (1855); Garcia v. Territory, 1 N.M. 415, 417-419 (1869);

Whitten v. Georgia, 47 Ga. 297, 301 (1872); Cummins v. People, 42 Mich. 142, 143-144, 3 N.W. 305 (1879); State v. Williams, 77 Mo. 310, 312-313 (1883); State v. White, 44 Kan. 514, 520-521, 25 P. 33, 34-35 (1890); People v. Morris, 80 Mich. 634, 638, 45 N.W. 591, 592 (1890); Hobbs v. State, 133 Ind. 404, 408-410, 32 N.E. 1019, 1020-1021 (1893); State v. Hogan, 63 Ohio St. 202, 218, 58 N.E. 572, 575 (1900); see also In re Bayard, 25 Hun. 546, 549-550 (1881). In the 19th century, judicial agreement that a "cruel and unusual" (or "cruel or unusual") provision did not constitute a proportionality requirement appears to have been universal. One case, late in the century, suggested in dictum, not a full-fledged proportionality principle, but at least the power of the courts to intervene

"in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people."

State v. Becker, 3 S.D. 29, 41, 51 N.W. 1018, 1022 (1892). That case, however, involved a constitutional provision proscribing all punishments that were merely "cruel," S.D.Const., Art. VI, § 23 (1889). A few decisions early in the present century cited it (again in dictum) for the proposition that a sentence "so out of proportion to the offense . . . as to shock public sentiment and violate the judgment of reasonable people"' would be "cruel and unusual." Jackson v. United States, 102 F. 473, 488 (CA9 1900); Territory v. Ketchum, 10 N.M. 718, 723, 65 P. 169, 171 (1901).

II

We think it enough that those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained. It is worth noting, however, that there was good reason for that choice -- a reason that reinforces the necessity of overruling Solem. While there are relatively clear historical guidelines and accepted practices that enable judges to determine which modes of punishment are "cruel and unusual," proportionality does not lend itself to such analysis. Neither Congress nor any state legislature has ever set out with the objective of crafting a penalty that is "disproportionate"; yet, as some of the examples mentioned above indicate, many enacted dispositions seem to be so -- because they were made for other times or other places, with different social attitudes, different criminal epidemics, different public fears, and different prevailing theories of penology. This is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept. But, for the same reason, these examples are easy to decide, they are certain never to occur. [Footnote 11] The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that some assemblage of men and women has considered proportionate -- and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.

This becomes clear, we think, from a consideration of the three factors that Solem found relevant to the proportionality determination: (1) the inherent gravity of the offense, (2) the sentences imposed for similarly grave offenses in the same jurisdiction, and (3) sentences imposed for the same crime in other jurisdictions. 463 U.S. at 463 U. S. 290-291. As to the first factor: of course, some offenses, involving violent harm to human beings, will always and everywhere be regarded as serious, but that is only half the equation. The issue is what else should be regarded to be as serious as these offenses, or even to be more serious than some of them. On that point, judging by the statutes that Americans have enacted, there is enormous variation -- even within a given age, not to mention across the many generations ruled by the Bill of Rights. The State of Massachusetts punishes sodomy more severely than assault and battery, compare Mass.Gen.Laws § 272:34 (1988) ("not more than twenty years" in prison for sodomy) with § 265:13A ("not more than two and one-half years" in prison for assault and battery); whereas, in several States, sodomy is not unlawful at all. In Louisiana, one who assaults another with a dangerous weapon faces the same maximum prison term as one who removes a shopping basket "from the parking area or grounds of any store . . . without authorization." La.Rev.Stat.Ann. §§ 14:37, 14:68.1 (West 1986). A battery that results in "protracted and obvious disfigurement" merits imprisonment "for not more than five years," § 14:34.1, one-half the maximum penalty for theft of livestock or an oilfield seismograph, §§ 14:67.1, 14:67.8. We may think that the First Congress punished with clear disproportionality when it provided up to seven years in prison and up to $1,000 in fine for "cut[ting] off the ear or ears, . . . cut[ting] out or disabl[ing] the tongue, . . . put[ting] out an eye, . . . cut[ting] off . . . any limb or member of any person with intention . . . to maim or disfigure," but provided the death penalty for "run[ning] away with [a] ship or vessel, or any goods or merchandise to the value of fifty dollars." Act of Apr. 30, 1790, ch. 9, §§ 8, 13, 1 Stat. 113-115. But then perhaps the citizens of 1791 would think that today's Congress punishes with clear disproportionality when it sanctions "assault by . . . wounding" with up to six months in prison, 18 U.S.C. § 113(d), unauthorized reproduction of the "Smokey Bear" character or name with the same penalty, 18 U.S.C. § 711, offering to barter a migratory bird with up to two years in prison, 16 U.S.C. § 707(b), and purloining a "key suited to any lock adopted by the

Post Office Department" with a prison term of up to 10 years, 18 U.S.C. § 1704. Perhaps both we and they would be right, but the point is that there are no textual or historical standards for saying so.

The difficulty of assessing gravity is demonstrated in the very context of the present case: Petitioner acknowledges that a mandatory life sentence might not be "grossly excessive" for possession of cocaine with intent to distribute, see Hutto v. Davis, 454 U. S. 370 (1982). But surely whether it is a "grave" offense merely to possess a significant quantity of drugs -- thereby facilitating distribution, subjecting the holder to the temptation of distribution, and raising the possibility of theft by others who might distribute -- depends entirely upon how odious and socially threatening one believes drug use to be. Would it be "grossly excessive" to provide life imprisonment for "mere possession" of a certain quantity of heavy weaponry? If not, then the only issue is whether the possible dissemination of drugs can be as "grave" as the possible dissemination of heavy weapons. Who are we to say no? The members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.

The second factor suggested in Solem fails for the same reason. One cannot compare the sentences imposed by the jurisdiction for "similarly grave" offenses if there is no objective standard of gravity. Judges will be comparing what they consider comparable. Or, to put the same point differently: when it happens that two offenses judicially determined to be "similarly grave" receive significantly dissimilar penalties, what follows is not that the harsher penalty is unconstitutional, but merely that the legislature does not share the judges' view that the offenses are similarly grave. Moreover, even if "similarly grave" crimes could be identified, the penalties for them would not necessarily be comparable, since there are many other justifications for a difference. For example, since deterrent effect depends not only upon the amount of the penalty, but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties. Grave crimes of the sort that will not be deterred by penalty may warrant substantially lower penalties, as may grave crimes of the sort that are normally committed once in a lifetime by otherwise law-abiding citizens who will not profit from rehabilitation. Whether these differences will occur, and to what extent, depends, of course, upon the weight the society accords to deterrence and rehabilitation, rather than retribution, as the objective of criminal punishment (which is an eminently legislative judgment). In fact, it becomes difficult even to speak intelligently of "proportionality" once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law. Cf. Bill For Proportioning Punishments, 1 Writings of Thomas Jefferson at 218, 228-229 ("[W]hoever . . . shall maim another, or shall disfigure him . . . shall be maimed or disfigured in like sort").

As for the third factor mentioned by Solem -- the character of the sentences imposed by other States for the same crime -- it must be acknowledged that that can be applied with clarity and ease. The only difficulty is that it has no conceivable relevance to the Eighth Amendment. That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows a fortiori from the undoubted fact that a State may criminalize an act that other States do not criminalize at all. Indeed, a State may criminalize an act that other States choose to reward -- punishing, for example, the killing of endangered wild animals for which other States are offering a bounty. What greater disproportion could there be than that?

"Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."

Rummel, 445 U.S. at 445 U. S. 282. Diversity not only in policy, but in the means of implementing policy, is the very raison d'etre of our federal system. Though the different needs and concerns of other States may induce them to treat simple possession of 672 grams of cocaine as a relatively minor offense, see Wyo.Stat. § 35-7-1031(c) (1988) (6 months); W.Va.Code § 60A-4-401(c) (1989) (6 months), nothing in the Constitution requires Michigan to follow suit. The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.

III

Our 20th-century jurisprudence has not remained entirely in accord with the proposition that there is no proportionality requirement in the Eighth Amendment, but neither has it departed to the extent that Solem suggests. In Weems v. United States, 217 U. S. 349 (1910), a government disbursing officer convicted of making false entries of small sums in his account book was sentenced by Philippine courts to 15 years of cadena temporal. That punishment, based upon the Spanish Penal Code, called for incarceration at "hard and painful labor"' with chains fastened to the wrists and ankles at all times. Several "accessor[ies]" were superadded, including permanent disqualification from holding any position of public trust, subjection to "[government] surveillance" for life, and "civil interdiction," which consisted of deprivation of "`the rights of parental authority, guardianship of person or property, participation in the family council[, etc.]"' Weems, supra at 217 U. S. 364.

