

We, Robert W. Kelly and James T. Mieding, affirm that the ACMA brief and copy enclosed with this letter are our original work submitted to the ACMA brief writing competition. No outside aid was sought or employed in the composition of this brief and it was composed originally for this competition.

Signed,

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12-23-2009

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12-23-09

No. 2009-3280

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OLYMPUS,

Petitioner-Appellant,

v.

WILLIAM DENOLF, JR.,

Respondent-Appellee,

*On Appeal from the
Supreme Court of the State of Olympus*

BRIEF FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

- (1) Whether the deployment of a visual enhancement device without a warrant violated the Fourth and Fourteenth Amendments to the United States Constitution; and
- (2) Whether the life in prison with the possibility of parole sentence imposed on Respondent violated the Eighth and Fourteenth Amendments to the United States Constitution.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
Cases on Record.....	v
<u>Supreme Court Cases:</u>	v
Cases Cited within Record.....	v
<u>Supreme Court Cases:</u>	v
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	vii
STATEMENT OF THE CASE.....	viii
SUMMARY OF THE ARGUMENT.....	xi
ARGUMENT	1
I. LAW ENFORCEMENT CONDUCTED BOTH SURVEILLANCE AND A SEARCH OF COMERFORD AND BRONNER'S RECREATIONAL VEHICLE; BOTH WERE CONSTITUTIONAL.....	1
A. Law enforcement's use of the CYCLOPS-237 visual surveillance technology is constitutional.	1
1. This Court has consistently upheld visual surveillance as constitutional even when technology assists the naked-eye.....	1
2. The CYCLOPS technology is in general public use and is therefore an acceptable use of surveillance technology according to <i>Kyllo v. United States</i>	3
B. Law enforcement's search of Comerford and Bronner's recreational vehicle is constitutional.	4
1. The search is justified because the police had a warrant.....	4
i. Prior to searching the recreational vehicle, police obtained a warrant from a local magistrate based on probable cause.....	4
ii. The warrant the police obtained was justified independently of the evidence obtained through the use of the CYCLOPS device.	5
2. Police were justified in their search by the presence of exigent circumstances.....	6

i.	The police had an objectively reasonable basis to believe that someone was about to come to bodily harm.	6
ii.	Even if the CYCLOPS is unconstitutional search technology, the police may use it to conduct incidental searches for their own safety.....	7
3.	Because the police were acting in good faith, the evidence obtained in the police search should not be excluded by the Court.	8
II.	IT IS CONSISTENT WITH THE EIGHTH AMENDMENT TO IMPOSE THE SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR WILLIAM DENOLF’S CRIME OF AGGRAVATED RAPE.	9
A.	Proposition 417 imposes a proportionate punishment for the crime of aggravated rape.	9
B.	The State of Olympus is not required to consider age as a mitigating factor prior to sentencing.	10
1.	The Court has consistently refused to require consideration of mitigating factors beyond the capitol context.	10
2.	Requiring consideration of mitigating factors outside the capitol context creates a dangerous precedent.	11
3.	Proposition 417 allows for appropriate consideration of age prior to sentencing.	12
C.	State Legislatures must be given deference to determine how best to restrict criminal offenders.....	13
	Conclusion.....	14

TABLE OF AUTHORITIES

Cases on Record

Supreme Court Cases:

<i>Brigham City v. Stuart</i> , 547 U.S. 398 (2006).....	4, 6
<i>California v. Carney</i> , 471 U.S. 386 (1985).....	6
<i>California v. Greenwood</i> , 486 U.S. 35 (1988).....	xi, 2, 8
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	xii, 10, 11
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	10, 12
<i>Ewing v. California</i> , 538 U.S. 11 (2003)	xii, 9, 13, 14
<i>Harmelin v. Michigan</i> , 501 U.S. 957 (1991).....	xii, 9, 10, 11
<i>Illinois v. Caballes</i> , 543 U.S. 405 (2005).....	7
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	4, 7
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001)	xi, 1, 2, 3
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	11
<i>Rummel v. Estelle</i> , 445 U.S. 263 (1980)	xii, 9, 10
<i>Solem v. Helm</i> , 463 U.S. 277 (1983).....	11
<i>United States v. Karo</i> , 468 U.S. 705 (1984).....	5

Cases Cited within Record

Supreme Court Cases:

<i>Agnello v. United States</i> , 269 U.S. 20 (1925)	7
--	---

<i>California v. Ciraolo</i> , 476 U.S. 207 (1986)	3
<i>Dow Chemical Co. v. United States</i> , 476 U.S. 277 (1986)	2, 3
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	11
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	11
<i>Leon v. United States</i> , 468 U.S. 897 (1984)	xi, 8
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	10, 11
<i>Mincey v. Arizona</i> , 437 U.S. 385 (1978)	6
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	7

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment IV:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

U.S. Constitution, Amendment VIII:

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

Olympus State Proposition 417:

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

The crime of aggravated rape shall be punished in the State of Olympus by a mandatory life term. No person convicted of aggravated rape in the State of Olympus will be eligible for parole. Aggravated rape shall be defined as the act of rape in conjunction with other heinous acts directed at the victim. These acts shall include, but not be limited to, abduction, kidnapping, torture, two or more perpetrators participating in the act, the use of physical force and threats of great and immediate bodily harm to the victim, or the use of a dangerous weapon to prevent victim resistance.

