August 5, 2022

IN THE SUPREME COURT OF THE UNITED STATES

No. 2022-2023

William DeNolf, Jr., 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 warrantless use of a drone equipped with optical sensors violated the Fourth Amendment to the United States Constitution;

(2) Whether the sentence of life in prison with the possibility of parole only after the first fifty years for a non-homicide offense imposed on Petitioner violates the Eighth Amendment to the United States Constitution.

SUPREME COURT OF THE STATE OF OLYMPUS

No. 20-76319

WILLIAM DENOLF, JR., Appellant

V.

THE STATE OF OLYMPUS, Appellee

On direct appeal from the Superior Court of Olympus

Before Bray, Chief Justice, Beauchamp, Dzierwinski**,** Hill, Hoyer, LaRoche, and McWaters, Associate Justices.

ORDER

Associate Justice Samantha Beauchamp, with whom Associate Justices Theresa Dzierwinski, Benjamin Hill, and Madison LaRoche join, delivered the OPINION OF THE COURT:

OPINION

I

Order

In 2019, when he was 15 years of age, Petitioner, William DeNolf, Jr. (hereinafter "DeNolf, Jr."), was convicted of attempted murder and sentenced to life with parole only after a minimum of 50 years served (LWP). DeNolf, Jr., now no longer a juvenile, appeals that conviction as well as his sentence. All of his claims arise under the Constitution of the United States; no claims were brought under the Olympus State Constitution or any Olympus law.[1] We review all questions *de novo*. Both sides have stipulated to the facts. The judgment of the trial court is AFFIRMED.

II

Facts

A

In 2019 when DeNolf, Jr. committed the crime of which he was convicted, he was a 15-year-old resident of Olympus. At his sentencing hearing mitigating evidence was produced by DeNolf's attorney which showed that DeNolf, Jr. is smart, with an intelligence quotient well above average

[1] The State of Olympus is the fifty-first state in the United States of America. In Olympus, felony trials are held in Superior Courts. Olympus does not have an intermediate appellate court. Under Olympus law, Petitioner has a right of direct appeal to this Court.

and that he did well in school academically. He participated as a volunteer for several charitable and environmental causes. The prosecuting attorney produced aggravating evidence for sentencing that DeNolf, Jr. had a history of discipline problems at school and a record of disruptive behavior that includes committing acts of physical violence. In one situation in middle school, he boasted on social media of his intent to hold in a school toilet the heads of every male sixth grader who did not provide him with $5 in cash. He was eventually caught in the act and suspended, but not before he performed the act on at least fifteen occasions. In addition, DeNolf, Jr. had a history of run-ins with the law. These culminated in two criminal convictions. The first was for shoplifting when he was 12. For this offense, he was sentenced to spend sixty hours performing community service because of his age. The second offense was a state felony charge of cruelty to animals. In light of his age, he was 14, the fact that this was a first felony offense, his expression of remorse, and an acknowledgment that he had a substance abuse problem (he was drunk and high on marijuana at the time of both of the incidents), he was sentenced to four weeks in a juvenile correctional "boot camp," and he was ordered to undergo substance abuse counseling. While in that camp, he was regularly disciplined for stealing and was involved in several fistfights. On at least two occasions, prison guards, Tim Cotter and Riley Smith, broke up fights in which DeNolf, Jr. was using a weapon and, according to his own statements and the testimony of the guards, he was, or appeared to be, intent on "killing" his victims.

This appeal stems from DeNolf, Jr.'s 2019 conviction for attempted second-degree murder. The crime was observed by a law enforcement task force (Task Force) investigating a conspiracy to grow and distribute marijuana.[2] During the course of the drug trafficking investigation in the City of Knerr, State of Olympus, several agents participating in the Task Force began to suspect DeNolf, Jr.'s stepfather, Chester Comerford, and an associate, Bobby Bronner, with being major marijuana growers. The Task Force, comprised of Knerr police officers and state drug enforcement officers, was led by Deputy Attorney General for the State of Olympus, Janson Requist. Requist obtained utility records for the Comerford residence, where DeNolf, Jr. lives, and discovered that Comerford owned two properties: a residential home in downtown Knerr ("Comerford Residence") and a heavily-wooded property of approximately twenty-five acres in a rural area on the outskirts of the Knerr city limits ("Comerford Property"). The utility company provided a spreadsheet for estimating average electrical use for both properties. Task Force officers concluded that the electricity usage at the Comerford Property was abnormally high, while the electricity usage at the Comerford Residence was slightly below average. Based on this information, the Task Force began to concentrate on the Comerford Property as the possible site of the drug growing operation.

For nearly three months, the Task Force periodically observed the wooded property from a public two-lane highway adjacent to the property. Based on publicly available satellite images (Google Earth), the Task Force became aware there was a forty-foot-long Class A recreational vehicle (RV) parked in a clearing approximately 150 yards from the edge of the property.[3] The RV was completely obscured from view from the road and adjacent properties by a dense forest of tall pine

[2] Olympus is one of five states where all use, possession, or distribution of marijuana is prohibited. Eighteen states allow for its recreational use, while thirteen have not legalized possession or distribution of marijuana, but have decriminalized its use. Some states allow for its medicinal use.

[3] A Class A recreational vehicle is a self-contained vehicle that has its own motor and can be driven rather than towed. These vehicles typically contain multiple sleeping locations, a kitchenette, a bathroom, and seating.

trees. During a motion hearing related to the Fourth Amendment issue in this case at trial, facts were obtained that indicated that in June 2015, the clearing was cut, an electrical service line to the Comerford Property established, and the RV was parked in the clearing. Comerford testified that the purpose for cutting the clearing and parking the RV in the woods was "to be able to get away from it all." Similarly, DeNolf, Jr., testified that he liked to go to the RV to be "left alone." During the motion hearing, facts were also adduced that the RV had not been moved since it was parked in June 2015 (and still had not been moved at the time of trial). On March 17, 2019, the RV had four flat tires, but otherwise appeared in working order. Had the tires been replaced, or fixed/filled with air, the vehicle could have been readily driven off the property, except that it lacked current registration and insurance.