Justice McKenna, writing for himself and three others, held that the imposition of cadena temporal was "Cruel and Unusual Punishment." (Justice White, joined by Justice Holmes, dissented.) That holding, and some of the reasoning upon which it was based, was not at all out of accord with the traditional understanding of the provision we have described above. The punishment was both (1) severe and (2) unknown to Anglo-American tradition. As to the former, Justice McKenna wrote:

"No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain."

217 U.S. at 217 U. S. 366-367.

As to the latter: "It has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genius from ours. It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character."

Id. at 217 U. S. 377. Other portions of the opinion, however, suggest that mere disproportionality, by itself, might make a punishment cruel and unusual:

"Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."

Id. at 217 U. S. 366-367.

"[T]he inhibition [of the Cruel and Unusual Punishments Clause] was directed not only against punishments which inflict torture, 'but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged.'" Id. at 217 U. S. 371, quoting O'Neil v. Vermont, 144 U. S. 323, 144 U. S. 339-340 (1892) (Field, J., dissenting).

Since it contains language that will support either theory, our later opinions have used Weems, as the occasion required, to represent either the principle that

"the Eighth Amendment bars not only those punishments that are 'barbaric,' but also those that are 'excessive' in relation to the crime committed,"

Coker v. Georgia, 433 U. S. 584, 433 U. S. 592 (1977), or the principle that only a "unique . . . punishmen[t]," a form of imprisonment different from the "more traditional forms . . . imposed under the Anglo-Saxon system," can violate the Eighth Amendment, Rummel, supra at 445 U. S. 274-275. If the proof of the pudding is in the eating, however, it is hard to view Weems as announcing a constitutional requirement of proportionality, given that it did not produce a decision implementing such a requirement, either here or in the lower federal courts, for six decades. In Graham v. West Virginia, 224 U. S. 616 (1912), for instance, we evaluated (and rejected) a claim that life imprisonment for a third offense of horse theft was "cruel and unusual." We made no mention of Weems, although the petitioner had relied upon that case. [Footnote 12] See also Badders v. United States, 240 U. S. 391 (1916).

Opinions in the Federal Courts of Appeals were equally devoid of evidence that this Court had announced a general proportionality principle. Some evaluated "cruel and unusual punishment" claims without reference to Weems. See, e.g., Bailey v. United States, 284 F. 126 (CA7 1922); Tincher v.

United States, 11 F.2d 18, 21 (CA4 1926). Others continued to echo (in dictum) variants of the dictum in State v. Becker, 3 S.D. 29, 51 N.W. 1018 (1892), to the effect that courts will not interfere with punishment unless it is "manifestly cruel and unusual," and cited Weems for the proposition that sentences imposed within the limits of a statute "ordinarily will not be regarded as cruel and unusual." See, e.g., Sansone v. Zerbst, 73 F.2d 670, 672 (CA10 1934); Bailey v. United States, 74 F.2d 451, 453 (CA10 1934). [Footnote 13] Not until more than half a century after Weems did the Circuit Courts begin performing proportionality analysis. E.g., Hart v. Coiner, 483 F.2d 136 (CA4 1973). Even then, some continued to state that "[a] sentence within the statutory limits is not cruel and unusual punishment." Page v. United States, 462 F.2d 932, 935 (CA3 1972). Accord, Rener v. Beto, 447 F.2d 20, 23 (CA5 1971); Anthony v. United States, 331 F.2d 687, 693 (CA9 1964).

The first holding of this Court unqualifiedly applying a requirement of proportionality to criminal penalties was issued 185 years after the Eighth Amendment was adopted. In Coker v. Georgia, supra, the Court held that, because of the disproportionality, it was a violation of the Cruel and Unusual Punishments Clause to impose capital punishment for rape of an adult woman. Five years later, in Enmund v. Florida, 458 U. S. 782 (1982), we held that it violates the Eighth Amendment, because of disproportionality, to impose the death penalty upon a participant in a felony that results in murder, without any inquiry into the participant's intent to kill. Rummel, 445 U. S. 263 (1980), treated this line of authority as an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law. We think that is an accurate explanation, and we reassert it. Proportionality review is one of several respects in which we have held that "death is different," and have imposed protections that the Constitution nowhere else provides. See, e.g., Turner v. Murray, 476 U. S. 28, 476 U. S. 36-37 (1986); Eddings v. Oklahoma, 455 U. S. 104 (1982); id. at 455 U. S. 117 (O'CONNOR, J., concurring); Beck v. Alabama, 447 U. S. 625 (1980). We would leave it there, but will not extend it further.

IV

Petitioner claims that his sentence violates the Eighth Amendment for a reason in addition to its alleged disproportionality. He argues that it is "cruel and unusual" to impose a mandatory sentence of such severity, without any consideration of so-called mitigating factors such as, in his case, the fact that he had no prior felony convictions. He apparently contends that the Eighth Amendment requires Michigan to create a sentencing scheme whereby life in prison without possibility of parole is simply the most severe of a range of available penalties that the sentencer may impose after hearing evidence in mitigation and aggravation.

As our earlier discussion should make clear, this claim has no support in the text and history of the Eighth Amendment. Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history. As noted earlier, mandatory death sentences abounded in our first Penal Code. They were also common in the several States -- both at the time of the founding and throughout the 19th century. See Woodson v. North Carolina, 428 U.S. at 428 U. S. 289-290. There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is "mandatory." See Chapman v. United States, 500 U. S. 453, 500 U. S. 467 (1991).

Petitioner's "required mitigation" claim, like his proportionality claim, does find support in our death penalty jurisprudence. We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is "appropriate" -- whether or not the sentence is "grossly disproportionate." See Woodson v. North Carolina, supra; Lockett v. Ohio, 438 U. S. 586 (1978); Eddings v. Oklahoma, supra; Hitchcock v. Dugger, 481 U. S. 393 (1987). Petitioner asks us to extend this so-called "individualized capitalsentencing doctrine," Sumner v. Shuman, 483 U. S. 66, 483 U. S. 73 (1987), to an "individualized mandatory life in prison without parole sentencing doctrine." We refuse to do so.

Our cases creating and clarifying the "individualized capital sentencing doctrine" have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties. See Eddings v. Oklahoma, 455 U.S. at 455 U. S. 110-112; id. at 455 U. S. 117-118 (O'CONNOR, J., concurring); Lockett v. Ohio, supra at 438 U. S. 602-

605; Woodson v. North Carolina, supra at 428 U. S. 303-305; Rummel v. Estelle, supra at 445 U. S. 272.

"The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." Furman v. Georgia, 408 U.S. at 408 U. S. 306 (Stewart, J., concurring).

It is true that petitioner's sentence is unique in that it is the second most severe known to the law; but life imprisonment with possibility of parole is also unique in that it is the third most severe. And if petitioner's sentence forecloses some "flexible techniques" for later reducing his sentence, see Lockett, supra at 438 U. S. 605 (Burger, C.J.) (plurality opinion), it does not foreclose all of them, since there remain the possibilities of retroactive legislative reduction and executive clemency. In some cases, moreover, there will be negligible difference between life without parole and other sentences of imprisonment -- for example, a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole, given to a 65-year-old man. But even where the difference is the greatest, it cannot be compared with death. We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.

The judgment of the Michigan Court of Appeals is

Affirmed.

(Issue Two: Eighth Amendment Case)

UNITED STATES SUPREME COURT

Hudson v. McMillian, 503 U.S. 1 (1992)

JUSTICE OCONNOR delivered the opinion of the Court.

OPINION

This case requires us to decide whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury. We answer that question in the affirmative.

I

At the time of the incident that is the subject of this suit, petitioner Keith Hudson was an inmate at the state penitentiary in Angola, Louisiana. Respondents Jack McMillian, Marvin Woods, and Arthur Mezo served as corrections security officers at the Angola facility. During the early morning hours of October 30,1983, Hudson and McMillian argued. Assisted by Woods, McMillian then placed Hudson in handcuffs and shackles, took the prisoner out of his cell, and walked him toward the penitentiary's "administrative lockdown" area. Hudson testified that, on the way there, McMillian punched Hudson in the mouth, eyes, chest, and stomach while Woods held the inmate in place and kicked and punched him from behind. He further testified that Mezo, the supervisor on duty, watched the beating but merely told the officers "not to have too much fun." App. 23. As a result of this episode, Hudson suffered minor bruises and swelling of his face, mouth, and lip. The blows also loosened Hudson's teeth and cracked his partial dental plate, rendering it unusable for several months.

