NO. ALB-20-01

IN THE SUPREME COURT OF THE UNITED STATES

WALT BLACK,

PETITIONER

v.

STATE OF ALBERS,

RESPONDENT

On Writ of Certiorari to the Albers Supreme Court

BRIEF FOR PETITIONER

# QUESTION PRESENTED

1. Whether the Albers Supreme Court incorrectly affirmed the determination that the Weathersfield’s Police Department’s aerial surveillance of Walt Black’s fenced-in backyard violated his Fourth Amendment protection against unreasonable searches.
2. Whether the Albers Supreme Court incorrectly affirmed a discretionary seventy-year-without-parole sentence imposed on fifteen-year-old Walt Black in violation of his Eighth Amendment protections against cruel and unusual punishment.

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# PROCEEDINGS BELOW

On August 15, 2015, the Weathersfield Police Department (“WPD”) arrested fifteen-year-old Walt Black for possession, manufacturing, and trafficking of marijuana and felony murder of a law enforcement officer. [R. 2, 5]. The Assistant District Attorney assigned to his case requested that Black be tried as an adult. [R. 5]. Despite his lack of any previous criminal record, on September 15, 2015, the juvenile court agreed and transferred Black’s case to the Orange County Superior Court. [R. 5].

On October 6, 2015, Black filed a motion to suppress the evidence obtained during the execution of the search warrant, namely the marijuana plants found in his fenced-in backyard and the marijuana found in his house. [R. 5]. Black argued that the basis for the search warrant—the footage taken from the Unarmed Aerial Vehicle (“UAV”) that entered his backyard—was violative of his Fourth Amendment protection against unreasonable searches. [R. 5]. On November 12, 2015, Black’s motion was denied on the grounds that the surveillance conducted by the UAV did not constitute a search within the meaning of the Fourth Amendment. [R. 5-6].

Black entered a conditional plea of nolo contendere on all charges but reserved his right to appeal the denial of his motion to suppress. At his sentencing hearing in January 2016, defense submitted evidence of mitigating circumstances, while the prosecution submitted evidence of aggravating circumstances. [R. 6]. Specifically, the defense presented unchallenged evidence that Black was severely abused as a child, that he grew up in a broken home, and that he was antisocial but capable of rehabilitation. [R. 6]. The prosecution presented evidence about the nature of the crime. [R. 6]. Black also introduced evidence, unchallenged by the prosecution, that his life expectancy is shortened by eleven years because he suffers from type 1 diabetes. [R. 6-7].

The parties disagreed as to the appropriate sentence, with the defense arguing for twenty-five years and the prosecution arguing for a life-without-parole sentence. [R. 6]. On February 8, 2016, Judge Fring of the trial court sentenced Black to sixty years in Albers state prison for the felony murder conviction, without the possibility of parole, and another ten years for the trafficking conviction, also without the possibility of parole. [R. 6-7]. These sentences were to run consecutively, totaling a seventy-year sentence without the possibility of parole. [R. 7]. Black filed a motion to set aside his sentence for the felony murder conviction. [R. 7]. His motion was denied by the superior court. [R. 7].

Black filed a timely appeal of his conviction for possession, distribution, and trafficking of marijuana on the grounds that the denial of his motion to suppress was erroneous. [R. 8]. He also filed a timely appeal of his sentence for felony murder on the grounds that the denial of his motion to set aside his sixty-year sentence was erroneous. [R. 8]. The Albers Appeals Court affirmed the judgment of the superior court. [R. 8]. After appealing to the Albers Supreme Court, on November 22, 2019, that court once again affirmed the trial court’s denials of Black’s motion to dismiss and his motion to set aside his felony murder sentence. [R. 20].

On January 22, 2020, the Supreme Court of the United States granted certiorari of Black’s petition to consider all issues raised in the courts below. [R. 21].

# CONSTITUTIONAL PROVISIONS

**U.S. const. amend. IV.**

The right of 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. const. amend. VIII.**

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

# STATUTORY PROVISIONS

**Albers Code Ann. § 921.1401 (2014).**

(2) In determine whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant’s youth and attendant circumstances.

# STATEMENT OF THE CASE

Walt Black lived with his older brother in a single-family home in Weathersfield, Albers. [R. 2]. Growing up, Black lived in a broken home, which led to a tumultuous childhood. [R. 6]. His parents—both alcoholics—regularly physically abused him. [R. 6]. At age ten, Black was finally able to escape the abuse when his parents divorced and both lost custody. [R. 6]. He has lived with his brother since the divorce. [R. 6]. However, as Black is only fifteen-years-old, the effects of the decade of abuse wear on and have manifested themselves as several developmental disorders. [R. 6]. Despite these manifestations, he is capable of rehabilitation. [R. 6].

On August 15, 2015, an anonymous person informed the Weathersfield Police Department that they believed someone was growing marijuana in Black’s backyard. [R. 2]. Acting exclusively on that tip, officers arrived at Black’s home without a warrant. [R. 2]. The officers were unable to see his backyard because of a ten-foot-high fence and a row of fourteen-foot-high trees. [R. 2]. Despite finding nothing on their visit to his home to suggest Black possessed anything illegal, the officers returned to the station and decided to fly an Unmanned Aerial Vehicle (“UAV”) over his fenced-in, covered backyard to record the contents of the yard. [R. 2]. The officers had no warrant to fly the UAV over Black’s yard. [R. 2]. The officers began this warrantless surveillance with the UAV at 150 feet above the yard. [R. 3]. However, because of the line of trees in Black’s yard, the officers could not see most of the yard. [R. 3]. They therefore lowered the UAV until they had a clearer view of Black’s garden. [R. 3]. At this point, the UAV was a mere thirty feet off Black’s yard. [R. 3]. Because of the relative novelty of UAV technology in Weathersfield, Black’s neighbors were alarmed by its presence, many of them fleeing inside to avoid feeling that it was spying on them. [R. 4-5].