During its investigation, the Task Force observed that Comerford and Bronner often visited the Comerford Property in a pickup truck, usually for brief periods of time around dawn or dusk. Task Force teams noticed that sometimes the bed of the pickup truck contained boxes when the truck arrived at the Comerford Property and different boxes when the truck left a few minutes later. On several occasions, the Task Force observed that Comerford and/or Bronner apparently spent the night in the Comerford Property.

As its investigation continued, the Task Force learned that Comerford had applied for a new vehicle registration and license plate for the RV. Concerned that Comerford and Bronner might be preparing to move their operation, the Task Force decided to rapidly complete its investigation. The Task Force obtained from the Olympus Drug Enforcement Agency ("Olympus DEA") an unmanned aerial vehicle ("drone") called the STEALTH EAGLE 2020 and an operator for the drone, Agent Courtney Reanier, of the Olympus DEA. Agent Reanier has special expertise in drone surveillance, both in law enforcement and when she was a member of an armed forces special operations group while deployed to Iraq.

As its name suggests, the STEALTH EAGLE 2020 is uncommonly quiet. In fact, it is considered the quietist drone made, other than drones rumored to be available only to the United States military and intelligence agencies. The STEALTH EAGLE 2020 is based on technology first developed by NASA and the United States Department of Defense. Its quiet operation is due to a special propeller blade design and its use of eight rotor motors (rather than the usual four), each tuned to different revolutions per minute, which reduces harmonics and spreads frequencies across the audible spectrum. The STEALTH EAGLE 2020 produces about 30-35 decibels (equivalent to a volume roughly between a clock ticking and a quiet refrigerator hum) at 100 yards away. By comparison, high-end, consumer-level (sometimes called "prosumer") drones are typically as loud as 55-60 decibels (equivalent to a volume roughly between a loud conversation and quiet traffic noise) from 100 yards away.[4] The STEALTH EAGLE 2020 employs patented ultra-light battery technology, the run time of which far exceeds the off-the-shelf capabilities of all other models available for purchase. It is capable of flying continuously for 120 minutes before requiring fresh batteries and can loiter (remain fixed in one spot in the air) for the entire 120 minutes. The STEALTH EAGLE 2020 is equipped with a powerful 10x optical zoom camera, capable of recording and transmitting Ultra High Definition (UHD) (4000k) video and infrared thermal

[4] During the motion hearing on the Fourth Amendment issue, the trial judge adduced evidence regarding typical drone capabilities at various price points. This summary is provided in Appendix II.

images.[5] The STEALTH EAGLE 2020 is used primarily by military units, law enforcement, and intelligence agencies, but is also used by some commercial enterprises engaged in the surveillance and property protection industries and by hunters, wildlife enthusiasts, and some paparazzi. The STEALTH EAGLE 2020 is available for sale to the general public at a cost of $24,995.

At 6:00 am on the morning of March 17, 2019, Agent Reanier launched the STEALTH EAGLE 2020 from the back of an unmarked van parked on the shoulder of the public highway adjacent to the property. She piloted the drone to an altitude of 375 feet above ground level (AGL), where it hovered. Both sides stipulate that the drone remained above the state-owned land adjacent to the public highway at all times, never crossing over the boundary into the airspace above the Comerford Property. Both parties further stipulate that the drone was operated at all times in accordance with all applicable federal and state aviation laws and regulations.[6]

Utilizing the drone's powerful optical zoom, Agent Reanier observed the RV. None of the windows in the RV had window coverings such as curtains or blinds, so Agent Reanier was able to see into the RV through the windows, though not with perfect clarity. Through a window toward the middle of the RV Agent Reanier observed the tops of a number of small plants growing under what appeared to be indoor "grow lamps."

When observing the RV, Agent Reanier identified movement within the vehicle. Agent Reanier testified that she believed the two persons appeared to be arguing and gesturing aggressively, but she did not initially observe any physical contact between the persons. Due to the angle of view, she could not see the persons' heads. At one-point, a young man Agent Reanier was able to identify as DeNolf, Jr., came outside with what appeared to be a bloody nose and mouth. He spit what appeared to be blood before grabbing a heavy wooden stick that was propped against the RV and heading back into the RV. Through the window, Agent Reanier was able to observe the stick being used to hit the torso and legs of the other person in the RV. Agent Reanier immediately engaged the automatic "return home" function of the STEALTH EAGLE 2020, and she and Knerr Police Department officers Georgina Tierney and Kelton Munch, who were accompanying her that morning, ran through the woods to the RV. As they approached the RV, they heard screams and the sounds of a struggle, sounds that had not been audible from their location next to the highway. The law enforcement officers immediately entered the RV and discovered DeNolf, Jr. strangling a teenage girl approximately 15-years of age, subsequently identified as Jane Doe. DeNolf, Jr., had apparently used the wooden stick, which was now on the ground, to beat Doe, who was

[5] The parties agree the thermal imaging capability of the STEALTH EAGLE 2020 was not used at any time during the investigation and its use is not at issue in this case.

[6] FAA regulations require that manned fixed-wing aircraft (airplanes) flying in uncongested areas such as the location of the Comerford property fly no lower than 500 feet above ground level (AGL). 500 feet AGL is generally considered to be the floor of navigable airspace in uncongested areas (the floor is 1,000 feet AGL in congested areas), though FAA regulations permit rotary-wing aircraft (helicopters) to fly lower than 500 feet AGL "if the operation is conducted without hazard to persons or property on the surface." FAA regulations permit unmanned aircraft systems ("drones") to fly at or below 400 feet AGL in uncontrolled airspace, such as the airspace in the entire vicinity of the Comerford Property. FAA regulations require that to operate a drone over a human being located inside a moving vehicle without giving the vehicle's occupants prior notice, the unmanned aircraft must have an airworthiness certificate issued by the FAA and detailed maintenance records must be kept for the aircraft. Olympus state law (Appendix I) prohibits anyone from flying a drone over the airspace of private property not owned by the operator of the drone, without the private property owner's prior consent. The STEALTH EAGLE 2020 was operated in a manner consistent with all Federal Aviation Administration (FAA) and state rules and regulations.

bleeding profusely from her mouth and head. In addition, her torso was bruised and her legs and right arm were broken. Tierney wrestled DeNolf, Jr. away from Doe, then Munch used his taser to subdue DeNolf, Jr. Tierney then cuffed him. Agent Reanier and Officer Munch administered first aid to Doe. Doe's injuries were severe and required immediate medical attention, emergency surgery, and hospitalization. Had the officers not entered when they did, Doe very likely would have died. Though she eventually recovered, Doe's face was permanently disfigured.