Hudson sued the three corrections officers in Federal District Court under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging a violation of the Eighth Amendment's prohibition on cruel and unusual punishments and seeking compensatory damages. The parties consented to disposition of the case before a Magistrate, who found that McMillian and Woods used force when there was no need to do so and that Mezo expressly condoned their actions. App. 26. The Magistrate awarded Hudson damages of $800. Id., at 29.

The Court of Appeals for the Fifth Circuit reversed. 929 F.2d 1014 (1990). It held that inmates alleging use of excessive force in violation of the Eighth Amendment must prove: (1) significant injury; (2) resulting "directly and only from the use of force that was clearly excessive to the need"; (3) the excessiveness of which was objectively unreasonable; and (4) that the action constituted an unnecessary and wanton infliction of pain. Id., at 1015. The court determined that respondents' use of force was objectively unreasonable because no force was required. Furthermore, "[t]he conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain." Ibid. However, Hudson could not prevail on his Eighth Amendment claim because his injuries were "minor" and required no medical attention. Ibid.

We granted certiorari, 499 U. S. 958 (1991), to determine whether the "significant injury" requirement applied by the Court of Appeals accords with the Constitution's dictate that cruel and unusual punishment shall not be inflicted.

II

In Whitley v. Albers, 475 U. S. 312 (1986), the principal question before us was what legal standard should govern the Eighth Amendment claim of an inmate shot by a guard during a prison riot. We based our answer on the settled rule that" 'the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" Id., at 319 (quoting Ingraham v. Wright, 430 U. S. 651, 670 (1977)) (internal quotation marks omitted).

What is necessary to establish an "unnecessary and wanton infliction of pain," we said, varies according to the nature of the alleged constitutional violation. 475 U. S., at 320. For example, the appropriate inquiry when an inmate alleges that prison officials failed to attend to serious medical needs is whether the officials exhibited "deliberate indifference." See Estelle v. Gamble, 429 U. S. 97, 104 (1976). This standard is appropriate because the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns. Whitley, supra, at 320.

By contrast, officials confronted with a prison

disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force. Despite the weight of these competing concerns, corrections officials must make their decisions "in haste, under pressure, and frequently without the luxury of a second chance." 475 U. S., at 320. We accordingly concluded in Whitley that application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Id., at 320-321 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (CA2), cert. denied sub nom. John v. Johnson, 414 U. S. 1033 (1973)).

Many of the concerns underlying our holding in Whitley arise whenever guards use force to keep order. Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need "to maintain or restore discipline" through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that" '[p]rison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" 475 U. S., at 321-322 (quoting Bell v. Wolfish, 441 U. S. 520, 547 (1979)). In recognition of these similarities, we hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in Whitley: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Extending Whitley's application of the "unnecessary and wanton infliction of pain" standard to all allegations of excessive force works no innovation. This Court derived the Whitley test from one articulated by Judge Friendly in Johnson v. Glick, supra, a case arising out of a prisoner's claim to have been beaten and harassed by a guard. Moreover, many Courts of Appeals already apply the Whitley standard to allegations of excessive force outside of the riot situation. See Corselli v. Coughlin, 842 F.2d 23, 26 (CA2 1988); Miller v. Leathers, 913 F.2d 1085, 1087 (CA4 1990) (en bane), cert. denied, 498 U. S. 1109 (1991); Haynes v. Marshall, 887 F.2d 700, 703 (CA6 1989); Stenzel v. Ellis, 916 F.2d 423, 427 (CA8 1990); Brown v. Smith, 813 F.2d 1187, 1188 (CAll 1987). But see Unwin v. Campbell, 863 F.2d 124, 130 (CA1 1988) (rejecting application of Whitley standard absent "an actual disturbance").

A

Under the Whitley approach, the extent of injury suffered by an inmate is one factor that may suggest "whether the use of force could plausibly have been thought necessary" in a particular situation, "or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." 475 U. S., at 321. In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat "reasonably perceived by the responsible officials," and "any efforts made to temper the severity of a forceful response." Ibid. The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it.

Respondents nonetheless assert that a significant injury requirement of the sort imposed by the Fifth Circuit is mandated by what we have termed the "objective component" of Eighth Amendment analysis. See Wilson v. Seiter, 501 U. S. 294, 298 (1991). Wilson extended the deliberate indifference standard applied to Eighth Amendment claims involving medical care to claims about conditions of confinement. In taking this step, we suggested that the subjective aspect of an Eighth Amendment claim (with which the Court was concerned) can be distinguished from the objective facet of the same claim. Thus, courts considering a prisoner's claim must ask both if "the officials act[ed] with a sufficiently culpable state of mind" and if the alleged wrongdoing was objectively "harmful enough" to establish a constitutional violation. Id., at 298, 303.

With respect to the objective component of an Eighth Amendment violation, Wilson announced no new rule. Instead, that decision suggested a relationship between the requirements applicable to different types of Eighth Amendment claims. What is

necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause depends upon the claim at issue, for two reasons. First, "[t]he general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should ... be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." Whitley, supra, at 320. Second, the Eighth Amendment's prohibition of cruel and unusual punishments "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,'" and so admits of few absolute limitations. Rhodes v. Chapman, 452 U. S. 337, 346 (1981) (quoting Trop v. Dulles, 356 U. S. 86, 101 (1958) (plurality opinion)).

The objective component of an Eighth Amendment claim is therefore contextual and responsive to "contemporary standards of decency." Estelle, supra, at 103. For instance, extreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society," Rhodes, supra, at 347, "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." Wilson, supra, at 298 (quoting Rhodes, supra, at 347) (citation omitted). A similar analysis applies to medical needs. Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are "serious." See Estelle v. Gamble, 429 U. S., at 103-104.

In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. See Whitley, supra, at 327. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today. See Estelle, supra, at 102 (proscribing torture and barbarous punishment was "the primary concern of the drafters" of the Eighth Amendment); Wilkerson v. Utah, 99 U. S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture ... and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]").

That is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action. See Johnson v. Glick, 481 F. 2d, at 1033 ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights"). The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort" 'repugnant to the conscience of mankind.'" Whitley, 475 U. S., at 327 (quoting Estelle, supra, at 106) (internal quotation marks omitted).

In this case, the Fifth Circuit found Hudson's claim untenable because his injuries were "minor." 929 F. 2d, at 1015. Yet the blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not de minimis for Eighth Amendment purposes. The extent of Hudson's injuries thus provides no basis for dismissal of his § 1983 claim.

B

The dissent's theory that Wilson requires an inmate who alleges excessive use of force to show serious injury in addition to the unnecessary and wanton infliction of pain misapplies Wilson and ignores the body of our Eighth Amendment jurisprudence. As we have already suggested, the question before the Court in Wilson was "[w]hether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials, and, if so, what state of mind is required." Wilson, supra, at 296. Wilson presented neither an allegation of excessive force nor any issue relating to what was dubbed the "objective component" of an Eighth Amendment claim.

Wilson did touch on these matters in the course of summarizing our prior holdings, beginning with Estelle v. Gamble, supra. Estelle, we noted, first applied the Cruel and Unusual Punishments Clause to deprivations that were not specifically part of the prisoner's sentence. Wilson, supra, at 297. As might be expected from this primacy, Estelle stated the

principle underlying the cases discussed in Wilson: Punishments "incompatible with the evolving standards of decency that mark the progress of a maturing society" or "involv[ing] the unnecessary and wanton infliction of pain" are "repugnant to the Eighth Amendment." Estelle, supra, at 102-103 (internal quotation marks omitted). This is the same rule the dissent would reject. With respect to the objective component of an Eighth Amendment claim, however, Wilson suggested no departure from Estelle and its progeny.

The dissent's argument that claims based on excessive force and claims based on conditions of confinement are no different in kind, post, at 24-25, and n. 4, is likewise unfounded. Far from rejecting Whitley's insight that the unnecessary and wanton infliction of pain standard must be applied with regard for the nature of the alleged Eighth Amendment violation, the Wilson Court adopted it. See Wilson, 501 U. S., at 302-303. How could it be otherwise when the constitutional touchstone is whether punishment is cruel and unusual? To deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the "'concepts of dignity, civilized standards, humanity, and decency'" that animate the Eighth Amendment. Estelle, supra, at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (CA8 1968)).