After completing the warrantless UAV surveillance, one of the officers obtained a warrant to search Black’s home and property. [R. 4]. He relied exclusively on the UAV footage to establish probable cause in support of the warrant. [R. 4]. When the officers arrived at Black’s home for the second time, he was unable to hear them knocking because he was listening to music. [R. 4]. Because he did not know anyone was knocking, when the officers forcibly entered his home, Black was frightened. [R. 4]. He quickly picked up his brother’s gun and fired it, fatally wounding an officer. [R. 4].

Black pled nolo contendere to the charges against him. [R. 5]. At the sentencing hearing, he introduced uncontroverted evidence that, as a type 1 diabetic, his life expectancy was approximately eleven years shorter than the average white male, meaning he could expect to live only forty-eight years after sentencing. [R. 6]. Despite this evidence, Judge Fring sentenced him to sixty years without parole for the felony murder conviction and an additional ten years without parole for the trafficking conviction, to run consecutively with his sixty-year-without-parole sentence. [R. 7]. Although the judge abstractly considered the “distinct features of [Black’s] youth,” he failed to consider whether Black was capable of rehabilitation or whether he is permanently incorrigible. [R. 7]. Judge Fring also failed to rely on the Albers Sentencing Statute, Albers Code Ann. § 921.1401, when sentencing Black to seventy years without parole. [R. 7]. Black now appeals the denial of the motion to suppress the evidence obtained in the warrantless UAV search and the denial of his motion to set aside his sentence. [R. 7].

# SUMMARY OF THE ARGUMENT

This Court should reverse the Albers Supreme Court’s finding that the Weathersfield Police Department’s use of aerial surveillance was not a search within the meaning of the Fourth Amendment. Black had a reasonable expectation of privacy in his fenced-in backyard and, thus, when the Weathersfield Police Department flew a UAV over it, it violated Black’s Fourth Amendment protections against unreasonable searches. The warrantless use of a UAV in police surveillance is presumptively unreasonable because it has the capability of collecting the same amount of intimate information as a GPS tracker. Further, this kind of surveillance technology is not commonly used by the public and thus individuals retain an expectation of privacy against it. Even if this Court determines that Black’s subjective expectation is unreasonable, Black’s Fourth Amendment protections against unreasonable searches were still violated because the Weathersfield Police Department committed a trespass by lowering the UAV merely thirty feet above his backyard for the sole purpose of effectuating a search.

This Court should reverse the Albers Supreme Court’s finding that fifteen-year-old Black’s discretionary seventy-year-without-parole sentence did not violate his Eighth Amendment protections against cruel and unusual punishment. The seventy-year-without-parole sentence imposed on Black is a de facto life sentence because it shared all the characteristics of a de jure life sentence. De facto life-without-parole sentences, when imposed on juveniles, should carry with them the same constitutional protections as de jure life-without-parole sentences. Given those constitutional protections, imposing a de facto life-without-parole sentence on Black violated his Eighth Amendment protections against cruel and unusual punishment. All life-without-parole sentences imposed on juveniles, whether imposed at the judge’s discretion or because of a statutory mandate, are facially unconstitutional. This is clear when proper consideration is given to juveniles’ lessened culpability, as it must be. Finally, even if this Court does not declare juvenile life-without-parole sentences facially unconstitutional, because Black’s substantive and procedural rights were violated during his sentencing, imposing a life-without-parole sentence is unconstitutional as applied to him.

# ARGUMENT

## I. THE ALBERS SUPREME COURT INCORRECTLY AFFIRMED THE DENIAL OF BLACK’S MOTION TO SUPPRESS BECAUSE THE POLICE’S INVASION OF BLACK’S BACKYARD USING A UAV VIOLATED HIS FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCHES.

This Court should reverse the Albers Supreme Court’s denial of Black’s motion to suppress evidence obtained from the Weathersfield Police Department’s warrantless UAV search of Black’s fenced-in backyard because it incorrectly held that the surveillance was not a search within the meaning of the Fourth Amendment. The denial of the motion to suppress and any legal conclusions is reviewed de novo. United States v. Scott, 731 F.3d 659, 663 (7th Cir. 2013); Smith v. State, 765 Alb. 34, 36 (2015). The standard for the trial court’s findings of fact, however, is clearly erroneous. See Scott, 731 F.3d at 663; Smith, 765 Alb. at 36.

The Fourth Amendment protects “[t]he right of the people to be sure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .” U.S. Const. amend. IV. Initially, the Fourth Amendment was considered a protection for property rights, not personal rights, and was rooted in the common-law trespass doctrine. See Olmstead v. United States, 277 U.S. 438, 466 (1928) (finding violation of Fourth Amendment rights where “there has been a[] . . . search of his person or his tangible material effects or an actual physical invasion of his house ‘or curtilage’”). However, this Court later departed from its exclusive use of this trespass conception to instead examine the defendant’s reasonable expectation of privacy, explaining that “the Fourth Amendment protects people, not places.” See Katz v. United States, 389 U.S. 347, 351 (1967) (holding that wiretap installed by police on telephone booth constituted search despite there being no trespass).

Since Katz, where there is nothing indicating a physical trespass, this Court has utilized a two-part test to determine whether a search occurred: (1) whether the individual had a subjective expectation of privacy and (2) whether that expectation is recognized by society as reasonable. Id. at 360-61 (Harlan, J., concurring). However, where the invasion in question infringes on a person’s property-based protections, the initial common-law trespass conception of the Fourth Amendment is still utilized because “[a]t bottom, [the Court] must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” United States v. Jones, 565 U.S. 400, 406 (2012) (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)). The Katz “expectation of privacy” test is best viewed as a supplement to the historical understanding of the Fourth Amendment rather than an attempt to supplant it. See id. at 406-07.

### A. The Weathersfield Police Department’s use of a UAV violated Black’s Fourth Amendment protection against unreasonable searches because he had a reasonable expectation of privacy in his backyard.

The use of a UAV to search Black’s fenced-in backyard was a search within the meaning of the Fourth Amendment under Katz. The government concedes, as they must, that Black had a subjective expectation of privacy in his backyard. [R. 9]. Thus, the issue is whether Black’s expectation that the police would not fly a UAV a mere thirty feet over his backyard was reasonable.