Doe later told police that at 4:00 p.m. the day before her rescue, she had "broken up" with DeNolf, Jr., while they were walking home from school. DeNolf, Jr., had asked Doe if they could go somewhere quiet to talk. They had both agreed to meet at the RV on the Comerford Property. There was no evidence to indicate that the crime was premeditated.

After DeNolf, Jr. was arrested and Doe transported to the hospital, a complete search of the RV revealed more than one hundred exotic pepper plants. No marijuana or illegal drug paraphernalia were found on the Comerford Property.

All of Agent Reanier's observations with the drone were digitally recorded. At trial, DeNolf, Jr. moved to prevent admission of the video captured by the STEALTH EAGLE 2020 and all testimony by Agent Reanier related to observations she made with the drone, arguing use of the drone violated his Fourth Amendment rights. Judge D.R. Fair denied the motion and allowed the video recording and testimony to be admitted into evidence.

B

DeNolf, Jr. was convicted in a jury trial by an Olympus state trial court of attempted second-degree murder. There was no evidence that DeNolf, Jr. was mentally challenged. Following a sentencing hearing approximately one month after the conviction, Judge Fair issued his sentencing ruling after concluding for the record that DeNolf, Jr. was culpable enough to be sentenced to life with the possibility of parole (LWP) and that in light of his past history of troubles with the law he was incorrigible. Because a weapon was involved (the heavy wooden stick), the victim was badly hurt, DeNolf, Jr. had a prior record, and he left and then re-entered the recreational vehicle, Judge Fair sentenced him to LWP only after a minimum of 50 years served.

C

Proposition 417

Olympus does not have a "three strikes law," but Proposition 417, adopted by the voters of Olympus in 2018, denies certain convicted defendants the possibility of parole. It establishes that punishment for juveniles who committed first or second-degree murder or first or second-degree attempted murder could be life in prison with or without the possibility of parole for certain offenders. (See Appendix III). Such sentences are non-mandatory and require that the juvenile offender first be found incorrigible. Proposition 417 did not speak to the issue of age or mental capacity; it simply refers to juveniles who are "incorrigible," meaning beyond rehabilitation. Proposition 417 was incorporated into the State of Olympus Penal Code on January 1, 2019.

D

In 2020, 1,215,800 persons spent time in state and federal prisons. 250,000 of these were juveniles. In fact, on any given day 60,000 of all inmates were juveniles. In comparison, in 2016, 1,506,800 persons were in state and federal prisons. Of these 300,000 were juveniles. On any given day, 75,000 juveniles were in state and federal prisons.

The United States comprises 5% of the world's population. Yet, 40% of all persons in the world serving life terms are incarcerated in the United States. This figure is the highest in the world. 194,865 of these inmates are serving life sentences for crimes committed while they were adults, while 9,000 are serving life sentences for crimes committed as a juvenile. We are the only nation that sentences a person to life in prison for crimes committed while a juvenile.

The average child born in the United States is estimated to have a life expectancy of 77-78 years. This life expectancy declines sharply if one is incarcerated. In 2012, the United States Sentencing Commission estimated that the life expectancy of the average inmate in the United States serving a life term is 39 years once imprisoned. Thus, a 20-year-old could be expected to live to 59, a 30-year-old to 69, and a 40-year-old to 79 and so-on. In light of these averages, DeNolf, Jr. can be expected to die in prison before he is eligible for parole and release. Thus, his sentence, given his age, is likely a virtual life sentence as he cannot be released until he is 65 years of age, just after the end-of-life expectancy for an incarcerated person of the same age at sentencing.[7]

Life Sentences

In 1970, there were fewer than 200,000 persons incarcerated in the United States. That figure rose to 1.4 million in 2020.[8] In 2016, 14.7% or 206,000 inmates (1 in 7) were serving life terms. Of these 206,000 inmates, 161,957 were serving life without parole (LWOP) or life with parole (LWP), while an additional 44,043 were serving a virtual life sentence (VLS).[9]

The numbers for 2020 show a slight decline in the total number of life sentences from 206,000 to 203,865. This is a drop from 14.7% to 14.6% in the total serving a life term. Of these 203,865 inmates serving life terms, 161,112 were serving life without parole (LWOP) or life with parole (LWP), while an additional 42,853 were serving a virtual life sentence. In 2022, thirty states and the Federal Government have more people serving life sentences than in 2017, while twenty-one states and the District of Columbia have fewer serving life sentences.

Of the 203,865 inmates serving some form of a life term, 91% (185,517) committed a violent crime while 9% (18,348) committed non-violent offenses including property offenses or drug related crimes. Of these 185,517 inmates, 65% (120,280), were imprisoned for homicide, 19% (34,657) for rape or sexual assault, and 16% (30,580) were for aggravated assault, kidnapping, or robbery.

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[7] A virtual life sentence is a sentence of a term of years that exceeds an individual's natural life expectancy.

[8] In 1984, 34,000 were serving life sentences. In 1992, there were 70,000. In 2003 and 2005, the figure rose to 132,000 and 142,000 respectively. It climbed to 158,000 in 2012 and to 206,000 by 2016 before dipping to 203,865 in 2020.

[9] As of 2016, the exact break down of the 206,000 was: 53,290 serving LWOP, 108,667 serving LWP and 44,043 serving VLS. The percentages of these sentences being served by persons who committed crimes as a juvenile were 4.3%, 6.7%, and 5.4% respectively.