C

Respondents argue that, aside from the significant injury test applied by the Fifth Circuit, their conduct cannot constitute an Eighth Amendment violation because it was "isolated and unauthorized." Brief for Respondents 28. The beating of Hudson, they contend, arose from "a personal dispute between correctional security officers and a prisoner," and was against prison policy. Ibid. Respondents invoke the reasoning of courts that have held the use of force by prison officers under such circumstances beyond the scope of "punishment" prohibited by the Eighth Amendment. See Johnson v. Glick, supra, at 1032 ("[A]lthough a spontaneous attack by a guard is 'cruel' and, we hope, 'unusual,' it does not fit any ordinary concept of 'punishment' "); George v. Evans, 633 F.2d 413, 416 (CA5 1980) ("[A] single, unauthorized assault by a guard does not constitute cruel and unusual punishment ... "). But see Duckworth v. Franzen, 780 F.2d 645, 652 (CA7 1985) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment ... "), cert. denied, 479 U. S. 816 (1986).

We take no position on respondents' legal argument because we find it inapposite on this record. The Court of Appeals left intact the Magistrate's determination that the violence at issue in this case was "not an isolated assault." App. 27, n. 1. Indeed, there was testimony that McMillian and Woods beat another prisoner shortly after they finished with Hudson. Ibid. To the extent that respondents rely on the unauthorized nature of their acts, they make a claim not addressed by the Fifth Circuit, not presented by the question on which we granted certiorari, and, accordingly, not before this Court. Moreover, respondents ignore the Magistrate's finding that Lieutenant Mezo, acting as a supervisor, "expressly condoned the use of force in this instance." App.26.

The judgment of the Court of Appeals is

Reversed.

(Issue Two: Eighth Amendment Case)

UNITED STATES SUPREME COURT

Helling v. McKinney, 509 U.S. 25 (1993)

JUSTICE WHITE delivered the opinion of the Court.

OPINION

This case requires us to decide whether the health risk posed by involuntary exposure of a prison inmate to environmental tobacco smoke (ETS) can form the basis of a claim for relief under the Eighth Amendment.

I

Respondent is serving a sentence of imprisonment in the Nevada prison system. At the time that this case arose, respondent was an inmate in the Nevada State Prison in Carson City, Nevada. Respondent filed a pro se civil rights complaint in United States District Court under Rev. Stat. § 1979, 42 U. S. C. § 1983, naming as defendants the director of the prison, the warden, the associate warden, a unit counselor, and the manager of the prison store. The complaint, dated December 18, 1986, alleged that respondent was assigned to a cell with another inmate who smoked five packs of cigarettes a day. App. 6. The complaint also stated that cigarettes were sold to inmates without properly informing of the health hazards a nonsmoking inmate would encounter by sharing a room with an inmate who smoked, id., at 7-8, and that certain cigarettes burned continuously, releasing some type of chemical, id., at 9. Respondent complained of certain health problems allegedly caused by exposure to cigarette smoke. Respondent sought injunctive relief and damages for, inter alia, subjecting him to cruel and unusual punishment by jeopardizing his health. Id., at 14.

The parties consented to a jury trial before a Magistrate.

The Magistrate viewed respondent's suit as presenting two issues of law: (1) whether respondent had a constitutional right to be housed in a smoke-free environment, and (2) whether defendants were deliberately indifferent to respondent's serious medical needs. App. to Pet. for Cert. D2-D3. The Magistrate, after citing applicable authority, concluded that respondent had no constitutional right to be free from cigarette smoke: While "society may be moving toward an opinion as to the propriety of non-smoking and a smoke-free environment," society cannot yet completely agree on the resolution of these issues. Id., at D3, D6. The Magistrate found that respondent nonetheless could state a claim for deliberate indifference to serious medical needs if he could prove the underlying facts, but held that respondent had failed to present evidence showing either medical problems that were traceable to cigarette smoke or deliberate indifference to them. Id., at D6-D10. The Magistrate therefore granted petitioners' motion for a directed verdict and granted judgment for the defendants. Id., at D10.

The Court of Appeals affirmed the Magistrate's grant of a directed verdict on the issue of deliberate indifference to respondent's immediate medical symptoms. McKinney v. Anderson, 924 F.2d 1500, 1512 (CA9 1991). The Court of Appeals also held that the defendants were immune from liability for damages since there was at the time no clearly established law imposing liability for exposing prisoners to ETS. * Although it agreed that respondent did not have a constitutional right to a smoke-free prison environment, the court held that respondent had stated a valid cause of action under the Eighth Amendment by alleging that he had been involuntarily exposed to levels of ETS that posed an unreasonable risk of harm to his future health. Id., at 1509. In support of this judgment, the court noticed scientific opinion supporting respondent's claim that sufficient exposure to ETS could endanger one's health. Id., at 1505-1507. The court also concluded that society's attitude had evolved to the point that involuntary exposure to unreasonably dangerous levels of ETS violated current standards of decency. Id., at 1508. The court therefore held that the Magistrate erred by directing a verdict without permitting respondent to prove that his exposure to ETS was sufficient to constitute an unreasonable danger to his future health.

Petitioners sought review in this Court. In the meantime, this Court had decided Wilson v. Seiter, 501 U. S. 294 (1991), which held that, while the Eighth Amendment applies to conditions of confinement that are not formally imposed as a sentence for a crime, such claims require proof of a subjective component, and that where the claim

alleges inhumane conditions of confinement or failure to attend to a prisoner's medical needs, the standard for that state of mind is the "deliberate indifference" standard of Estelle v. Gamble, 429 U. S. 97 (1976). We granted certiorari in this case, vacated the judgment below, and remanded the case to the Court of Appeals for further consideration in light of Seiter. 502 U. S. 903 (1991).

On remand, the Court of Appeals noted that Seiter added an additional subjective element that respondent had to prove to make out an Eighth Amendment claim, but did not vitiate its determination that it would be cruel and unusual punishment to house a prisoner in an environment exposing him to levels of ETS that pose an unreasonable risk of harming his health-the objective component of respondent's Eighth Amendment claim. McKinney v. Anderson, 959 F.2d 853, 854 (CA9 1992). The Court of Appeals therefore reinstated its previous judgment and remanded for proceedings consistent with its prior opinion and with Seiter. 959

Petitioners again sought review in this Court, contending that the decision below was in conflict with the en banc decision of the Court of Appeals for the Tenth Circuit in Clemmons v. Bohannon, 956 F.2d 1523 (1992). We granted certiorari. 505 U. S. 1218 (1992). We affirm.

II

The petition for certiorari which we granted not only challenged the Court of Appeals' holding that respondent had stated a valid Eighth Amendment claim, but also asserted, as did its previous petition, that it was improper for the Court of Appeals to decide the question at all. Pet. for Cert. 25-29. Petitioners claim that respondent's complaint rested only on the alleged current effects of exposure to cigarette smoke, not on the possible future effects; that the issues framed for trial were likewise devoid of such an issue; and that such a claim was not presented, briefed, or argued on appeal and that the Court of Appeals erred in sua sponte deciding it. Ibid. Brief for Petitioners 46-49. The Court of Appeals was apparently of the view that the claimed entitlement to a smoke-free environment subsumed the claim that exposure to ETS could endanger one's future health. From its examination of the record, the court stated that "[b]oth before and during trial, McKinney sought to litigate the degree of his exposure to ETS and the actual and potential effects of such exposure on his health," 924 F. 2d, at 1503; stated that the Magistrate had excluded evidence relating to the potential health effects of exposure to ETS; and noted that two of the issues on appeal addressed whether the Magistrate erred in holding as a matter of law that compelled exposure to ETS does not violate a prisoner's rights and whether it was error to refuse to appoint an expert witness to testify about the health effects of such exposure. While the record is ambiguous and the Court of Appeals might well have affirmed the Magistrate, we hesitate to dispose of this case on the basis that the court misread the record before it. We passed over the same claim when we vacated the judgment below and remanded when the case was first before us, Pet. for Cert., O. T. 1991, No. 91-269, pp. 23-26, and the primary question on which certiorari was granted, and the question to which petitioners have devoted the bulk of their briefing and argument, is whether the court below erred in holding that McKinney had stated an Eighth Amendment claim on which relief could be granted by alleging that his compelled exposure to ETS poses an unreasonable risk to his health.

