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 THE RESPONDENT

**QUESTIONS PRESENTED**

1. Whether the Orange County Superior Court correctly denied appellant’s motion to suppress evidence obtained during aerial surveillance with a Quadcopter drone, because the surveillance did not constitute a search under the Fourth Amendment.
2. Whether the Orange County Superior Court appropriately sentenced Appellant to sixty years in prison without parole for the murder of a police officer, where the crime was extremely serious and the sentencing judge explicitly and carefully considered all mitigating factors presented, including Appellant’s youth and its attendant characteristics.

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Appellant Walt Black (“Appellant”) was charged with felony murder of a law enforcement officer as well as possession, manufacturing, and trafficking of marijuana. [R. 5] Because these crimes were extremely serious, the juvenile court agreed to waive jurisdiction and transfer the case to Orange County Superior Court. Id. On October 6, 2015, Appellant filed a pre-trial motion to suppress the marijuana plants found in his home and back yard, which Orange County Superior Court Judge Fring denied on November 12, 2015. Id. at 5-6. Judge Fring held that the Quadcopter surveillance was not a search subject to the Fourth Amendment, and thus did not require a warrant.

Appellant then entered a conditional plea of *nolo* contendere on all charges, and the case advanced to sentencing. Id. at 6. At the sentencing hearing in January of 2016, both Appellant and the prosecution submitted evidence of mitigating and aggravating circumstances regarding Appellant’s character and criminality. Id.; Albers Code Ann. 921.1404(3)(a)-(h). Appellant put forth evidence of his tumultuous upbringing and of his type 1 diabetes. [R. 6]. He also presented that he is below age developmentally and emotionally disturbed, and called a psychologist to testify that Appellant is anti-social. Id. The psychologist also opined that Appellant is capable of rehabilitation. Id. The prosecution then presented a long list of aggravating circumstances: that Appellant knowingly created a great risk of death to more than one person, that the murder was “especially heinous, atrocious, or cruel,” that Appellant committed murder for the purposes of avoiding arrest, and the considerable probability that Appellant would continue to commit criminal acts of violence in the future, constituting a continuing threat to society. Id.; Albers Code Ann. 921.1404(2)(b), (d)-(e), (g)-(h). The prosecution also included that the victim was an officer killed while performing her official duty. [R. 6].

Finally, Appellant also offered evidence about his life expectancy. Id. at 7. Based on the available data in 2015, a white male (Appellant is a white male) born in the year 2000 had a life expectancy of 74.7 years. Id. Those with type 1 diabetes, however, lost around eleven years of life expectancy, bringing Appellant’s life expectancy to about 63.7 years. Id.

Judge Fring carefully considered the various mitigating factors presented by Appellant, including the evidence regarding his difficult childhood. Id. Nevertheless, he ultimately decided that “the crime was too severe, the need to protect the public from potential future harm too paramount, and the need for just punishment too incontrovertible” and sentenced Appellant to sixty years in state prison without the possibility of parole for the murder conviction. Id. He also sentenced Appellant to ten years without the possibility of parole for the drug trafficking conviction, which will run consecutively with the murder conviction. Id. at 8.

Appellant appealed his trafficking conviction and murder sentence to the Albers Appeals Court, and then again to the Albers Supreme Court, where both appeals were denied. Id. He now appeals to this Court. Appellee sought a sentence of life without parole, while defense sought a sentence of only twenty-five years. Id. On February 8, 2016, Judge Fring sentenced Appellant to sixty years in Albers state prison without the possibility of parole for his homicide conviction, and an additional ten years for his marijuana conviction. Id. at 7-8. In his sentencing memorandum, Judge Fring found that “the crime was too severe, the need to protect the public from potential future harm too paramount, and the need for just punishment too incontrovertible” to sentence Appellant to only twenty-five years as the defense requested. Id. at 7. Judge Fring did not note whether Appellant’s crimes reflected permanent incorrigibility or transient immaturity, but did state that he “carefully considered” all of the evidence presented at the sentencing hearing, including all of the mitigating factors relating to Appellant’s youth and attendant circumstances. Id. Appellant filed a motion to set aside his sixty-year sentence for the homicide conviction. Id. at 8. The Superior Court denied this motion. Id.