#### 1. A broad reading of Carpenter instructs that using warrantless UAV surveillance is a presumptively unreasonable search within the meaning of the Fourth Amendment.

This Court should adopt a broad reading of the Carpenter decision and hold that, because UAVs have the ability to track any or all of a suspect’s movements, any warrantless use of a UAV is a search within the meaning of the Fourth Amendment. As a general matter, individuals traveling on public thoroughfares do not have a privacy interest in their movements. United States v. Knotts, 460 U.S. 276, 281 (1983). However, there is a significant difference between the ability of police to follow individuals on public roads and the ability of technology to establish twenty-four-hour, long-term surveillance. Compare id., at 281-82 (finding no expectation of privacy where police could easily follow individual in their police car), with Jones, 565 U.S. at 430 (Alito, J., concurring) (finding that police may infringe on privacy rights if they were able to track every movement that person made over extended period of time). The latter threatens to establish the long-feared “dragnet-type law enforcement practices.” See Knotts, 460 U.S. at 284. Importantly, “[a] majority of this Court has . . . recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements.” Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (citing Jones, 565 U.S. at 430 (Alito, J., concurring)) (emphasis added); Jones, 565 U.S. at 415 (Sotomayor, J., concurring).

Carpenter places new and heightened importance on examining the nature of the technology at issue in determining whether police conduct violates a person’s constitutional right to privacy under the Fourth Amendment. See Carpenter, 138 S. Ct. at 2210 (noting that novelty of cell site location information technology and depth of information it collects “present[s] even greater privacy concerns” than the Court had ever considered before); see also United States v. Shipton, 0:18-cr-202-PJS-KMM, 2019 WL 5330928, at \*12 (D. Minn. Sept. 11, 2019) (noting that Carpenter and Jones “undoubtedly suggest that where modern technology is involved, either as an investigative tool or as a target of the government’s scrutiny, close analysis is required to determine whether a person has a reasonable expectation of privacy protected by the Fourth Amendment” (emphasis added)).

Carpenter determined that a search occurred because the cell site location information (“CSLI”) record obtained by the police was an “all-encompassing record” of information that was “qualitatively different” than that of prior cases. Compare Carpenter 138 S. Ct. at 2216-17 (recognizing expectation of privacy in exhaustive record of individual’s every movement collected by their phone), with Smith v. Maryland, 442 U.S. 735, 745 (1979) (finding no expectation of privacy in phone numbers dialed), and United States v. Miller, 425 U.S. 435, 437 (1976) (finding no expectation of privacy in personal bank records). Indeed, the CSLI records at issue in Carpenter were “detailed, encyclopedic, and effortlessly compiled.” Carpenter, 138 S. Ct. at 2216-17. Compared to pole cameras, which have limited surveillance capabilities insofar as they are stagnant, CSLI records afford a substantially more “intimate window” into a person’s life. Compare id., with United States v. Jackson, 213 F.3d 1269, 1280 (10th Cir. 2000), vacated on other grounds, 531 U.S. 1033 (holding that surveillance conducted by camera mounted on telephone pole not Fourth Amendment search because it only “record[ed] activity visible to the naked eye”). That is, the sheer breadth of information gathered by the CSLI record functions much like an ankle bracelet or other GPS tracking device. See Carpenter, 138 S. Ct at 2217; Jones, 565 U.S. at 415 (Sotomayor, J., concurring). The stronger reading of Carpenter is that all technology with the capability to conduct long-term surveillance and collect this kind of information about a person should be subjected to this “close analysis.” See Shipton, 2019 WL 5330928, at \*12.

Here, the nature of the UAV surveillance technology is exactly the kind this Court was concerned with in Carpenter. Police officers conducting surveillance with UAVs have the capability to obtain an “all-encompassing record” of “detailed, encyclopedic, and effortlessly compiled” information that violates an individual’s constitutional right to privacy. Carpenter, 138 S. Ct. at 2216-17. Like the cell phone data in Carpenter, UAVs empower officers to follow suspects around wherever they go and obtain information about their whereabouts and their “familial, political, professional, religious, and sexual associations.” Jones, 565 U.S. at 415 (Sotomayor, J., concurring); see also Carpenter, 138 S. Ct. at 2216-17. The ability to conduct such long-term, intrusive surveillance renders UAV technology significantly more similar to a GPS tracking device—or a cell phone used by police as such a device—than to a stagnant pole camera. See Carpenter, 138 S. Ct. at 2216 (likening location CSLI data to GPS monitoring because of vastness of information collected); Jones, 565 U.S. at 416 (Sotomayor, J., concurring) (recognizing potential for abuse of police discretion where GPS technology can collect “such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track”).

Pole cameras are significantly limited in that they can only observe what an ordinary passerby can observe. See Jackson, 213 F.3d at 1280. To obtain the same amount of information as the police using a UAV are able to obtain, a passerby would have to follow someone around at close range for an extended period of time. See Jones, 565 U.S. at 425 (Alito, J., concurring) (suggesting long-term monitoring would trigger Fourth Amendment protections); id. at 430 (Alito, J., concurring) (“[S]ociety’s expectation has been that law enforcement agents and others would not—and . . . simply could not—secretly monitor and catalogue every single movement of an [individual] for a very long period.”). While it is physically possible, although extraordinarily unlikely, for a passerby to conduct the type of surveillance a UAV can, it is impossible for a pole camera to do so because it is immobile. See id. at 430 (Alito, J. concurring). In that respect, UAV surveillance is readily distinguishable from—and guarantees heightened constitutional protections compared to—pole camera surveillance. See id. (finding that pole camera surveillance does not violate Fourth Amendment). The stronger reading of Carpenter would therefore correctly balance the individual’s privacy interest against technology that has the capacity to follow their every move and determine the most intimate details about their life. Just like the CSLI data in Carpenter, warrantless UAV surveillance allows the police to invade individuals’ constitutionally recognized privacy. Carpenter, 138 S. Ct. at 2217. Thus, this Court should adopt such a reading and find that surveilling Black’s fenced-in backyard with a UAV was a search within the meaning of the Fourth Amendment.