III

It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment. As we said in DeShaney v. Winnebago County Dept. of Social Services, 489 U. S. 189, 199-200 (1989): "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs-e. g., food, clothing, shelter, medical care, and reasonable safety-it transgresses the substantive limits on state action set by the Eighth Amendment .... "

Contemporary standards of decency require no less. Estelle v. Gamble, 429 U. S., at 103-104. In Estelle, we concluded that although accidental or inadvertent failure to provide adequate medical care to a prisoner would not violate the Eighth Amendment, "deliberate indifference to serious medical needs of prisoners"

violates the Amendment because it constitutes the unnecessary and wanton infliction of pain contrary to contemporary standards of decency. Id., at 104. Wilson v. Seiter, 501 U. S. 294 (1991), later held that a claim that the conditions of a prisoner's confinement violate the Eighth Amendment requires an inquiry into the prison officials' state of mind. " 'Whether one characterizes the treatment received by [the prisoner] as inhuman conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the "deliberate indifference" standard articulated in Estelle.'" Id., at 303.

Petitioners are well aware of these decisions, but they earnestly submit that unless McKinney can prove that he is currently suffering serious medical problems caused by exposure to ETS, there can be no violation of the Eighth Amendment. That Amendment, it is urged, does not protect against prison conditions that merely threaten to cause health problems in the future, no matter how grave and imminent the threat.

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. In Hutto v. Finney, 437 U. S. 678, 682 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed. We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.

That the Eighth Amendment protects against future harm to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is "reasonable safety." DeShaney, supra, at 200. It is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." Youngberg v. Romeo, 457 U. S. 307, 315-316 (1982). It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event. Two of them were cited with approval in Rhodes v. Chapman, 452 U. S. 337, 352, n. 17 (1981). Gates v. Collier, 501 F.2d 1291 (CA5 1974), held that inmates were entitled to relief under the Eighth Amendment when they proved threats to personal safety from exposed electrical wiring, deficient firefighting measures, and the mingling of inmates with serious contagious diseases with other prison inmates. Ramos v. Lamm, 639 F.2d 559, 572 (CAlO 1980), stated that a prisoner need not wait until he is actually assaulted before obtaining relief. As respondent points out, the Court of Appeals cases to the effect that the Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering are legion. See Brief for Respondent 24-27. We thus reject petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.

The United States as amicus curiae supporting petitioners does not contend that the Amendment permits "even those conditions of confinement that truly pose a significant risk of proximate and substantial harm to an inmate, so long as the injury has not yet occurred and the inmate does not yet suffer from its effects." Brief for United States as Amicus Curiae 19. Hutto v. Finney, the United States observes, teaches as much. The Government recognizes that there may be situations in which exposure to toxic or similar substances would "present a risk of sufficient likelihood or magnitude-and in which there is a sufficiently broad consensus that exposure of anyone to the substance should therefore be prevented-that" the Amendment's protection would be available even though the effects of exposure might not be manifested for some time. Brief for United States as Amicus Curiae 19. But the United States submits that the harm to any particular individual from exposure to ETS is speculative, that the risk is not sufficiently grave to implicate a "'serious medical nee[d],'" and that exposure to ETS is not contrary to current standards of decency. Id., at 20-22. It would be premature for us, however, as a matter of law to reverse the Court of Appeals on the

basis suggested by the United States. The Court of Appeals has ruled that McKinney's claim is that the level of ETS to which he has been involuntarily exposed is such that his future health is unreasonably endangered and has remanded to permit McKinney to attempt to prove his case. In the course of such proof, he must also establish that it is contrary to current standards of decency for anyone to be so exposed against his will and that prison officials are deliberately indifferent to his plight. We cannot rule at this juncture that it will be impossible for McKinney, on remand, to prove an Eighth Amendment violation based on exposure to ETS.

IV

We affirm the holding of the Court of Appeals that McKinney states a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health. We also affirm the remand to the District Court to provide an opportunity for McKinney to prove his allegations, which will require him to prove both the subjective and objective elements necessary to prove an Eighth Amendment violation. The District Court will have the usual authority to control the order of proof, and if there is a failure of proof on the first element that it chooses to consider, it would not be an abuse of discretion to give judgment for petitioners without taking further evidence. McKinney must also prove that he is entitled to the remedy of an injunction.

With respect to the objective factor, McKinney must show that he himself is being exposed to unreasonably high levels of ETS. Plainly relevant to this determination is the fact that McKinney has been moved from Carson City to Ely State Prison and is no longer the cellmate of a five-pack-aday smoker. While he is subject to being moved back to Carson City and to being placed again in a cell with a heavy smoker, the fact is that at present he is not so exposed. Moreover, the director of the Nevada State Prisons adopted a formal smoking policy on January 10, 1992. This policy restricts smoking in "program, food preparation/serving, recreational and medical areas" to specifically designated areas. It further provides that wardens may, contingent on space availability, designate nonsmoking areas in dormitory settings, and that institutional classification committees may make reasonable efforts to respect the wishes of nonsmokers where double bunking obtains. See App. to Brief for United States as Amicus Curiae A1-A2. It is possible that the new policy will be administered in a way that will minimize the risk to McKinney and make it impossible for him to prove that he will be exposed to unreasonable risk with respect to his future health or that he is now entitled to an injunction.

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

On remand, the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct, which may have changed considerably since the judgment of the Court of Appeals. Indeed, the adoption of the smoking policy mentioned above will bear heavily on the inquiry into deliberate indifference. In this respect we note that at oral argument McKinney's counsel was of the view that depending on how the new policy was administered, it could be very difficult to demonstrate that prison authorities are ignoring the possible dangers posed by exposure to ETS. Tr. of Oral Arg. 33. The inquiry into this factor also would be an appropriate vehicle to consider arguments regarding the realities of prison administration.

V

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Last Term, in Hudson v. McMillian, 503 U. S. 1 (1992), the Court held that the Eighth Amendment prohibits the use of force that causes a prisoner only minor injuries. Believing that the Court had expanded

the Eighth Amendment "beyond all bounds of history and precedent," id., at 28, I dissented. Today the Court expands the Eighth Amendment in yet another direction, holding that it applies to a prisoner's mere risk of injury. Because I find this holding no more acceptable than the Court's holding in Hudson, I again dissent.

I

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Court holds that a prisoner states a cause of action under the Cruel and Unusual Punishments Clause by alleging that prison officials, with deliberate indifference, have exposed him to an unreasonable risk of harm. This decision, like every other "conditions of confinement" case since Estelle v. Gamble, 429 U. S. 97 (1976), rests on the premise that deprivations suffered by a prisoner constitute "punishmen[t]" for Eighth Amendment purposes, even when the deprivations have not been inflicted as part of a criminal sentence. As I suggested in Hudson, see 503 U. S., at 18-20, I have serious doubts about this premise.

A

At the time the Eighth Amendment was ratified, the word "punishment" referred to the penalty imposed for the commission of a crime. See 2 T. Cunningham, ANew and Complete Law-Dictionary (1771) ("the penalty of transgressing the laws"); 2 T. Sheridan, A General Dictionary of the English Language (1780) ("[a]ny infliction imposed in vengeance of a crime"); J. Walker, A Critical Pronouncing Dictionary (1791) (same); 4 G. Jacob, The Law-Dictionary: Explaining the Rise, Progress, and Present State, of the English Law 343 (1811) ("[t]he penalty for transgressing the Law"); 2 N. Webster, American Dictionary of the English Language (1828) ("[a]ny pain or suffering inflicted on a person for a crime or offense"). That is also the primary definition of the word today. As a legal term of art, "punishment" has always meant a "fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him." Black's Law Dictionary 1234 (6th ed. 1990). And this understanding of the word, of course, does not encompass a prisoner's injuries that bear no relation to his sentence.

Nor, as far as I know, is there any historical evidence indicating that the Framers and ratifiers of the Eighth Amendment had anything other than this common understanding of "punishment" in mind. There is "no doubt" that the English Declaration of Rights of 1689 is the "antecedent of our constitutional text," Harmelin v. Michigan, 501 U. S. 957, 966 (1991) (opinion of SCALIA, J.), and "the best historical evidence" suggests that the "cruell and unusuall Punishments" provision of the Declaration of Rights was a response to sentencing abuses of the King's Bench, id., at 968. Just as there was no suggestion in English constitutional history that harsh prison conditions might constitute cruel and unusual (or otherwise illegal) "punishment," the debates surrounding the framing and ratification of our own Constitution and Bill of Rights were silent regarding this possibility. See 2 J. Elliot, Debates on the Federal Constitution 111 (2d ed. 1854) (Congress should be prevented from "inventing the most cruel and unheard-of punishments, and annexing them to crimes") (emphasis added); 1 Annals of Congo 753-754 (1789). The same can be said of the early commentaries. See 3 J. Story, Commentaries on the Constitution of the United States 750-751 (1833); T. Cooley, Constitutional Limitations 694 (8th ed. 1927).