Appellant timely appealed both his conviction for possession, distribution, and trafficking of marijuana, as well as his sentence for felony murder. Id. Appellant claimed that Orange County Superior Court erred in refusing to grant his motion to suppress the evidence obtained through the Quadcopter observation, and that Judge Fring erred in refusing to grant Appellant’s motion to set aside his felony murder sentence. Id. The Albers Appeals Court affirmed the superior court’s judgments. Id.

Appellant appealed both issues to the Albers Supreme Court, which also affirmed the lower court’s judgments. Id. at 11. Judge O’Brien on the Albers Supreme Court held that the Weathersfield Police Department’s Quadcopter surveillance did not constitute a search under the Fourth Amendment. Id. Judge O’Brien also held that Appellant’s sentence was not a *de facto* life sentence and that the Eighth Amendment generally does not prohibit a lengthy sentence without parole for a juvenile offender. Id. at 18-19. Thus, the Albers Supreme Court affirmed Appellant’s conviction and sentence. Id. at 20.

Appellant then petitioned for Writ of Certiorari to the Supreme Court of the United States, which this Court granted. Id. at 21.

**CONSTITUTIONAL PROVISIONS**

**U.S. Const. amend. IV****. Search and Arrest Warrants**

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. Const. amend. VIII****. Bails, Fines, and Punishments**

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

**STATUTORY PROVISIONS**

**Albers Code Ann. § 921.1401 (2014). 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 or 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 the 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:
3. The nature and circumstances of the offense committed by the defendant.
4. The effect of the crimes on the victim’s family and on the community.
5. The defendant’s age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
6. The defendant’s background, including his or her family, home, and community environment.
7. The effect, if any of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant’s judgment.
8. The possibility of rehabilitating the defendant.
9. 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:
10. Whether the defendant was previously convicted of a felony involving the use or threat of violence to the person;
11. Whether the defendant knowingly created a risk of death to more than one person;
12. Whether the person committed the murder for remuneration or the promise of remuneration or employed another to commit murder for remuneration or the promise of remuneration;
13. Whether the murder was especially heinous, atrocious, or cruel;
14. Whether the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
15. Whether the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
16. Whether the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
17. 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.

**STATEMENT OF THE FACTS**

Prior to his arrest for murder and drug trafficking, Appellant lived with his older brother in Weathersfield, Albers. [R. 2]. Both Appellant and his brother were members of the notorious neighborhood gang, the Cove Cohort, known for its violence, drug trafficking, and illegal gambling activities. Id. The brothers grew, packed, and distributed marijuana from their home as part of their gang responsibilities, and kept an unregistered handgun lying in their kitchen should the need to use it arise. Id.

On the morning of August 15, 2015, the Weathersfield Police Department (“WPD”) received an anonymous tip about the marijuana Appellant grew for distribution in his back yard. Id. WPD officers went to Appellant’s address to investigate, but because of a row of tall trees outside the fence, the officers were unable to observe the marijuana from the sidewalk. Id.

Later that day, three WPD officers deployed an unmanned aerial vehicle (also known as a “drone”) from a public parking lot near Appellant’s house to complete their investigation into the tip. Id. Reports indicate that drone flights are becoming more popular throughout the United States, including in Weathersfield where the Town Council noted in a report that the town has “some problems with teenagers flying recreational drones too close to residential properties.” Id. at 4. The trial court, too, noted that in 2016 over 181,000 hobbyists in the United States registered their personal drones with the Federal Aviation Administration. Id.

The drone model used by the WPD was a “DJI Inspire 1” Quadcopter (hereinafter “Quadcopter”), a publicly-available drone featuring an X3 camera without zoom capabilities. Id. at 2. The Quadcopter also transmitted a live video stream to a laptop connected to the WPD remote control. Id.

The officers directed the Quadcopter over Appellant’s property at an altitude of 150 feet, and then lowered it to 30 feet to get a better view of the drug garden in Appellant’s back yard, partially obscured by an oak tree’s branches at the higher altitude. Id. From the hover at 30 feet, the officers were able to positively identify the multiple marijuana plants Appellant was growing in his back yard. Id. Eight minutes after launching the drone, the WPD officers ended the Quadcopter surveillance. Id. They complied with Federal Aviation Administration UAV Guidelines at all times during the surveillance. Id. at 3 n.4.