Life Sentences for Juveniles

In 2016, 12,000 persons were serving some life sentence for a crime committed as a juvenile. These sentences take one of three forms: JLWOP, JLWP, or JVLS. By 2020, that figure had declined to 9,000, a drop of 25%. Olympus has 265 inmates serving life sentences for crimes committed as a juvenile.

Juvenile Life without Parole (JLWOP)

In 2016, 2,300 persons were serving JLWOP in the U.S. That figure dropped to 1,400 in 2020, a decline of 35% from 2016 when JLWOP was at a record high. 26 states allow JLWOP sentences. Seven of these 26 have limited their application of JLWOP. The most common limit is to require a chance at parole between 15 and 40 years. Of the 26 states that allow JLWOP, six have no inmates serving such sentences. This means that the 1,400 persons serving JLWOP are found in 20 states.[10] Olympus has 50 inmates serving JLWOP – all for first degree murder. 25 states and the District of Columbia have banned the use of JLWOP. 20 of these 25 states had previously practiced JLWOP.

Juvenile Life with Parole (JLWP)

In 2016, 7,300 persons in the U.S. were serving life with the possibility of parole for crimes committed as juveniles (JLWP). By 2020, JLWP fell by 2,100 or 23% from 7,300 to 5,600.

46 states allow life with parole sentences (JLWP), while five states and the District of Columbia do not. 25 states, including Olympus, have fewer than 100 persons serving JLWP. Two of these 25 states have between zero and five and several have fewer than 25. Olympus has 115 inmates serving JLWP – 100 for murder or attempted murder in the second degree and 15 for rape. 21 states have more than 100 persons serving JLWP. Two states, California and Texas, have more than 1,000 persons serving JLWOP, JLWP, or VLS. Six states (Florida, Georgia, Louisiana, Michigan, New York, and Pennsylvania) have 350-900. 60% or 3,360 of the 5,600 inmates serving JLWP for crimes committed as juveniles are in California, Georgia, New York, and Texas.

The 46 states that allow JLWP can be broken into three groups. First, the five states that have expanded their use of JLWP to include other violent crimes (e.g., rape or armed robbery). Second, the 20 states that have enacted measures to curtail the type of crimes punishable by JLWP. Fifteen of these 20 states have done so since 2020 while five did so between 2010 and 2020. Half of these 20 states have raised the minimum age for a juvenile to be sentenced to LWP to 16 or 17. Third, the 21 states that to date have taken no action to expand or curtail their use of JLWP. These 21 states can be subdivided into the 11 of whom have seen measures introduced into their state legislatures to limit the use of JLWP and the ten who have seen state legislators introduce bills to expand JLWP. The most commonly proposed limits are to require a chance at parole between 15 and 35 years (ten state legislatures have had such bills proposed) or to raise the age for JLWP (one state legislature considered such a measure). The most commonly proposed extension is to lower the age eligible to receive JLWP (ten state legislatures have had such bills proposed).

[10] The Federal Government does not have a juvenile parole system.

Virtual Life Sentences (VLS):

As of 2020, 2,000 inmates are serving VLS of 50 years or more for crimes committed as a juvenile. This number is down slightly from 2,400 in 2016. These 2,000 inmates are housed in 39 states. VLS can be with or without parole. 12 states and the District of Columbia report no such persons. In those twelve states, eight have had rulings issued by their state supreme courts finding VLS for juveniles to be unconstitutional. In one, Maryland, the General Assembly overrode the governor's veto to ban VLS for juveniles. No state supreme court since 2010 has affirmed VLS for juveniles. Of the 39 states that allow for VLS for juveniles, the average state has 20 such inmates. Some have as few as five. These figures are in contrast to 2010 when every state had persons serving such sentences, and the average state had closer to 50 persons serving virtual sentences for crimes committed while juveniles. Olympus has 50 inmates serving VLS for crimes committed as a juvenile (40 for second degree murder or attempted murder and 10 for rape). This number may increase as more juveniles are sentenced under Proposition 417. Thus, while technically allowed, virtual sentences for juveniles are arguably rare in practice. In fact, with respect to persons serving VLS for crimes committed as a juvenile, 60% (1,200) of the 2,000 persons serving such terms are found in four states: Indiana, Louisiana, Pennsylvania, and Texas.

Comparing DeNolf, Jr's Penalty to the Practices of other Jurisdictions:

In many states the crime of second-degree attempted murder results in five to 15 years in prison for juveniles. DeNolf Jr.'s sentence was more extreme than would have been issued in just about any other state. Nationwide, 25% of juveniles who attempt or commit murder in the first degree receive sentences such as 25 years to life, 25% receive 25 to 50 years, and 50% receive a sentence of life with or without parole. The numbers for second degree or attempted murder in the second degree are a bit different. Nationwide, 15% of juveniles who attempt or commit murder in the second degree receive sentences such as 15 years to 25 years, 25 % receive sentences such as 25 to 50 years, 50% receive a sentence of life with parole after a minimum number of years served, and 10% receive life without parole. Thus, DeNolf, Jr. received the sentence that occurs half the time. A review of the most common range of years issued among the 51 states and the District of Columbia finds that the most common sentencing range of years for the crime of second-degree attempted murder is: 10 or fewer (5%), 10 to 15 (15%), 15 to 25 years served (50%), 25 to 40 years (5%), 25 to 50 years (20%), and 25 to more than 50 years (5%). DeNolf received the same sentence issued to 49 other juveniles in Olympus. DeNolf Jr.'s sentence was not as severe as the sentences issued in Olympus to adults guilty of murder or attempted murder of any degree; every such adult (10 total) has been executed or is serving LWOP.

DeNolf, Jr. received a more severe sentence than most violent and all non-violent felons in Olympus[11] and a comparable sentence to the 34,657 of the nation's 160,000 rapists who are serving life terms nationwide. [12] He received a harsher sentence than 125,343 rapists. He received a comparable sentence to the 30,580 inmates nationwide who are serving life terms for aggravated assault, kidnapping, or robbery, and the 18,348 inmates serving life terms for non-violent offenses including property offenses or drug-related crimes.