#### 2. Spying on Black’s fenced-in backyard with a UAV constituted a search under the Fourth Amendment because the UAV is not in the general public use.

The use of UAV surveillance to spy on Black’s fenced-in backyard constituted a search within the meaning of the Fourth Amendment because this specific UAV—a “DJI Inspire 1” Quadcopter equipped with a Zenmuse X3 camera—is not in the general public use. At minimum, an individual maintains a reasonable expectation of privacy in their home. Kyllo, 533 U.S. at 34. Thus police conduct violates an individual’s reasonable expectation of privacy where “any information regarding the interior of the home that could not otherwise have been obtained without” a physical invasion is obtained. Id. This invasion of privacy therefore constitutes a search within the meaning of the Fourth Amendment. Id. This is particularly true where the technology used to obtain that information is either “not in general public use,” meaning it is not “routine.” Id.; see also id. at 39 n.6 (citing California v. Ciraolo, 476 U.S. 207, 215 (1986)).

Here, Black was entitled to rely on the base-level expectation of privacy he had in his fenced-in backyard. The information gathered by the UAV’s camera is information the Weathersfield Police Department would not have been able to obtain but for the UAV surveillance or a physical trespass onto his yard. See Kyllo, 533 U.S. at 34 (holding that police’s use of thermal imaging detector was a search within meaning of Fourth Amendment).

Further, this specific technology used by the Weathersfield Police Department was not in general public use. The retail price of the UAV model the police used to spy on Black’s backyard, with all the necessary specifications, was $2899. [R. 3]. The astronomically high price of the model used by the police in spying on Black paired with the fact that a buyer could purchase a different UAV model at a much lower price suggests that the specific UAV used by the police was not in the general public use. Further, UAVs of any kind were not routine near Black’s home. Compare Kyllo, 533 U.S. at 39 n.6 (finding expectation of privacy against thermal imaging because detector used by police was not “routine”), with Ciraolo, 476 U.S. at 215 (finding no expectation of privacy against overhead flight because “private and commercial flight in the public airways is routine”). Black’s neighbors’ reactions—fleeing from their backyards and fearing the UAV was spying on them—coupled with the trial court’s conclusion that use of UAVs is still far from routine demonstrates that the UAV model used by the police to surveil Black’s home was not in the general public use. See Kyllo, 533 U.S. at 39 n.6; [R. 4]. Because these UAVs were not in the general public use, the police’s use of the UAV constituted a search within the meaning of the Fourth Amendment.

#### 3. The factors enumerated in Florida v. Riley instruct that this UAV surveillance is unconstitutional under the Fourth Amendment.

Applying the factors enumerated in Florida v. Riley, 488 U.S. 445 (1989), the aerial surveillance of Black’s fenced-in backyard violated his Fourth Amendment rights. The Riley factors include: commonality of UAV surveillance, interference with the property, and whether the surveillance viewed intimate details of the home. Id. at 450-51; Pew v. Scopino, 904 F. Supp. 18, 26-28 (D. Me. 1995). Aerial surveillance interferes with a person’s property when they are unable to engage in a “normal use of [their] premises.” See United States v. Saltzman, No. 92-5389, 1993 U.S. App. LEXIS 7850, \*6-7 (6th Cir. Apr. 5, 1993). Aerial surveillance also interferes with a person’s property where it exposes intimate details of that person’s home or yard. Kyllo, 533 U.S. at 37 (“In the home . . . all details are intimate details, because the entire area is held safe from prying government eyes.”); see also United States v. Penny-Feeney, 773 F. Supp. 220, 227-28 (D. Haw. 1991) (explaining that, where “no intimate details connected with the use of the home or curtilage were observed,” aerial surveillance complied with Fourth Amendment).

Here, several of the enumerated Riley factors support a finding that Black had a reasonable expectation of privacy in his backyard. The neighbors’ fear and the trial court’s findings regarding the frequency of UAV surveillance both demonstrate that drone surveillance is not common in the area surrounding Black’s home. See Riley, 488 U.S. at 450-51; [R. 5]. Further, because his neighbors felt the need to run inside to avoid being spied on by the UAV, the UAV violated their ability to engage in “normal use of [their] premises.” See Saltzman, 1993 U.S. App. LEXIS 7850, at \*7. Finally, because Black had a reasonable expectation of privacy in his home and his backyard, enlisting the “prying government eyes”—flying the UAV only 30 feet above his yard—exposed the intimate details of his home. See Kyllo, 533 U.S. at 37.

### B. Flying a UAV over and hovering only thirty feet above Black’s backyard constituted a physical trespass and, thus, violated his Fourth Amendment rights.

This Court should reverse the trial court’s denial of Black’s motion to suppress because, by lowering the UAV to only thirty feet above Black’s backyard, the Weathersfield Police Department committed a trespass, which violated Black’s Fourth Amendment rights. A person’s home is “afforded the most stringent Fourth Amendment protections,” which also extend to the home’s curtilage. Oliver v. United States, 466 U.S. 170, 180 (1984) (citation omitted). Curtilage is defined as “the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” Id. (quoting Boyd v. United States, 116 U.S. 616, 630 (1886). This often includes backyards. Id.; see California v. Ciraolo, 476 U.S. 207, 213 (1986) (finding enclosed backyard “adjacent to suburban home” to be curtilage). The Government commits a search within the original meaning of the Fourth Amendment when it “engage[s] in [a] physical intrusion of a constitutionally protected area.” Knotts, 460 U.S. at 286 (Brennan, J., concurring).

The limited exception to this general principle is that, when police officers observe from where they have a right to be—such as a front yard or walkway—there is no search for purposes of the Fourth Amendment, even when they encroach upon an individual’s property. See Kentucky v. King, 563 U.S. 452, 469-70 (2011). But, this license is “limited not only to a particular area but also to a specific purpose.” Florida v. Jardines, 569 U.S. 1, 9, 11-12 (2013) (“[T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search.”). For example, a police officer may approach a home without violating the resident’s Fourth Amendment protections because all private citizens are permitted to do the same. King, 563 U.S. at 469-70 (permitting police to conduct knock-and-talk). When an officer’s conduct goes beyond the scope of that purpose, however, Fourth Amendment protections are triggered because the officer’s presence effectuates a trespass. See Jardines, 569 U.S. at 9, 11-12 (finding police’s bringing drug dog onto porch constituted search under Fourth Amendment); cf. King, 563 U.S. at 469-70.