To the extent that there is any affirmative historical evidence as to whether injuries sustained in prison might constitute "punishment" for Eighth Amendment purposes, that evidence is consistent with the ordinary meaning of the word. As of 1792, the Delaware Constitution's analogue of the Eighth Amendment provided that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted; and in the construction of jails a proper regard shall be had to the health of prisoners." Del. Declaration of Rights, Art. I, § XI (1792) (emphasis added). This provision suggests that when members of the founding generation wished to make prison conditions a matter of constitutional guarantee, they knew how to do so.

Judicial interpretations of the Cruel and Unusual Punishments Clause were, until quite recently, consistent with its text and history. As I observed in Hudson, see 503 U. S., at 19, lower courts routinely rejected "conditions of confinement" claims well into this century, see, e. g., Negrich v. Hohn, 246 F. Supp. 173, 176 (WD Pa. 1965) ("Punishment is a penalty

inflicted by a judicial tribunal in accordance with law in retribution for criminal conduct"), and this Court did not so much as intimate that the Cruel and Unusual Punishments Clause might reach prison conditions for the first 185 years of the provision's existence. It was not until the 1960's that lower courts began applying the Eighth Amendment to prison deprivations, see, e. g., Wright v. McMann, 387 F.2d 519, 525-526 (CA2 1967); Bethea v. Crouse, 417 F.2d 504, 507-508 (CAlO 1969), and it was not until 1976, in Estelle v. Gamble, 429 U. S. 97, that this Court first did so.

Thus, although the evidence is not overwhelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries-but not jailers-impose "punishment." At a minimum, I believe that the original meaning of "punishment," the silence in the historical record, and the 185 years of uniform precedent shift the burden of persuasion to those who would apply the Eighth Amendment to prison conditions. In my view, that burden has not yet been discharged. It was certainly not discharged in Estelle v. Gamble.

B

The inmate in Estelle claimed that inadequate treatment of a back injury constituted cruel and unusual punishment. The Court ultimately rejected this claim, but not before recognizing that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment. Id., at 104. In essence, however, this extension of the Eighth Amendment to prison conditions rested on little more than an ipse dixit. There was no analysis of the text of the Eighth Amendment in Estelle, and the Court's discussion of the provision's history consisted of the following single sentence: "It suffices to note that the primary concern of the drafters was to proscribe 'torture[sJ' and other 'barbar[ousJ' methods of punishment." Id., at 102. And although the Court purported to rely upon "our decisions interpreting" the Eighth Amendment, ibid., none of the six cases it cited, see id., at 102-103, held that the Eighth Amendment applies to prison deprivations-or, for that matter, even addressed a claim that it does. All of those cases involved challenges to a sentence imposed for a criminal offense.1

The only authorities cited in Estelle that supported the Court's extension of the Eighth Amendment to prison deprivations were lower court decisions (virtually all of which had been decided within the previous 10 years), see id., at 102, 104-105, nn. 10-12, 106, n. 14, and the only one of those decisions upon which the Court placed any substantial reliance was Jackson v. Bishop, 404 F.2d 571 (CA8 1968). But Jackson, like Estelle itself, simply asserted that the Eighth Amendment applies to prison deprivations; the Eighth Circuit's discussion of the problem consisted of a two-sentence paragraph in which the court was content to state the opposing view and then reject it: "Neither do we wish to draw ... any meaningful distinction between punishment by way of sentence statutorily prescribed and punishment imposed for prison disciplinary purposes. It seems to us that the Eighth Amendment's proscription has application to both." 404 F. 2d, at 580-581. As in Estelle, there was no analysis of the text or history of the Cruel and Unusual Punishments Clause.

II

To state a claim under the Cruel and Unusual Punishments Clause, a party must prove not only that the challenged conduct was both cruel and unusual, but also that it constitutes punishment. The text and history of the Eighth Amendment, together with pre-Estelle precedent, raise substantial doubts in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of a sentence. And Estelle itself has not dispelled these doubts. Were the issue squarely presented, therefore, I might vote to overrule Estelle. I need not make that decision today, however, because this case is not a straightforward application of Estelle. It is, instead, an extension.

In Hudson, the Court extended Estelle to cases in which the prisoner has suffered only minor injuries; here, it extends Estelle to cases in which there has been no injury at all.3 Because I seriously doubt that Estelle was correctly decided, I decline to join the Court's holding. Stare decisis may call for hesitation in overruling a dubious precedent, but it does not demand that such a precedent be expanded to its outer limits. I would draw the line at actual, serious injuries and reject the claim that exposure to the risk of injury can violate the Eighth Amendment.

Accordingly, I would reverse the judgment of the Court of Appeals.

(Issue Two: Eighth Amendment Case)

UNITED STATES SUPREME COURT

Ewing v. California, 538 U.S. 11 (2003)

JUSTICE OCONNOR delivered the opinion of the Court.

OPINION

In this case, we decide whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of 25 years to life under the State's "Three Strikes and You're Out" law.

I

…

B

California's current three strikes law consists of two virtually identical statutory schemes "designed to increase the prison terms of repeat felons." People v. Superior Court of San Diego Cty. ex rel. Romero, 13 Cal. 4th 497, 504, 917 P. 2d 628, 630 (1996) (Romero). When a defendant is convicted of a felony, and he has previously been convicted of one or more prior felonies defined as "serious" or "violent" in Cal. Penal Code Ann. §§ 667.5 and 1192.7 (West Supp. 2002), sentencing is conducted pursuant to the three strikes law. Prior convictions must be alleged in the charging document, and the defendant has a right to a jury determination that the prosecution has proved the prior convictions beyond a reasonable doubt. § 1025; § 1158 (West 1985).

If the defendant has one prior "serious" or "violent" felony conviction, he must be sentenced to "twice the term otherwise provided as punishment for the current felony conviction." § 667(e)(1) (West 1999); § 1170.12(c)(1) (West Supp. 2002). If the defendant has two or more prior "serious" or "violent" felony convictions, he must receive "an indeterminate term of life imprisonment." § 667(e)(2)(A) (West 1999); § 1170.12(c)(2)(A) (West Supp. 2002). Defendants sentenced to life under the three strikes law become eligible for parole on a date calculated by reference to a "minimum term," which is the greater of (a) three times the term otherwise provided for the current conviction, (b) 25 years, or (c) the term determined by the court pursuant to § 1170 for the underlying conviction, including any enhancements. §§ 667(e)(2)(A)(i)-(iii) (West 1999); §§ 1170.12(c)(2)(A)(i)-(iii) (West Supp. 2002).

Under California law, certain offenses may be classified as either felonies or misdemeanors. These crimes are known as "wobblers." Some crimes that would otherwise be misdemeanors become "wobblers" because of the defendant's prior record. For example, petty theft, a misdemeanor, becomes a "wobbler" when the defendant has previously served a prison term for committing specified theft-related crimes. § 490 (West 1999); § 666 (West Supp. 2002). Other crimes, such as grand theft, are "wobblers" regardless of the defendant's prior record. See § 489(b) (West 1999). Both types of "wobblers" are triggering offenses under the three strikes law only when they are treated as felonies. Under California law, a "wobbler" is presumptively a felony and "remains a felony except when the discretion is actually exercised" to make the crime a misdemeanor. People v. Williams, 27 Cal. 2d 220, 229, 163 P. 2d 692, 696 (1945) (emphasis deleted and internal quotation marks omitted).

In California, prosecutors may exercise their discretion to charge a "wobbler" as either a felony or a misdemeanor. Likewise, California trial courts have discretion to reduce a "wobbler" charged as a felony to a misdemeanor either before preliminary examination or at sentencing to avoid imposing a three strikes sentence. Cal. Penal Code Ann. §§ 17(b)(5), 17(b)(1) (West 1999); People v. Superior Court of Los Angeles Cty. ex rel. Alvarez, 14 Cal. 4th 968, 978, 928 P. 2d 1171, 1177-1178 (1997). In exercising this discretion, the court may consider "those factors that direct similar sentencing decisions," such as "the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, . . . [and] the general objectives of sentencing." Ibid. (internal quotation marks and citations omitted).

California trial courts can also vacate allegations of prior "serious" or "violent" felony convictions, either on motion by the prosecution or sua sponte. Romero, supra, at 529-530, 917 P. 2d, at 647-648. In ruling whether to vacate allegations of prior felony convictions, courts consider whether, "in light of the nature and circumstances of [the defendant's] present

felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes'] scheme's spirit, in whole or in part." People v. Williams, 17 Cal. 4th 148, 161, 948 P. 2d 429, 437 (1998). Thus, trial courts may avoid imposing a three strikes sentence in two ways: first, by reducing "wobblers" to misdemeanors (which do not qualify as triggering offenses), and second, by vacating allegations of prior "serious" or "violent" felony convictions.