[11] 75% received a lesser sentence, while 25% received a similar sentence or the same exact sentence.

[12] It is comparable because some are serving LWP or LWOP as opposed to a virtual life sentence, and the minimum number of years varies.

DeNolf, Jr.'s Appeal

DeNolf, Jr. appealed his conviction and sentence on the grounds that his Fourth and Eighth Amendment rights were violated. We now examine his claims in turn.

-III-

Fourth Amendment Analysis

First, we can quickly reject the claim that a recreational vehicle is a home entitled to heightened scrutiny under the Fourth Amendment. Not one shred of evidence was proffered to establish that DeNolf, Jr. or his stepfather—the owner of the property—utilized the property for residential purposes. Moreover, DeNolf, Jr., as a guest to the RV rather than its owner, had no reasonable expectation of privacy. *Minnesota v. Carter*, 525 U.S. 83 (1998). The essential issue here is whether the Fourth Amendment prohibits the warrantless search of a property using sense enhancing techniques. We find that it does not.

It has long been recognized that a warrantless search violates the Fourth Amendment only if the defendant manifested a subjective expectation of privacy and society accepts that expectation as reasonable. *California v. Greenwood*, 486 U.S. 35, 39 (1988). In the instant case, DeNolf, Jr. may have had an expectation of privacy in the abstract. Only an unusually high-powered optical device operated at some distance from the RV by a stealth drone was able to observe him. However, an expectation of privacy does not give rise to Fourth Amendment protections unless society is prepared to accept such expectations as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). By leaving the RV's windows open and without curtains while assaulting Ms. Doe, DeNolf, Jr. did not exhibit much concern about his privacy.

There is no reasonable expectation of privacy in the behaviors that one exposes to the public. The Supreme Court has long held that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id., at 351* (majority opinion). As a practical matter, law enforcement officers cannot be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Though a drone with a powerful zoom lens and video recording and transmitting capability was used in this case, any member of the public possessing such a device could have witnessed the conduct at issue here. The drone was operated from, and at all times remained in, space lawfully accessible to any member of the public. Accordingly, law enforcement did not trespass on the Comerford Property to obtain the videos or to observe the activities about which Agent Reanier testified.

The Supreme Court has previously recognized there is no expectation of privacy regarding what can be seen by the general public from the air. *See Florida v. Riley*, 488 U.S. 445 (1989) (helicopters); *California v. Ciraolo*, 476 U.S. 207 (1986) (fixed-wing aircraft). The dissent argues that the drone technology used here is not in "general public use," but, though expensive, the STEALTH EAGLE 2020 is available to the general public. Moreover, approximately 8% of the United States population possesses a drone capable of flying up to 400 feet AGL, and 15% of the population has at some time operated a drone. While it may have been unusual for a person to operate a drone above the highway adjacent to the Comerford Property, that is not the applicable standard for determining Fourth Amendment violations. Because there was no reasonable

expectation of privacy, there was no "search," and Agent Reanier's observations and the video recordings did not violate DeNolf, Jr.'s Fourth Amendment rights.

The dissent's interpretation and application of leading case law misses the mark, and as a result it fails to persuade, let alone overcome the fact that *California v. Carney*, 471 U.S. 386 (1985) allows warrantless searches of RVs. Nor is it correct to conclude that *Kyllo v. United States* 533 U.S. 27 (2001) invalidates searches that rely on devices not readily available to the public. *Kyllo* turned on devices "not in general public use." Here, the STEALTH EAGLE 2020 is available to the public, and is used by military personnel in combat and to protect civilians in war zones, by law enforcement personnel, by wildlife enthusiasts, hunters, and by others who wish to observe and record activity without being detected by or disturbing the subjects of their observation. The dissent's use of case law is selective. The dissent correctly notes that the Supreme Court has recently breathed new life into the trespass doctrine. *See Florida v. Jardines,* 561 U.S. 1 (2013). But the dissent overlooks that *Jardines* is distinguished from the facts of this case. *Jardines* involved a physical trespass, and this case does not. However creative the dissent may be, there was no Fourth Amendment violation, and the trial judge appropriately admitted the evidence.

IV

Eighth Amendment Analysis

DeNolf, Jr. contends that the Eighth Amendment to the Constitution prohibits the extreme sentence handed down today. In our view, the Constitution, while it may forbid life without parole (LWOP) sentences for minors for offenses other than homicide, does not forbid life with parole (LWP) for attempted murder – especially under the circumstances present in this case. This determination is a matter for the people to decide through their elected representatives or, as they have in Olympus, through direct democracy. We live in times when democracy is under assault. We will not add to that assault by rejecting the bedrock of our political system – namely the right of the people to express themselves at the ballot box. If DeNolf, Jr. wants to change the law, he should petition his legislators or arrange a ballot initiative to repeal Proposition 417, not this Court.

Murders committed by juveniles have been on the rise. In fact, the number of juveniles arrested for murder has more than doubled from just over 900 in 2018 to over 2,000 in 2020. In 2020, the range of juveniles arrested for murder ranged from one to four years old (1), five to eight years old (4), nine to 12 years old (18), 13 to 16 years old (604), to 17 to 18 years of age (over 1,000). This sad situation reflects the reality of the world in which we now live. It is certainly not unconstitutional for citizens to push for laws to protect themselves from criminal activity, nor is it unconstitutional for legislatures to reflect the will of the people. *See Ewing v. California*, 538 U.S. 11 (2003). Moreover, there is nothing cruel about a life sentence for attempted murder – especially one whose attempt failed only because of fortuitous police intervention.