The act of raping a minor sixteen and younger shall be considered an aggravated rape. Lack of knowledge of the victim's age shall not be a defense.

This law shall take effect on January 1, 2009

STATEMENT OF THE CASE

The following facts were agreed to by both parties. On January 17, 2009, William DeNolf Jr., a fifteen year old resident of Olympus, was arrested for the kidnapping and aggravated rape of a minor. DeNolf's criminal activity was inadvertently uncovered by a joint task force in the course of a three-month investigation of Chester Comerford, DeNolf's step-father, who was suspected of conspiracy to grow and distribute marijuana.

During the course of the investigation, the joint task force began to suspect Comerford and an associate, Bobby Bronner, of being major growers of marijuana. After obtaining information from confidential sources, as well as utility records which suggested that the electrical usage at Comerford's undeveloped wooded property was abnormally high, the task force began observation of the wooded area.

For nearly three months, the task force monitored the property, observing Comerford and Bronner's frequent, but brief, visits to the property in their truck. Comerford and Bronner routinely entered with boxes and departed the thirty-five foot recreational vehicle carrying full black bags. Occasionally, the pair spent the night in the recreational vehicle. While the vehicle itself did not have current registration or insurance, it appeared to be in working condition with the exception that all four tires were flat and in need of repair prior to operating the vehicle.

On January 17, 2009, Detective Kristin Paige, a police member of the task force utilized the CYCLOPS-237, a visual enhancement device, to observe the recreational vehicle from the nearest highway approximately 900 feet away. The CYCLOPS-237 is used both by members of the military and wildlife enthusiasts. The device is available through specialty catalogues and military suppliers with a small but increasing level of public distribution given its relatively high cost.

Detective Paige observed through the device the tops of small plants growing under a lamp through an open window of the vehicle. The plants could not be identified, and without the use of the CYCLOPS-237, the presence of the plants could not be discerned.

Based on this information the task force obtained a warrant to search the property including the recreational vehicle. That same day, prior to executing the warrant, Detective Paige again utilized the CYCLOPS-237 to determine if the vehicle was occupied. She observed movement within the vehicle and saw two unidentifiable shadows engaged in what, at times, appeared to be fighting. Subsequently, Detective Paige noticed DeNolf emerge from the vehicle with a bloody nose and mouth.

The task force entered the area and discovered the Respondent and Jane Doe, a fifteen-year-old classmate, within the vehicle. No drugs or drug paraphernalia were found on the property. Doe later indicated that after having

been abducted at gunpoint by DeNolf twenty-four hours earlier, she had been brought to the property and raped and sodomized repeatedly. The task force responded to her injuries, which required immediate medical attention, emergency surgery, and hospitalization.

DeNolf was sentenced to life imprisonment without parole pursuant to Proposition 417, which punishes aggravated rape by a mandatory life sentence. DeNolf appealed his conviction which was upheld by lower state courts before being overturned by the Supreme Court of Olympus.

SUMMARY OF THE ARGUMENT

On January 17, 2009, the Olympus State police conducted a search and a surveillance; both were constitutional. That morning the police utilized the CYCLOPS-237 optical technology to conduct visual surveillance of the recreational vehicle belonging to Comerford and Bronner. According to the Court's decision in *Kyllo v. United States*, surveillance of a purely visual nature, such as that conducted with the CYCLOPS, is no search at all and presumptively constitutional under the Fourth Amendment. This provision for visual surveillance extends to include the use of technology so long as what is discerned is exposed to a public line of sight.

Later that afternoon, the police entered onto Comerford and Bronner's property and conducted a search of their recreational vehicle. This search performed by the police was made pursuant to a warrant and independently justified by the presence of exigent circumstances. Further, the police, when they searched Comerford and Bronner's recreational vehicle, were acting in good faith executing a warrant which they had properly applied for and obtained, and therefore, according to *Leon v. United States* cited in *California v. Greenwood*, the information they obtained should not be excluded by the Court.

Additionally, by imposing the sentence of life imprisonment without possibility of parole for Mr. DeNolf's crime of aggravated rape, the State of

Olympus did not violate the Eighth Amendment's prohibition against cruel and unusual punishments. The sentence fulfills the Court's standard in *Rummel v. Estelle* that a punishment must not be grossly disproportionate to the crime committed. Pursuant to the ruling in *Coker v. Georgia*, aggravated rape is the most severe crime an individual can commit, second only to homicide. Imposing the second most severe penalty possible does not constitute a grossly disproportionate punishment.