Here, Black’s Fourth Amendment rights were clearly violated when the police caused the UAV to not only fly over his backyard, but lower down to only thirty feet above the ground when they could not otherwise see the marijuana plants. The government concedes that his backyard is considered his curtilage, meaning they concede that it is an area “where ‘privacy expectations are most heightened.’” Jardines, 569 U.S. at 7 (citing Ciraolo, 476 U.S. at 213); see Oliver, 466 U.S. at 180. The Weathersfield Police Department’s UAV here far exceeded the scope of any alleged license when, after realizing they could not see what they were searching for from 150 feet, officers lowered the UAV to an altitude of only thirty feet. See Jardines, 569 U.S. at 7-9 (finding trespassory invasion where officers went beyond what was “routine” by bringing drug dog for specific purpose of conducting search).

Thus, this Court should reverse the denial of Black’s motion to suppress the evidence obtained from the search pursuant to the warrant. The sheer breadth of information police could obtain from conducting surveillance with UAVs requires this Court to perform a “close analysis” and, in this case, requires recognition of the ability of these vehicles to collect a vast amount of information. Black had a reasonable expectation of privacy in his backyard, and, by using this Orwellian technology, the Weathersfield Police Department violated his Fourth Amendment rights. The use of UAVs such as the one used here was not sufficiently routine to rebut the reasonableness of this expectation. Additionally, the factors laid out in Riley require this Court to find this aerial surveillance unconstitutional as violative of Black’s Fourth Amendment rights. Lastly, the warrantless use of a UAV constituted a trespass upon Black’s backyard because the Weathersfield police department exceeded the scope of permission any private citizen would have.

## II. THE ALBERS SUPREME COURT INCORRECTLY AFFIRMED FIFTEEN-YEAR-OLD BLACK’S SEVENTY-YEAR-WITHOUT-PAROLE SENTENCE BECAUSE THE SENTENCE IS A DE FACTO LIFE SENTENCE IMPOSED ON A TRANSIENTLY IMMATURE JUVENILE IN VIOLATION OF THE EIGHTH AMENDMENT.

The Eighth Amendment protects any person from suffering from cruel and unusual punishment. U.S. Const. amend VIII. A punishment need not be barbaric or torturous to violate the Eighth Amendment; for example, sentences that are disproportionate to the crime offend the Eighth Amendment. See Graham v. Florida, 560 U.S. 48, 59 (2010) (“The concept of proportionality is central to the Eighth Amendment.”). Determining whether a sentence is disproportionate to the offense is an ever-changing inquiry, adapting to “the ‘evolving standards of decency that mark the progress of a maturing society.’” Graham, 560 U.S. at 58 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

In the past two decades, this exact evolution has occurred regarding juvenile sentencing. In 2005, this Court established that sentencing any juvenile offender to death violates the Eighth Amendment. Roper v. Simmons, 543 U.S. 551, 575 (2005). Five years later, it understood the Eighth Amendment to require a “meaningful opportunity to obtain release” for any juvenile, non-homicide offender sentenced to life without parole, regardless of whether the sentence is mandatory or discretionary. Graham, 560 U.S. at 75. Miller v. Alabama, 567 U.S. 460 (2012), relying on Roper and Graham, then struck down all mandatory life-without-parole juvenile sentencing regimes. Id. at 473 (explaining that “characteristics of youth . . . render a life-without-parole sentence disproportionate.”). This Court most recently sought to clarify the boundaries of juvenile sentencing in Montgomery v. Louisiana, 136 S. Ct. 723 (2016), where it held that a juvenile homicide offender may only be sentenced to life without parole where the crime does not reflect “transient immaturity,” but instead reflects some “rare . . . irreparable corruption.” Id. at 734.

Since Montgomery, many jurisdictions have properly understood that Graham and its progeny function as a categorical ban on “any sentence that denied a juvenile nonhomicide offender a realistic opportunity to obtain release” rather than a ban only on those sentences named “life-without-parole sentences.” E.g., Budder v. Addison, 851 F.3d 1047, 1057 (10th Cir. 2017). Several jurisdictions also have correctly understood Montgomery’s holding to apply to both mandatory and discretionary life-without-parole sentences for juveniles. E.g., Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018), cert. granted 139 S. Ct. 1317 (2019).

Whether the imposition of a discretionary lengthy-term-of-years-without-parole sentence violates a juvenile’s constitutional rights is a question of law. This Court reviews the question de novo. See Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 508 n.27 (1984).

The Albers Supreme Court incorrectly held that Black’s combined seventy-year-without-parole sentence was not a de facto life sentence and thus did not violate his Eighth Amendment rights. [R. 19]. In doing so, it unconstitutionally sentenced an abused child to spend, likely, the rest of his life in prison for a crime that reflects “transient immaturity” stemming from his “lack of control over [his] immediate surroundings” rather than irreparable corruption. See Montgomery, 136 S. Ct. at 734; Roper, 543 U.S. at 553. His sentence should be vacated.

### A. A term-of-years-without-parole sentence twenty-two years longer than Black’s life expectancy is a de facto life sentence in violation of his Eighth Amendment rights.

Black’s seventy-year-without-parole sentence—which is twenty-two years longer than his life expectancy—is a de facto life sentence in violation of his Eighth Amendment protections against cruel and unusual punishment. This Court has long recognized the existence of de facto life sentences. See Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (noting “negligible difference” between life-without-parole sentence and “a lengthy term sentence without eligibility for parole”). A lengthy term-of-years-without-parole sentence is a de facto life sentence when it has “the effect of mandating that a juvenile ‘die in prison even if a judge or jury would have thought that his youth and attendant characteristics . . . made a lesser sentence . . . more appropriate.’” Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014) (quoting Miller, 567 U.S. at 2460).