C

On parole from a 9-year prison term, petitioner Gary Ewing walked into the pro shop of the EI Segundo Golf Course in Los Angeles County on March 12, 2000. He walked out with three golf clubs, priced at $399 apiece, concealed in his pants leg. A shop employee, whose suspicions were aroused when he observed Ewing limp out of the pro shop, telephoned the police. The police apprehended Ewing in the parking lot.

Ewing is no stranger to the criminal justice system. In 1984, at the age of 22, he pleaded guilty to theft. The court sentenced him to six months in jail (suspended), three years' probation, and a $300 fine. In 1988, he was convicted of felony grand theft auto and sentenced to one year in jail and three years' probation. After Ewing completed probation, however, the sentencing court reduced the crime to a misdemeanor, permitted Ewing to withdraw his guilty plea, and dismissed the case. In 1990, he was convicted of petty theft with a prior and sentenced to 60 days in the county jail and three years' probation. In 1992, Ewing was convicted of battery and sentenced to 30 days in the county jail and two years' summary probation. One month later, he was convicted of theft and sentenced to 10 days in the county jail and 12 months' probation. In January 1993, Ewing was convicted of burglary and sentenced to 60 days in the county jail and one year's summary probation. In February 1993, he was convicted of possessing drug paraphernalia and sentenced to six months in the county jail and three years' probation. In July 1993, he was convicted of appropriating lost property and sentenced to 10 days in the county jail and two years' summary probation. In September 1993, he was convicted of unlawfully possessing a firearm and trespassing and sentenced to 30 days in the county jail and one year's probation.

In October and November 1993, Ewing committed three burglaries and one robbery at a Long Beach, California, apartment complex over a 5-week period. He awakened one of his victims, asleep on her living room sofa, as he tried to disconnect her video cassette recorder from the television in

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that room. When she screamed, Ewing ran out the front door. On another occasion, Ewing accosted a victim in the mailroom of the apartment complex. Ewing claimed to have a gun and ordered the victim to hand over his wallet. When the victim resisted, Ewing produced a knife and forced the victim back to the apartment itself. While Ewing rifled through the bedroom, the victim fled the apartment screaming for help. Ewing absconded with the victim's money and credit cards.

On December 9, 1993, Ewing was arrested on the premises of the apartment complex for trespassing and lying to a police officer. The knife used in the robbery and a glass cocaine pipe were later found in the back seat of the patrol car used to transport Ewing to the police station. A jury convicted Ewing of first-degree robbery and three counts of residential burglary. Sentenced to nine years and eight months in prison, Ewing was paroled in 1999.

Only 10 months later, Ewing stole the golf clubs at issue in this case. He was charged with, and ultimately convicted of, one count of felony grand theft of personal property in excess of $400. See Cal. Penal Code Ann. § 484 (West Supp. 2002); § 489 (West 1999). As required by the three strikes law, the prosecutor formally alleged, and the trial court later found, that Ewing had been convicted previously of four serious or violent felonies for the three burglaries and the robbery in the Long Beach apartment complex. See § 667(g) (West 1999); § 1170.12(e) (West Supp. 2002).

At the sentencing hearing, Ewing asked the court to reduce the conviction for grand theft, a "wobbler" under California law, to a misdemeanor so as to avoid a three strikes sentence. See §§ 17(b), 667(d)(1) (West 1999); § 1170.12(b)(1) (West Supp. 2002). Ewing also asked the trial court to exercise its discretion to dismiss the allegations of some or all of his prior serious or violent felony convictions, again

for purposes of avoiding a three strikes sentence. See Romero, 13 Cal. 4th, at 529-531, 917 P. 2d, at 647-648. Before sentencing Ewing, the trial court took note of his entire criminal history, including the fact that he was on parole when he committed his latest offense. The court also heard arguments from defense counsel and a plea from Ewing himself.

In the end, the trial judge determined that the grand theft should remain a felony. The court also ruled that the four prior strikes for the three burglaries and the robbery in Long Beach should stand. As a newly convicted felon with two or more "serious" or "violent" felony convictions in his past, Ewing was sentenced under the three strikes law to 25 years to life.

The California Court of Appeal affirmed in an unpublished opinion. No. B143745 (Apr. 25, 2001). Relying on our decision in Rummel v. Estelle, 445 U. S. 263 (1980), the court rejected Ewing's claim that his sentence was grossly disproportionate under the Eighth Amendment. Enhanced sentences under recidivist statutes like the three strikes law, the court reasoned, serve the "legitimate goal" of deterring and incapacitating repeat offenders. The Supreme Court of California denied Ewing's petition for review, and we granted certiorari, 535 U. S. 969 (2002). We now affirm.

II A

The Eighth Amendment, which forbids cruel and unusual punishments, contains a "narrow proportionality principle" that "applies to noncapital sentences." Harmelin v. Michigan, 501 U. S. 957, 996-997 (1991) (KENNEDY, J., concurring in part and concurring in judgment); cf. Weems v. United States, 217 U. S. 349, 371 (1910); Robinson v. California, 370 U. S. 660, 667 (1962) (applying the Eighth Amendment to the States via the Fourteenth Amendment). We have most recently addressed the proportionality principle as applied to terms of years in a series of cases beginning with Rummel v. Estelle, supra.

In Rummel, we held that it did not violate the Eighth Amendment for a State to sentence a three-time offender to life in prison with the possibility of parole. Id., at 284-285. Like Ewing, Rummel was sentenced to a lengthy prison term under a recidivism statute. Rummel's two prior offenses were a 1964 felony for "fraudulent use of a credit card to obtain $80 worth of goods or services," and a 1969 felony conviction for "passing a forged check in the amount of $28.36." Id., at 265. His triggering offense was a conviction for felony theft-"obtaining $120.75 by false pretenses." Id., at 266.

This Court ruled that "[h]aving twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State." Id., at 284. The recidivism statute "is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole." Id., at 278. We noted that this Court "has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." Id., at 271. But "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." Id., at 272. Although we stated that the proportionality principle "would . . . come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment," id., at 274, n. 11, we held that "the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments," id., at 285.

In Hutto v. Davis, 454 U. S. 370 (1982) (per curiam), the defendant was sentenced to two consecutive terms of 20 years in prison for possession with intent to distribute nine ounces of marijuana and distribution of marijuana. We held that such a sentence was constitutional: "In short, Rummel stands for the proposition that federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare." Id., at 374 (citations and internal quotation marks omitted).

Three years after Rummel, in Solem v. Helm, 463 U. S. 277, 279 (1983), we held that the Eighth Amendment prohibited "a life sentence without possibility of parole for a seventh nonviolent felony." The triggering offense in Solem was "uttering a 'no account' check for $100." Id., at 281. We specifically

stated that the Eighth Amendment's ban on cruel and unusual punishments "prohibits . . . sentences that are disproportionate to the crime committed," and that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." Id., at 284, 286. The Solem Court then explained that three factors may be relevant to a determination of whether a sentence is so disproportionate that it violates the Eighth Amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Id., at 292.

Applying these factors in Solem, we struck down the defendant's sentence of life without parole. We specifically noted the contrast between that sentence and the sentence in Rummel, pursuant to which the defendant was eligible for parole. 463 U. S., at 297; see also id., at 300 ("[T]he South Dakota commutation system is fundamentally different from the parole system that was before us in Rummel"). Indeed, we explicitly declined to overrule Rummel: "[O]ur conclusion today is not inconsistent with Rummel v. Estelle." 463 U. S., at 303, n. 32; see also id., at 288, n. 13 ("[O]ur decision is entirely consistent with this Court's prior cases-including Rummel v. Estelle").

Eight years after Solem, we grappled with the proportionality issue again in Harmelin. Harmelin was not a recidivism case, but rather involved a first-time offender convicted of possessing 672 grams of cocaine. He was sentenced to life in prison without possibility of parole. A majority of the Court rejected Harmelin's claim that his sentence was so grossly disproportionate that it violated the Eighth Amendment. The Court, however, could not agree on why his proportionality argument failed. JUSTICE SCALIA, joined by THE CHIEF JUSTICE, wrote that the proportionality principle was "an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law." 501 U. S. at 994. He would thus have declined to apply gross disproportionality principles except in reviewing capital sentences. Ibid.

JUSTICE KENNEDY, joined by two other Members of the Court, concurred in part and concurred in the judgment. JUSTICE KENNEDY specifically recognized that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences." Id., at 997. He then identified four principles of proportionality review-"the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors" -that "inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id., at 1001 (citing Solem, supra, at 288). JUSTICE KENNEDY'S concurrence also stated that Solem "did not mandate" comparative analysis "within and between jurisdictions." 501 U. S., at 1004-1005.