The State of Olympus is not required to consider Respondent's youth at the time of his crime as a basis for reducing his sentence. As exemplified in the decision of *Harmelin v. Michigan*, the Court has consistently declined to extend consideration of mitigating factors beyond the context of the death penalty. To diverge with this rule would create a dangerous precedent of allowing individuals to raise Eighth Amendment challenges to virtually any statutory punishment if not first permitted to posit mitigating factors.

Finally, in applying the punishment of life imprisonment without parole to the crime of aggravated rape, the State of Olympus is entitled to judicial deference. Recognizing that state legislatures are obligated to protect their citizens, the Court ruled in *Ewing v. California* that judicial deference must be granted to states in order for them to determine the best way to restrict those who cannot conform to the norms of society. Respondent qualifies as a member of this category of felons

given his prior criminal record as well as the particularly abhorrent means of
perpetrating the aggravated rape of Jane Doe.

ARGUMENT

I. LAW ENFORCEMENT CONDUCTED BOTH SURVEILLANCE AND A SEARCH OF COMERFORD AND BRONNER'S RECREATIONAL VEHICLE; BOTH WERE CONSTITUTIONAL.

On January 17th, the police engaged in two distinct types of activity. The first, conducted that morning, was their surveillance of the Comerford and Bronner property with the CYCLOPS-237 vision-enhancing device. Later that afternoon, after obtaining a warrant, the police entered onto the property itself and searched the recreational vehicle parked on the property. While the two police activities are connected, they need to be considered separately, as different circumstances justify each action.

A. Law enforcement's use of the CYCLOPS-237 visual surveillance technology is constitutional.

1. This Court has consistently upheld visual surveillance as constitutional even when technology assists the naked-eye.

The Court has traditionally treated visual surveillance as categorically different from other types of surveillance for purposes of the Fourth Amendment. Reaching back to the common law roots of the Fourth Amendment, this Court held that “visual surveillance was unquestionably lawful because ‘the eye cannot by the laws of England be guilty of trespass.’” *Kyllo v. United States*, 533 U.S. 27, 31-32 (2001), quoting *Boyd v. United States*, 116 U.S. 616, 628 (1886). On these grounds, Justice Scalia, writing for the majority in *Kyllo*, notes that “visual

observation is no search at all.” *Id* at 32. Hence this Court’s long held doctrine that police need not avert their eyes from criminal activity that has been knowingly exposed to the public. *California v. Greenwood*, 486 U.S. 35, 41 (1988).

Even when this visual observation is enhanced through the use of technology, it is still acceptable. One hundred years after their decision in *Boyd* the Court opted to extend the visual surveillance exception to cover the use of enhanced aerial photography in *Dow Chemical Co. v. United States*, 476 U.S. 277 (1986), as cited in *Kyllo* 533 U.S., 32. Thus, per this Court’s jurisprudence, visual technology may be employed to observe information which has been exposed to a public line of sight. Although the police were 900 feet away from the recreational vehicle, they had a clear, unobstructed line of sight from the public highway through the open window and were therefore acting in accordance with this Court’s rulings on the use of technology for visual surveillance.

Opposing counsel will undoubtedly contend that the features of the CYCLOPS device go beyond the realm of mere visual surveillance, specifically, its night vision, motion detection, and video recording capabilities. *Moot Court Problem 4* ¶1. While we contend that all three of these additional features are purely visual in nature since they do not alter the eye’s natural abilities but merely enhance them, this Court need not consider the precise nature of what constitutes visual surveillance, because neither the night vision, nor motion-detecting features

of the CYCLOPS needed to be employed by the police to obtain the evidence they sought. On the morning of January 17th, using the CYCLOPS the police observed the tops of several plants located under growth lamps. *Moot Court Problem 4* ¶2. To observe this they needed neither night vision, nor motion detection. The ability to record videos is clearly visual in nature as it directly parallels the enhanced photography explicitly allowed by the Court in *Dow Chemical* cited in *Kyllo*. In light of this, law enforcement's use of the CYCLOPS device is an acceptable deployment of purely visual surveillance technology.

2. The CYCLOPS technology is in general public use and is therefore an acceptable use of surveillance technology according to *Kyllo v. United States*.

In addition to visual surveillance, the Court in *Kyllo* also laid forth an exception under the Fourth Amendment for technology it deemed to be "in general public use." *Kyllo* 533 U.S., 34. In *Kyllo*, the Court declined to define what general public is; nonetheless it is instructive to look at the examples of technology the Court held to be in general public use. Specifically, in *Kyllo*, Justice Scalia pointed to *California v. Ciraolo*, 476 U.S. 207 (1986), where he noted that law enforcement's use of a fixed-wing aircraft is an example of technology in general use. *Kyllo*, 533 U.S., 39 n. 6. Aircraft are a technology in general public use, he noted, because the public reasonably expects to be observed by aircraft flying overhead. *Id.* Similarly, the CYCLOPS optical device, though only owned by a