The WPD used the live camera footage from the drone to obtain a search warrant for Appellant’s home, which they executed later that day. Id. at 4. Appellant was packing marijuana for sale in the kitchen when the police arrived, knocked on the door, and announced their presence. Id. at 5. Appellant did not answer the door, maintaining that he could not hear the officers knock and announce because of headphones he was wearing. Id. The officers then entered through the unlocked front door. Id.

When the police entered the kitchen, Appellant ran to grab his brother’s gun instead of putting his hands in the air and surrendering his contraband. Id. He fired at the group of officers, shooting and killing police officer Frankie Schrader, who was brand new to the police force. Id. He was then subdued by the remaining officers on the scene. Id. Appellant was thereafter charged with possession, manufacturing, and trafficking of marijuana, as well as felony murder of a law enforcement officer. Id.

**SUMMARY OF THE ARGUMENT**

This Court should affirm the trial court’s denial of both Appellant’s motion to suppress the evidence found as a result of the Quadcopter flight above his back yard, as well as his motion to vacate his sentence for murder of a police officer.

The Quadcopter’s surveillance of Appellant’s back yard does not constitute a search subject to the Fourth Amendment because it did not violate an objectively reasonable expectation of privacy. Even if Appellant has a subjective expectation of privacy in the contents of his back yard, so long as an officer makes aerial observations from where he legally has a right to be, that expectation of privacy is categorically unreasonable. Because the Quadcopter complied at all times with FAA regulations, did not view the intimate details of the home, and did not create undue noise, wind, dust, or threat of injury, its surveillance did not amount to the Court’s definition of a search under the Ciarolo precedent and Riley plurality. Due to the increasing popularity of drones in both Weathersfield and the United States, individuals could expect their back yards to be observed at any time by similar privately-owned drones flying at FAA-compliant altitudes. Further, the technology used in the Quadcopter merely enhanced the existing senses of the WPD officers, and the duration of the surveillance was not nearly long enough to violate any privacy of Appellant himself. Ultimately, the Fourth Amendment protects people, not places.

Additionally, the Quadcopter never hovered low enough to constitute a physical trespass of Appellant’s curtilage. For these reasons, the evidence obtained as a result of the Quadcopter surveillance was appropriately admitted, and the motion to suppress appropriately denied.

Furthermore, this Court should affirm the Appellant’s sentence of sixty years without parole because it does not violate the Eighth Amendment’s prohibition on cruel and unusual punishment.

A plain reading of Graham v. Florida indicates a prohibition on *de jure* life sentences for non-homicide juvenile offenders because such sentences provide “no meaningful opportunity for release” as is required by the Eighth Amendment. Appellant’s sentence is for a term of sixty years without parole levied upon a conviction for murder of a police officer, explicitly not the type of *de jure* “life sentence” prohibited by Graham. Further, this Court should not prohibit lengthy term-of-years sentences because such sentences are already rare and doing so would remove the penological flexibility that fact-finding courts should have in meting out punishments for the most serious crimes.

Even if this court were to rule that *de facto* life without parole sentences could violate Graham, this Court should affirm Appellant’s sentence because the sentencing judge fully considered Appellant’s youth and attendant circumstances, as required by Miller and Montgomery. Neither case requires a separate, formal fact-finding hearing, nor do they require the sentencing judge to specifically make specific statements about an offender’s incorrigibility. Instead, they require that the judge balance the enhanced mitigating factors related to the offender’s youth with the severity of the crime to determine a proportional sentence.

Murder of a police officer while evading arrest is exactly the type of heinous crime for which such a lengthy term-of-years sentence is proportionate. This sentence is exactly the type for which this Court has left room in its previous decisions, and meets the penological goals of criminal sentencing. Whether to categorically ban this type of sentence is therefore a question best left to the legislature, as it is not prohibited by the Eighth Amendment.

**ARGUMENT**

1. The Quadcopter flight above Appellant’s house does not constitute a search subject to the Fourth Amendment because it did not violate an objectively reasonable expectation of privacy, and does not amount to physical trespass on Appellant’s curtilage.