Taking the above into consideration, the dissent's reliance on *Solem v. Helm,* 463 U.S. 277 (1983) is misplaced. There, the respondent was not a violent criminal. The correct precedent is *Harmelin v. Michigan,* 501 U.S. 957 (1991), where the prevailing opinion upheld a life sentence for a relatively minor offense. In doing so, the Court rejected the *Solem* framework. Even more recently, the United States Supreme Court again affirmed a life sentence for relatively minor offenses in

Ewing. Courts would be hard pressed to uphold such sentences under a test of proportionality. If such offenses merit life, then surely so can attempted murder. If *Ewing* specifically upheld such sentences, then, again, the *Solem* calculus must be inoperative.

The dissent favorably cites *Roper v. Simmons,* 543 U.S. 551 (2005). Unfortunately, it reads far more into *Roper* than is actually there. *Roper* established only one new constitutional right, the right for a juvenile not to be given the death penalty. DeNolf, Jr. was not sentenced to death. To base a decision voiding DeNolf, Jr.'s penalty on *Roper* is misplaced. The dissent's reference to more recent case law such as *Graham v Florida,* 560 U.S. 48 (2010) and *Miller v. Alabama,* 567 U.S. 460 (2012) is appropriate. But the conclusions it draws miss the mark because the cases are distinguishable and because DeNolf, Jr. was only spared from becoming a murderer due to the heroic efforts of law enforcement, rather than anything that he did. R. at 5-6.

DeNolf, Jr. has a pattern of violent acts far more serious than those in *Ewing v. California. Ewing* affirmed life terms for relatively minor offenses. That someone guilty of a string of crimes, including attempted murder, would go free due to the happy fortune of age is at best horribly wrong, and at worst perverse and short-sighted. Consider the message sent to would-be criminals: to avoid life in prison, commit your crimes in your youth. The public has rights as well, and one must be for common sense government and official acts that support public safety. Precedents such as *Roper* leave the states with little choice but to find alternatives to capital punishment for crimes involving minors and acts other than killings. The people of Olympus took such a step. This is not to say that the people can punish *carte blanche* – that is without reference to standards. But when a free people adopt a punishment that squares with the written requirements of higher law, that policy should stand both because it satisfies the Constitution and because we are a democracy.

There is nothing cruel about locking up an attempted murderer for the remainder of his natural life subject to parole. This proposition applies especially to someone who has been found to be sufficiently culpable as required by the Supreme Court. *See Miller*, 567 U.S. at 498 (2012). The dissent states that DeNolf, Jr. is capable of change. That may be true. But as the Supreme Court made clear in its recent decision of *Jones v Mississippi,* 593 U.S. ___ (2021) that fact, true or not, is of no moment.

There is nothing unusual about locking up an attempted murderer for the remainder of his natural life subject to parole. At present, there are over 9,000 individuals nationwide serving life sentences for crimes they committed as a juvenile. DeNolf, Jr. is one of those 9,000.

The dissent asserts that such punishment is unusual. It does so largely because state laws vary widely, and most other nations do not sentence individuals 15 years of age to LWP. Yet, what is unusual ought to be examined over time, and not so soon after a law is adopted and before other states might adopt similar approaches. If the dissent's stress on being novel had applied to the three strikes laws or to the mandatory sentencing laws, they would have been unconstitutional on their face. The fact that the United States Supreme Court has affirmed these very innovations reveals that the dissent's logic is untenable.

The conviction and sentence are AFFIRMED.

Chief Justice Katherine Bray, with whom Associate Justices Danielle Hoyer and Micheal McWaters join, DISSENTING:

I. Fourth Amendment Analysis

We begin with consideration of the Fourth Amendment question. DeNolf, Jr.'s position is two-fold: (1) a warrant was necessary before the government agents utilized the STEALTH EAGLE 2020 device, and (2) the recreational vehicle (RV) was a home, to which the greatest Fourth Amendment protection against governmental searches and seizures applies. We agree and would have ordered the video evidence and Agent Reanier's testimony regarding what she observed while using the STEALTH EAGLE 2020 excluded from trial.

The seminal case in the current Fourth Amendment interpretive regime is *Katz v. United States,* 389 U.S. 347 (1967). Under *Katz,* the individual need not show actual physical intrusion or invasion into a protected space, as the Fourth Amendment protects people—and not simply areas—against unreasonable searches and seizures. The issue in *Katz* was the government's warrantless use of electronic listening and recording devices in a public phone booth. The Court deemed the government's activity unconstitutional on the grounds that an individual has a "reasonable expectation of privacy" that is protected by the Fourth Amendment and that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." This logic applies with equal—perhaps greater—force to the facts of this case, given that an RV parked 150 yards through dense woods from the nearest public space is a far more private place than a phone booth.

The majority of this august body applies *Katz* in a manner that is inconsistent with that precedent. What is more, the majority accepts the state's contention that the RV is not a home within the meaning of the Fourth Amendment, and thus no reasonable expectation of privacy attaches. *California v. Carney,* 471 U.S. 386 (1985). The essence of its overall argument is that this expectation of privacy is not unfettered. *See Florida v. Riley,* 488 U.S. 445 (1989); *California v. Greenwood,* 486 U.S. 35 (1988).

Privacy is not absolute. That said, this truth does not negate a person's right to expect privacy in their own home (whether that home is their first or second home). It is reasonable for citizens to believe that they are not being spied upon by means of extraordinary devices. The majority errs when it holds that DeNolf, Jr. had no basis of a privacy expectation because he was in an RV. The controlling case is *California v. Carney,* 471 U.S. 386 (1985). Under *Carney* when a vehicle is being used on the highway or is capable of such use and is found stationary in a place not regularly used for residential purposes, the following two justifications for a vehicle exception come into play. First, the Fourth Amendment provides less protection to motor vehicles if they can be easily and quickly moved before a warrant can be obtained. Second, there is a reduced expectation of privacy stemming from the pervasive regulation of vehicles capable of travelling on the highways. However, the vehicle in this case never moved for years, including during the long period of surveillance, nor was it likely to be moved anytime soon. It was parked in an area traditionally used for residential purposes. In addition, the tires were flat, rendering it incapable of immediate transport. Although this vehicle was used only occasionally for daily life, we conclude that the vehicle was placed upon the property for primarily residential purposes. Thus, enhanced

protections apply under the Fourth Amendment. The state needed a warrant.