A life-without-parole sentence eliminates a convicted person’s chances of release. See Graham, 560 U.S. at 50. This means that “good behavior and character improvement are immaterial” because, regardless of what the person does in prison, “he will remain in prison for the rest of his days.” Id. at 70 (quoting Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989)). The harsh reality of life-without-parole sentences is exacerbated when applied to juveniles because, if sentenced to life without parole, a child will spend a significantly greater percentage of their life deprived of “the most basic liberties without . . . hope of restoration.” Id. Although departing in name from life-without-parole sentences, these realities still exist when a court sentences a juvenile to a lengthy term of years without parole that extends far beyond their expected lifespan. See Budder, 851 F.3d at 1056 (“The Court in Graham focused, not on the label attached to the sentence, but on the irrevocability of the punishment.”). A de facto life-without-parole sentence is therefore indistinguishable from a de jure life-without-parole sentence. See id.; McKinley v. Butler, 809 F.3d 908, 914 (7th Cir. 2016).

Black’s combined seventy-year-without-parole sentence is a de facto life sentence because, with near certainty, “he will remain in prison for the rest of his days.” Graham, 560 U.S. at 70 (quoting Naovarath, 779 P.3d at 944). As he suffers from diabetes, doctors predict Black’s life expectancy is sixty-three, meaning he would live only forty-eight years after sentencing. [R. 6]. His seventy-year-without-parole sentence extends twenty-two years beyond his life expectancy. This essentially guarantees he will die in prison, forever denied the most basic liberties, “even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.” Graham, 560 U.S. at 79. Because Black’s seventy-year-without-parole sentence shares, in effect if not in name, the qualities of a de jure life-without-parole sentence, it is a de facto life-without-parole sentence. See McKinley, 809 F.3d at 911 (recognizing existence of de facto life sentences). He should thus receive the same constitutional protections as if he were sentenced to a de jure life-without-parole sentence. See id. at 914 (noting that Miller’s “concern that courts should consider in sentencing that ‘children are different’ extends to . . . de facto life sentences”).

### B. Life-without-parole sentences for juveniles are facially unconstitutional whether imposed at the judge’s discretion or because of statutory mandate.

Life-without-parole sentences imposed on juveniles, whether statutorily mandated or given at the judge’s discretion, are facially unconstitutional because these sentences are always disproportionately severe compared to juveniles’ culpability. See Miller, 567 U.S. at 465 (declaring mandatory life-without-parole sentences imposed on juveniles facially unconstitutional under Eighth Amendment); McKinley, 809 F.3d 911 (explaining that Miller’s logic extends to discretionarily imposed life-without-parole sentences for juveniles). A sentence is facially unconstitutional when it “always operates unconstitutionally.” United States v. Jones, 480 F. App’x 969, 971 (11th Cir. 2012) (citations omitted); see also Miller, 567. U.S. at 465. It is an essential component of the Eighth Amendment that a defendant’s sentence be proportional “given all the circumstances in a particular case” because “punishment for crime should be graduated and proportioned to [the] offense.” Graham, 560 U.S. at 59 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). Thus, if a sentence is disproportionately harsh compared to the defendant’s characteristics and nature of the crime, it violates the Eighth Amendment. Id.

#### 1. The penological justifications for life-without-parole sentences are substantially diminished in the juvenile sentencing context.

Because the penological justifications for both mandatory and discretionary life-without-parole sentences are substantially diminished when applied to juveniles, the sentences violate the Eighth Amendment’s proportionality requirement. A sentence that lacks penological justification is a per se violation of the Eighth Amendment. Graham, 560 U.S. at 71. There are four penological justifications for punishment: retribution, deterrence, incapacitation, and rehabilitation. Id. (citing Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion)). A sentence is not justified as retributive unless it reflects society’s “condemnation of the crime.” Id. at 71. However, it also “must be directly related to the personal culpability of the criminal offender” to be justifiable. Id. (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)). Deterrence is only a valid justification for sentencing where the government demonstrates a given sentence will actually deter others from committing that crime. See id. at 72 (explaining that deterrence does not justify life-without-parole sentence because juveniles are not deterred by threat of punishment). To justify life-without-parole sentences for juveniles on incapacitation grounds, the court must determine the child is the “rare juvenile offender” who is “incorrigible,” meaning they “forever will be a danger to society.” Id. at 72-73 (quoting Roper, 543 U.S. at 573). Finally, rehabilitation cannot justify life-without-parole sentences. Id. at 74 (“life imprisonment without parole . . . forswears altogether the rehabilitative ideal.”).

None of the penological justifications for life-without-parole sentences is persuasive in the juvenile sentencing context whether imposed under a discretionary or mandatory sentencing regime. First, a retributive justification for imposing a life-without-parole sentence is substantially weaker as applied to juvenile sentencing because juveniles, by virtue of their youth, have lessened culpability. Roper, 543 U.S. at 571. Given that the retributive justification hinges on an offender’s culpability, the rationale behind the justification is diminished by the fact that juveniles’ characteristics make them less blameworthy. Montgomery, 136 S. Ct. at 733; Miller, 567 U.S. at 465. A deterrence justification is also significantly undermined in the context of juvenile sentencing because the likelihood a juvenile offender considers their potential for punishment before acting in a certain way is “virtually nonexistent.” Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) (plurality opinion); see also McKinley, 809 F.3d at 913-14. Finally, because “ordinary adolescent development diminishes the likelihood that a juvenile offender ‘forever will be a danger to society,’” life-without-parole sentences cannot be justified by a desire to incapacitate the child. See Montgomery, 136 S. Ct. at 733 (quoting Graham, 567 U.S. at 72). Because “incorrigibility is inconsistent with youth,” it should not be possible to conclude a child is so without hope for rehabilitation that he must be permanently removed from society. See Graham, 560 U.S. at 73 (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968)).