The proportionality principles in our cases distilled in JusTICE KENNEDY'S concurrence guide our application of the Eighth Amendment in the new context that we are called upon to consider.

B

For many years, most States have had laws providing for enhanced sentencing of repeat offenders. See, e. g., U. S. Dept. of Justice, Bureau of Justice Assistance, National Assessment of Structured Sentencing (1996). Yet between 1993 and 1995, three strikes laws effected a sea change in criminal sentencing throughout the N ation.[Footnote 1] These laws responded to widespread public concerns about crime by targeting the class of offenders who pose the greatest threat to public safety: career criminals. As one of the chief architects of California's three strikes law has explained: "Three Strikes was intended to go beyond simply making sentences tougher. It was intended to be a focused effort to create a sentencing policy that would use the judicial system to reduce serious and violent crime." Ardaiz, California's Three Strikes Law: History, Expectations, Consequences, 32 McGeorge L. Rev. 1, 12 (2000) (hereinafter Ardaiz).

Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety. Though three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such

important policy decisions is longstanding. Weems, 217 U. S., at 379; Gore v. United States, 357 U. S. 386, 393 (1958); Payne v. Tennessee, 501 U. S. 808, 824 (1991); Rummel, 445 U. S., at 274; Solem, 463 U. S., at 290; Harmelin, 501 U. S., at 998 (KENNEDY, J., concurring in part and concurring in judgment).

Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution "does not mandate adoption of anyone penological theory." Id., at 999 (KENNEDY, J., concurring in part and concurring in judgment). A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. See 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, pp. 30-36 (1986) (explaining theories of punishment). Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.

When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice. To the contrary, our cases establish that "States have a valid interest in deterring and segregating habitual criminals." Parke v. Raley, 506 U. S. 20, 27 (1992); Oyler v. Boles, 368 U. S. 448, 451 (1962) ("[T]he constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge"). Recidivism has long been recognized as a legitimate basis for increased punishment. See AlmendarezTorres v. United States, 523 U. S. 224, 230 (1998) (recidivism "is as typical a sentencing factor as one might imagine"); Witte v. United States, 515 U. S. 389, 400 (1995) ("In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense . . . [is] 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one'" (quoting Gryger v. Burke, 334 U. S. 728, 732 (1948))).

California's justification is no pretext. Recidivism is a serious public safety concern in California and throughout the Nation. According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one "serious" new crime within three years of their release. See U. S. Dept. of Justice, Bureau of Justice Statistics, P. Langan & D. Levin, Special Report:

Recidivism of Prisoners Released in 1994, p. 1 (June 2002). In particular, released property offenders like Ewing had higher recidivism rates than those released after committing violent, drug, or public-order offenses. Id., at 8. Approximately 73 percent of the property offenders released in 1994 were arrested again within three years, compared to approximately 61 percent of the violent offenders, 62 percent of the public-order offenders, and 66 percent of the drug offenders. Ibid.

In 1996, when the Sacramento Bee studied 233 three strikes offenders in California, it found that they had an aggregate of 1,165 prior felony convictions, an average of 5 apiece. See Furillo, Three Strikes-The Verdict: Most Offenders Have Long Criminal Histories, Sacramento Bee, Mar. 31, 1996, p. Al. The prior convictions included 322 robberies and 262 burglaries. Ibid. About 84 percent of the 233 three strikes offenders had been convicted of at least one violent crime. Ibid. In all, they were responsible for 17 homicides, 7 attempted slayings, and 91 sexual assaults and child molestations. Ibid. The Sacramento Bee concluded, based on its investigation, that "[i]n the vast majority of the cases, regardless of the third strike, the [three strikes] law is snaring [the] long-term habitual offenders with multiple felony convictions " Ibid.

The State's interest in deterring crime also lends some support to the three strikes law. We have long viewed both incapacitation and deterrence as rationales for recidivism statutes: "[A] recidivist statute['s] . . . primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." Rummel, supra, at 284. Four years after the passage of California's three strikes law, the recidivism rate of parolees returned to prison for the commission of a new crime dropped by nearly 25 percent. California Dept. of Justice, Office of the Attorney General, "Three Strikes and You're Out"-Its Impact on the California Criminal Justice System After Four Years, p. 10 (1998). Even more dramatically:

"An unintended but positive consequence of 'Three Strikes' has been the impact on parolees leaving the state. More California parolees are now leaving the state than parolees from other jurisdictions entering California. This striking turnaround started in 1994. It was the first time more parolees left the state than entered since 1976. This trend has continued and in 1997 more than 1,000 net parolees left California." Ibid.

See also Janiskee & Erler, Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law, 39 Duquesne L. Rev. 43, 45-46 (2000) ("Prosecutors in Los Angeles routinely report that 'felons tell them they are moving out of the state because they fear getting a second or third strike for a nonviolent offense'" (quoting Sanchez, A Movement Builds Against "Three Strikes" Law, Washington Post, Feb. 18,2000, p. A3)).

To be sure, California's three strikes law has sparked controversy. Critics have doubted the law's wisdom, costefficiency, and effectiveness in reaching its goals. See, e. g., Zimring, Hawkins, & Kamin, Punishment and Democracy:

Three Strikes and You're Out in California (2001); Vitiello, Three Strikes: Can We Return to Rationality? 87 J. Crim. L. & C. 395, 423 (1997). This criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme. We do not sit as a "superlegislature" to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons "advance[s] the goals of [its] criminal justice system in any substantial way." See Solem, 463 U. S., at 297, n. 22.

III

Against this backdrop, we consider Ewing's claim that his three strikes sentence of 25 years to life is unconstitutionally disproportionate to his offense of "shoplifting three golf clubs." Brief for Petitioner 6. We first address the gravity of the offense compared to the harshness of the penalty. At the threshold, we note that Ewing incorrectly frames the issue. The gravity of his offense was not merely "shoplifting three golf clubs." Rather, Ewing was convicted of felony grand theft for stealing nearly $1,200 worth of merchandise after previously having been convicted of at least two "violent" or "serious" felonies. Even standing alone, Ewing's theft should not be taken lightly. His crime was certainly not "one of the most passive felonies a person could commit." Solem, supra, at 296 (internal quotation marks omitted). To the contrary, the Supreme Court of California has noted the "seriousness" of grand theft in the context of proportionality review. See In re Lynch, 8 Cal. 3d 410, 432, n. 20, 503 P. 2d 921, 936, n. 20 (1972). Theft of $1,200 in property is a felony under federal law, 18 U. S. C. § 641, and in the vast majority of States. See App. B to Brief for Petitioner 21a.

That grand theft is a "wobbler" under California law is of no moment. Though California courts have discretion to reduce a felony grand theft charge to a misdemeanor, it remains a felony for all purposes "unless and until the trial court imposes a misdemeanor sentence." In re Anderson, 69 Cal. 2d 613, 626, 447 P. 2d 117, 126 (1968) (Tobriner, J., concurring); see generally 1 B. Witkin & N. Epstein, California Criminal Law § 73 (3d ed. 2000). "The purpose of the trial judge's sentencing discretion" to downgrade certain felonies is to "impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon." Anderson, supra, at 664-665, 447 P. 2d, at 152 (Tobriner, J., concurring). Under California law, the reduction is not based on the notion that a "wobbler" is "conceptually a misdemeanor." Necochea v. Superior Court, 23 Cal. App. 3d 1012, 1016, 100 Cal. Rptr. 693, 695 (1972). Rather, it is "intended to extend misdemeanant treatment to a potential felon." Ibid. In Ewing's case, however, the trial judge justifiably exercised her discretion not to extend such lenient treatment given Ewing's long criminal history.

In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of

society as established by its criminal law." Rummel, 445 U. S., at 276; Solem, supra, at 296. To give full effect to the State's choice of this legitimate penological goal, our proportionality review of Ewing's sentence must take that goal into account.

Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record.2 Ewing has been convicted of numerous misdemeanor and felony offenses, served nine separate terms of incarceration, and committed most of his crimes while on probation or parole. His prior "strikes" were serious felonies including robbery and three residential burglaries. To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. The State of California "was entitled to place upon [Ewing] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State." Rummel, supra, at 284. Ewing's is not "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Harmelin, 501 U. S., at 1005 (KENNEDY, J., concurring in part and concurring in judgment).

We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments. The judgment of the California Court of Appeal is affirmed.

It is so ordered.

SELECTED STATUTE / CASE LAW