Equally problematic was the use by the police of an unusually quiet drone equipped with an ultra-high-definition camera with optical zoom, which is not in routine general use by the general public. Although "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," in instances where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo v. United States* 533 U.S. 27, 40 (2001).

As with its application of *Kyllo*, the majority's understanding of the reach of *Ciraolo* and *Riley* is incorrect. Those cases do not stand for the proposition that *all* warrantless aerial surveillance is justified. Critically, the observation and video recording in this case were made using a new technology not even contemplated in those cases, and from a location where the aerial vehicles addressed in those cases may not lawfully fly absent exigent circumstances.

Because the STEALTH EAGLE 2020 is so uncommon, in the context of this criminal investigation, its use constituted a search and thus required a specific warrant. The lack of such a warrant and any exigency stemming from the vehicle being readily moved renders the evidence obtained prior to attaining a warrant inadmissible. A Michigan court of appeals has considered a similar set of facts and come to the conclusion we reach here. *See Long Lake Township v. Maxon*, __ N.W.2d __, 2021 WL 1047366 (Mich. Ct. App. 2021). Thus, there is a split among state appellate courts worthy of review.

The majority too readily discards *Florida v. Jardines*, 561 U.S. 1 (2013) and its predecessors. Though the drone itself did not cross into the airspace above the Comerford Property, by observing and recording what was occurring 150 yards into the property in a space otherwise not visible to the naked eye, the state engaged in a digital trespass with the same effect as a physical trespass. An interpretation of the Fourth Amendment that relies on whether a drone is two feet to one side or the other side of a property boundary line is inconsistent with the central premise of *Katz*.

While law enforcement may have had good intentions, and they apparently saved Doe's life, those facts do not absolve them of the constitutional requirement to obtain a warrant.

II. Eighth Amendment Analysis

We now turn to the punishment itself which we conclude violates the Eighth Amendment.

The Constitution says little about sentences passed down for crimes, and the Court has tended to defer to the states in sentencing cases where possible. *See Ewing v. California*, 538 U.S. 11 (2003). This traditional deference aside, it is our duty to place the punishment in this case within this history of what is allowed and what is not. It is a constitutional duty from which we cannot shirk.

Olympus asserts that the penalty is neither cruel nor unusual. It notes that the Supreme Court has upheld both life sentences without parole for a first offense of drug possession and, in the name of public safety, three-strikes laws that proscribe life in prison for repeat offenders. *See Harmelin v. Michigan*, 501 U.S. 957 (1991), and *Ewing v. California*, 538 U.S. 11 (2003). What is more, it

holds that the state performed the factor analysis to determine if a juvenile's level of culpability meets the sentence as is required in *Miller v. Alabama*, 567 U.S. 460, 498 (2012). Olympus argues that life in prison for attempted murder is a humane punishment and that states regularly pass down this sanction for violent acts. In addition, it defends Proposition 417 as a perfectly reasonable response to shifting precedent. *Roper v. Simmons*, 543 U.S. 551 (2005), for example, barred the states from executing minors, while *Graham v Florida*, 560 U.S. 48 (2010) barred LWOP for juveniles convicted of non-homicide offenses. This court opines that "precedent such as *Roper* leave the states with little choice but to find alternatives to capital punishment for crimes involving minors and acts other than killings. The people of Olympus took such a step." Maj. Opin. at 12. In light of this precedent, we must decide whether mandating life with the possibility of parole for attempted murder for a 15-year-old falls into the same category as death for minors or LWOP for crimes not involving death. We believe it does and, as such, is unconstitutional.

DeNolf, Jr. argues that it follows logically from *Roper* and *Graham* that LWP for juveniles is unconstitutional. The *Roper*, Court noted that all minors, including older teenagers, are different from adults. They are less mature, more impulsive, more susceptible to peer pressure and more likely to change for the better over time. Given this fact, it defies logic and is horribly unfair to sentence a young man or woman to spend his or her natural years behind bars for a crime committed as a mere child. In *Graham*, the Court found it cruel to deny a juvenile hope, especially because such a sentence served no valid penological justification. 560 U.S. at 74. We must never forget that juveniles have a "capacity for change[.]" *Miller*, 565 U.S. at 465 (quoting *Graham*, 560 U.S. at 68, 74). Mindful of these facts, we find that the sentence upheld today should be struck for the same reasons.

In examining the Eighth Amendment, we note the statement in *Roper*, 543 U.S. at 561 that:

> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

While the crimes committed in this case are despicable and shocking in and of themselves, to send a boy away for life at this stage in this young life does not square within the evolving standards of decency in a free society. Juveniles are not permitted to vote, to contract, to purchase alcoholic beverages, or to marry without the consent of their parents. It seems inconsistent that one be denied the fruits of the tree of the law, yet be subjected to all of its thorns. To say that a child who commits a crime at 15 will never change is flawed and that life without parole is an appropriate punishment is strong medicine given what we know today about human development. This is especially true in light of the growing number of studies that have documented an age crime curve. This curve finds that persons are more likely to commit crimes between the ages of 15 and 19 but less likely as they mature. The likelihood of reoffending seems to end at 25 (around 50% reoffend between 15 and 25). After 25, the likelihood that one reoffends drops from 50% to between 15% and 20%, a drop of about two-thirds. To be fair, the drop for violent offenses does seem to come

later than 25 years of age.[13] But that does not change the larger issue at the core of this case – that the sentence as applied in this case contravenes the Eighth Amendment.

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

In evaluating whether the punishment was cruel, we turn to the judicial process that produced this challenge. Cases involving the death penalty receive careful review at multiple levels. In contrast, life sentences can receive almost none. Mr. DeNolf, Jr.'s trial, for instance, lasted but a day. He was represented by a lawyer who made no opening statement, called no expert witnesses, and whose closing occupies about six double-spaced pages of the trial transcript. These facts do not suggest the actions of a "mature" or "decent" society. Such a process is cruel and cannot stand.