Although this Court historically divides its analysis regarding mandatory and discretionary sentencing regimes, the lack of penological justification for the imposition of life-without-parole sentences on juveniles persists whether imposed because of a mandatory sentencing regime or at a judge’s discretion. See Malvo, 893 F.3d 274 (holding that Miller may apply in any juvenile life-without-parole sentencing case); McKinley, 809 F.3d at 914 (noting that Miller “expresses great skepticism” about whether discretionary life-without-parole sentences are ever constitutional when imposed on juveniles). Because none of the penological justifications for sentencing can justify jailing a child for the rest of their life, life-without-parole sentences imposed on juveniles are facially unconstitutional.

#### 2. Unanimous, worldwide opposition to juvenile life-without-parole sentences is instructive in determining that juvenile life-without-parole sentences violate the Eighth Amendment.

Other countries’ laws are instructive in determining whether punishment is cruel and unusual. Roper, 543 U.S. at 575-76 (citations omitted); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002). The United Kingdom’s laws are of “particular relevance” because of “the historic ties between our countries and in light of the Eighth Amendment’s origins.” Roper, 543 U.S. at 577. Presently, the United States is the only country in the world that permits putting juveniles in prison for life. See Katie Rose Quandt, Why Does the U.S. Sentence Children to Life in Prison?, JSTOR Daily (Jan. 31, 2018), https://daily.jstor.org/u-s-sentence-children-life-prison/.

The worldwide, unanimous opposition—including the United Kingdom—to imposing life-without-parole sentences on juveniles demonstrates that society has matured into finding these sentences cruel and unusual. See Graham, 560 U.S. at 58. Considering the “evolving standards of decency that mark the progress of a maturing society,” it is clear that a fully evolved interpretation of the Eighth Amendment cannot tolerate sentencing juveniles to life without parole. See Estelle, 429 U.S. at 102. Life-without-parole sentences for juveniles are therefore violative of the Eighth Amendment because the worldwide consensus demonstrates that such sentences are cruel and unusual.

#### 3. Life-without-parole sentences for juveniles run afoul of this Court’s individualized sentencing requirement because the juveniles’ youth and its attendant characteristics make it impossible to determine their propensity to reoffend.

Because predicting whether a juvenile offender is likely to reoffend is incredibly unreliable, any sentence that requires a court presume such a propensity does not rely on the defendant’s individualized characteristics and is therefore violative of the Eighth Amendment. Before imposing a life-without-parole sentence on a juvenile, a court must always consider a defendant’s “youth and its attendant characteristics.” Miller, 567 U.S. at 461. These characteristics include the fact that there are important differences between juvenile and adult brains. Graham, 560 U.S. at 68 (citing psychologists’ studies confirming differences in juvenile and adult brains). This cognitive distinction results in an “underdeveloped sense of responsibility,” an enhanced vulnerability to negative influences, and underdeveloped characters. Roper, 543 U.S. at 569-70. Despite these underdevelopments, juveniles also maintain an enhanced capacity to change when compared to adults. Id. at 570. These characteristics taken together make it incredibly difficult to predict whether a given juvenile has the propensity to re-offend, meaning “juveniles cannot with reliability be classified among the worst offenders.” Id. at 569.

Notwithstanding the reality that it is nearly impossible to determine that a juvenile offender is permanently incorrigible, juveniles like Black are currently sentenced to the second most severe punishment in the American criminal justice system: life without parole. Graham, 560 U.S. at 69-70 (likening life-without-parole sentences to capital sentences). Allowing a sentencing judge to make unreliable assumptions about whether a juvenile offender is permanently incorrigible—and thus whether they should be placed in prison for the rest of their life—“runs afoul of [this Court’s] cases’ requirement of individualized sentencing” because it fails to give proper consideration to the child’s youth. Miller, 567 U.S. at 465. While the judge technically exercises his discretion in imposing these sentences, because the judge is always required to improperly rely on assumptions rather than individualized characteristics when sentencing the juvenile, discretionarily imposed life-without-parole sentences offend the Eighth Amendment just as mandatory ones do. See Miller, 567 U.S. at 465. Life-without-parole sentences for juveniles, whether imposed because of a statutory mandate or at the judge’s discretion, are therefore facially unconstitutional.

### C. Black’s discretionary de facto life-without-parole sentence is unconstitutional as applied to Black.

Even if this Court determines that life-without-parole sentences for juveniles are not facially unconstitutional, Black’s seventy-year-without-parole sentence is unconstitutional as applied to him, and thus it should be vacated. A juvenile cannot be sentenced to life without parole absent a finding that they are permanently incorrigible. See Montgomery, 136 S. Ct. at 735 (explaining that Miller banned life-without-parole sentences “for all but the rarest juvenile offenders”). Miller is best understood as creating both a substantive and a procedural rule. Id. at 732. Substantively, Miller mandates that “life without parole is an excessive sentence for children whose crimes reflect transient immaturity.” Id. at 735. Procedurally, it requires a sentencing hearing that metes out juveniles who are transiently immature from those rare juveniles that are permanently incorrigible by explicitly considering the defendant’s youth and its attendant characteristics. Id.

#### 1. Black’s seventy-year-without-parole sentence is unconstitutional because he is capable of rehabilitation and therefore not permanently incorrigible.

The evidence that Black presented at his sentencing hearing shows that, although he has developmental disorders likely stemming from the decade of abuse he suffered, he is capable of rehabilitation and thus is not permanently incorrigible. A juvenile can only be sentenced to life without parole if he is a rare, permanently incorrigible juvenile offender rather than a transiently immature one. Montgomery, 136 S. Ct. at 734. This means that the juvenile must be so uncommonly incapable of rehabilitation that “no matter how much time he spends in prison and regardless of the amount of therapeutic interventions,” he will remain incorrigible. Commonwealth v. Batts, 163 A.3d 410, 435 (Pa. 2017). Generally, juveniles’ actions are “less likely to be ‘evidence of irretrievabl[e] deprav[ity]’ than adults.” Miller, 567 U.S. at 461 (quoting Roper, 543 U.S. at 570). This fact speaks loudest where there is evidence the child is capable of rehabilitation. United States v. Briones, 929 F.3d 1057, 1064 (9th Cir. 2019) (“a juvenile defendant who is capable of change or rehabilitation is not permanently incorrigible”). The juvenile defendant’s familial background must also be considered in determining whether their actions reflect permanent incorrigibility. See Miller, 567 U.S. at 476, 478-79 (reversing juvenile defendant’s life-without-parole sentence after considering past abuse suffered).