We turn now to the matter of whether the punishment is unusual. The majority's conclusion that there is no trend away from harsh penalties for juveniles is wrong. It is wrong because the facts show that while the majority of the states allow LWP for minors for non-homicide crimes, the majority do not actively pass out such sentences. This number has risen from six in 2000 to 15 today. Moreover, the majority relies on an arbitrary distinction between LWOP and LWP. To say that the former is invalid for non-homicides but the latter is not is inconsistent with the spirit if not the actual letter of *Graham*, a decision that survived *Jones v Mississippi*, 593 U.S. ___ (2021). Several state supreme courts have arrived at the conclusion that JLWOP violates the Eighth Amendment. *See State v. Sweet*, 879 N.W.2d 811 (Iowa 2016) and *People v. Caballero*, 55 Cal. 4th 262 (2012). We should arrive at the same conclusion for JLWP in the immediate case.

Also problematic is the fact that VLS are unusual. As the majority notes at page 9:

> Of the 39 states that allow VLS for juveniles, the average state has 20 such inmates. Some have as few as five. This is in contrast to 2010, when every state had persons serving such sentences, and the average state had closer to 50 persons serving virtual sentences for crimes committed while juveniles. Olympus has 50 inmates serving VLS for crimes committed as juveniles. . . . Thus, while technically allowed, virtual sentences for juveniles are rare in practice. In fact, with respect to persons serving VLS for crimes committed as a juvenile, 60% (1,200) of the 2,000 persons serving such terms are found in four states: Indiana, Louisiana, Pennsylvania, and Texas.

Reasonable people can disagree about whether the punishment here is cruel. However, the views

[13] From a 2014 study issued by the National Institute of Justice.

expressed in the majority opinion aside, there is no question that it is unusual. There is a clear direction away from such penalties. R. at 6 n. 3. Numbers matter less than trends. *See Roper*, 543 U.S. at 566; *see also Miller*, 565 U.S. at 485 n.11. Olympus may not stand alone in this approach to sentencing, but it stands outside the national norm. Further, virtually all countries in the world reject the punishment of life for child offenders. All countries except the United States have ratified the U.N. Convention on the Rights of the Child, which explicitly forbids "life imprisonment without possibility of release" for "offenses committed by persons below eighteen years of age." These facts set the State of Olympus apart from not only other states but from much of the world as well. Consideration of punishment in other nations can not only be helpful in cases such as this, it is also appropriate under *Roper*, 543 U.S. at 575-79, and *Graham*, 560 U.S. at 80-82. We must never forget that America is not an island unto itself, nor does it possess a monopoly on issues of morality and decency. Other decent societies exist, and how they have evolved can be instructive to this endeavor.

There is a quantum of cruelty inherent in sentencing a juvenile to a LWP – especially when it likely constitutes a virtual life sentence. Olympus should have adopted some type of sliding scale to achieve justice. The "evolving standards of decency" identified in *Roper*, 543 U.S. at 561, require no less.

Accordingly, we respectfully Dissent.

Appendix I

Olympus Revised Code, Chapter 2917.11: Use of Drones

Section 1: DEFINITION:

(A) For purposes of this chapter, "drone" shall be defined as a remote-controlled pilotless aerial vehicle. This statute shall apply to all forms of drones, in present or future use.

Section 2: TRESPASS:

(A) No person shall knowingly operate a drone in the airspace directly above private land owned by another, without said landowner's prior permission.

(B) Violation of this section shall constitute a Class C misdemeanor trespass.

(C) This Section shall not bar operation of drones by government personnel in performance of their official duties, so long as such operation does not violate any other state or federal aviation law or regulation, the Olympus Constitution, or the United States Constitution.

(D) This law shall take effect January 1, 2018.

Appendix II:

Summary of Capabilities of Various Drone Types Available for Purchase in the United States

Capability	STEALTH EAGLE 2020	TYPICAL "PRO-SUMER" MODEL	ENTRY LEVEL MODEL
Maximum flight length ("loiter time") without recharge	120 minutes	30-45 minutes	25-30 minutes
Noise produced at 100 yards away	30-35 decibels	55-60 decibels	75 decibels
Optical sensors	UHD (4000k) video recording with 10x optical zoom; infrared thermal imager	UHD (4000k) video recording with 10x optical zoom	720p video recording; no optical zoom
Standoff control and video transmission	Controllable at 10 miles from operator; transmits UHD (4000k) video to receiver	Controllable at 3-5 miles from operator; transmits HD (1080p) video to receiver	Controllable up to .5 miles from operator; transmits 720p video to receiver
Tracking	Can automatically track and fly along with designated target on land (human, animal, or vehicle)	No automatic tracking	No automatic tracking
Cost	$24,995	$1,000-$3,000	$250-500

Appendix III:

Proposition 417

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

I Adults convicted of first-degree murder or attempted murder shall be subject to execution or a penalty of life without parole in the State of Olympus.

II Adults convicted of second-degree murder or attempted murder shall be sentenced to a penalty of life without parole in the State of Olympus.

III Non-adults who are convicted of first-degree murder or attempted murder can be sentenced to life in prison without parole if a judge concludes that the offender is incorrigible. If the defendant is not incorrigible, the sentence shall be life with the possibility of parole after a minimum number of years to be determined by the judge in accordance with applicable state sentencing guidelines.

IV Non-adults who are convicted of second-degree murder or attempted murder can be punished in the State of Olympus to life with the possibility of parole after a minimum of fifty years is served if a judge concludes that the offender is incorrigible. If the defendant is not incorrigible, the sentence shall be determined by the judge in accordance with applicable state sentencing guidelines provided that it not exceed 50 years and be no less than 15 years.

This law shall take effect on January 1, 2019

Cases Cited in the Record:

4th Amendment Cases:

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Link to Dissent of Judge Hood: COA 349230 D LONG LAKE TOWNSHIP V TODD MAXON Opinion - Dissent 03/18/2021 (michigan.gov)

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