At his sentencing hearing, Black presented evidence that he is capable of rehabilitation, meaning he is not permanently incorrigible. Briones, 929 F.3d at 1064. When Black’s background of abuse and neglect is considered in tandem with the evidence that he is capable of rehabilitation—as it must be—it is clear that his actions are symptomatic of the residual effects of years of abuse. See Miller, 567 U.S. at 478-79. Just five years before this incident, Black escaped from a broken home, dangerous parents, and a decade-long abuse cycle. [R. 6]. While this horrific childhood rendered Black developmentally and emotionally disturbed, because it is possible for him to recover, he is not irreparably incorrigible. Briones, 929 F.3d at 1064. Black’s life-without-parole sentence is therefore unconstitutional. Id. (“juvenile defendants who are not permanently incorrigible . . . are constitutionally ineligible for a sentence of life without parole.”).

#### 2. Black’s seventy-year-without-parole sentence is unconstitutional because Judge Fring did not find Black is permanently incorrigible.

A sentencing judge must hold a hearing where “‘youth and its attendant characteristics’ are considered as sentencing factors” before imposing a life-without-parole sentence on a juvenile. Montgomery, 136 S. Ct. at 735 (quoting Miller, 567 U.S. at 465). The goal of this hearing is to “give effect to Miller’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.” Id. at 734. Although Montgomery afforded states some “latitude regarding the procedure,” it is insufficient for the sentencing judge to merely consider a juvenile defendant’s age before sentencing him to life in prison. Montgomery, 136 S. Ct. at 734; see also Batts, 163 A.3d 410, 416 (requiring government prove juvenile is incapable of rehabilitation before imposing life-without-parole sentence). Because Miller’s substantive guarantee is that a juvenile will not be sentenced to life without parole without a finding of permanent incorrigibility, any procedure that does not require that finding does not satisfy Miller and Montgomery. See Malvo, 893 F.3d at 275 (noting that finding of incorrigibility is “now a prerequisite” to imposing life-without-parole sentence on juvenile).

Here, because Judge Fring failed to find that Black was permanently incorrigible, it was unconstitutional to impose a life-without-parole sentence on him. Montgomery, 136 S. Ct. at 735; Malvo, 893 F.3d at 275. Black’s hearing gave no effect to Miller’s promise that juveniles will not be sentenced to life without parole unless they are found to be permanently incorrigible. See Montgomery, 136 S. Ct. at 734. Judge Fring’s failure to make such a finding before sentencing Black to spend the rest of his life in jail therefore went far beyond the “latitude regarding the procedure” granted to states. See Malvo, 893 F.3d at 275. In fact, there is no evidence Judge Fring even followed Albers state procedure of sentencing juveniles according to the state’s statutory scheme. Albers Code Ann. § 921.1401; [R. 7]. Even if Judge Fring followed the Albers scheme, however, the procedure still does not satisfy the constitutional requirements for sentencing a juvenile to life without parole because the statute does not require a finding of permanent incorrigibility. See Malvo, 893 F.3d at 275 (requiring finding of permanent incorrigibility); Albers Code Ann. § 921.1401. Because Judge Fring failed to find that Black is permanently incorrigible, it cannot be said that he is, and thus sentencing him to life without parole was unconstitutional.

The Albers Supreme Court therefore improperly affirmed the imposition of a life-without-parole sentence on fifteen-year-old Black in violation of his Eighth Amendment protections against cruel and unusual punishment. His seventy-year-without-parole sentence extends twenty-two years beyond his expected life span, and thus it is a de facto life-without-parole sentence. Further, life-without-parole sentences imposed on juveniles, whether imposed at the judge’s discretion or because of a statutory mandate, are facially unconstitutional because they are always disproportionately severe given a juvenile’s youth and propensity to be rehabilitated. Finally, even if this Court believes life-without-parole sentences imposed on juveniles are not per se unconstitutional, Black’s sentence is unconstitutional as applied to him because it denied him both Miller’s substantive and procedural guarantees. His sentence should be vacated and his case should be remanded for resentencing in accordance with his Eighth Amendment protections.

# CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court REVERSE the denial of Petitioner’s motion to suppress evidence and VACATE his sentence and REMAND for resentencing.

Respectfully Submitted,

Walt Black

By his attorneys,

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Attorney 1

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Attorney 2

# APPENDIX A

Albers Code Ann. § 921.1401 (2014).

**921.1401 Sentence of life imprisonment for persons who are under the age of 18 years at the time of the offense; sentencing proceedings.**—

(1) Upon conviction or adjudication of guilt of murder which was committed by persons who are under the age of 18 at the time of the offense, the court shall conduct a separate sentencing hearing to determine if a term of imprisonment for life or a term of years equal to life imprisonment is an appropriate sentence.

(2) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant’s youth and attendant circumstances, including, but not limited to:

(a) The nature and circumstances of the offense committed by the defendant.

(b) The effect of the crime on the victim’s family and on the community.

(c) The defendant’s age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.

(d) The defendant’s background, including his or her family, home, and community environment.

(e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant’s participation in the offense.

(f) The extent of the defendant’s participation in the offense.

(g) The effect, if any, of familial pressure or peer pressure on the defendant’s actions.

(h) The nature and extent of the defendant’s prior criminal history.

(i) The effect, if any, of characteristics attributable to the defendant’s youth on the defendant’s judgment.

(j) The possibility of rehabilitating the defendant.

(3) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court may consider the following aggravating circumstances:

(a) Whether the defendant was previously convicted of a felony involving the use or threat of violence to the person;

(b) Whether the defendant knowingly created a great risk of death to more than one person;

(c) Whether the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration; A-2

(d) Whether the murder was especially heinous, atrocious, or cruel;

(e) Whether the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

(f) Whether the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

(g) Whether the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

(h) Whether the victim of the murder was a peace officer, or correctional employee of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.