The Fourth Amendment to the United States Constitution protects the right of the people to be free from “unreasonable searches and seizures.” U.S. Const. amend. IV. Under the exclusionary rule, the Fourth Amendment requires evidence be inadmissible only when the evidence is “obtained by searches and seizures in violation of the Constitution.” Mapp v. Ohio, 367 U.S. 643, 655 (1961). The Supreme Court’s precedent throughout the years has shined light upon what exactly falls under the protection of the Fourth Amendment and thus the exclusionary rule—namely, what qualifies as a search, what is considered a reasonable search, and when a warranted search is required. See, e.g., Katz v. United States, 389 U.S. 347 (1967) (holding that government recording of defendant’s conversation in a phone booth constituted a search). In the pivotal Katz v. United States, the Supreme Court opined that “the Fourth Amendment protects people, not places.” Id. at 351. On the most basic level, the exclusionary rule does not require evidence be suppressed if it was not obtained through a “search.” See, Mapp, 367 at 655. Here, as the lower court found, the Quadcopter flight does not constitute a search because the surveillance (1) did not violate an objectively reasonable expectation of privacy, and (2) did not amount to a physical trespass of Appellant’s curtilage. See Katz, 389 U.S. at 347; United States v. Jones, 565 U.S. 400, 404 (2012). Although it was appropriate for the lower court to deny Appellant’s motion to suppress, this Court reviews this issue *de novo*. See Ornelas v. United States, 517 U.S. 690, 699 (1996). In doing so, this Court should review “findings of historical fact only for clear error and give due weight to inferences draw from those facts” drawn by the lower court. Id. Nonetheless, this Court should find just as the lower courts did, in holding that the denial of Appellant’s motion to suppress was appropriate given the circumstances.

* 1. The Quadcopter flight is not a search subject to the Fourth Amendment because there was no intrusion an expectation of privacy that society is prepared to recognize as reasonable.

Under precedent in Katz, the drove surveillance of Appellant’s back yard would only qualify as a search under the Fourth Amendment (1) if Appellant had a subjective expectation of privacy in the contents of his back yard, and (2) if that expectation is “one that society is prepared to recognize as ‘reasonable.’” Katz, 389 U.S. at 361. This follows the reasoning 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. Here, the government concedes that Appellant had a subjective expectation of privacy in his back yard. Thus, the question for this Court is whether Appellant’s expectation was one that society is prepared to recognize as reasonable. See id. at 361. The Supreme Court cases California v. Ciraolo and Florida v. Riley describe the combination of factors that explain why an expectation of privacy from overhead government surveillance is objectively unreasonable. 476 U.S. 207 (1986); 488 U.S. 445 (1989). Based on these factors, Appellant’s subjective expectation of privacy against overhead government surveillance was not objectively reasonable. Further, the technology utilized through the Quadcopter was not so novel as to render the surveillance a search. See United States v. Knotts, 460 U.S. 276 (1983); Kyllo v. United States, 533 U.S. 27 (2001). Finally, the eight-minute Quadcopter surveillance in this case was nowhere near a length of observation that would implicate Fourth Amendment protections. See, e.g., United States v. Jackson, 213 F.3d 1269, 1281 (10th Cir.), vacated on other grounds, 531 U.S. 1033 (2000). For these reasons, the denial of Appellant’s motion to suppress the evidence obtained through the surveillance was appropriate.

* + 1. Based on the combination of factors as established in Ciraolo and Riley, the Quadcopter flight in this case did not violate an objectively reasonable expectation of privacy.

Although the Fourth Amendment and the related precedent does prevent physical intrusion on the curtilage of someone’s home, it categorically does not prevent mere observation of the curtilage its visible contents. Specifically, the Fourth Amendment protections have “never been extended to require law enforcement officers to shield their eyes when passing by a home,” even if an individual has taken “measures to restrict some views of his activities.” Ciraolo, 476 U.S. at 213 (1986) (holding police flying private plane 10,000 ft. above back yard within navigable airspace to observe marijuana plants was not a search). So long as an officer makes observations from a “public vantage point where he has a right to be,” there can be no objectively reasonable expectation of privacy in what is clearly visible. Id. at 214 (“[R]espondent’s expectation that his garden was protected from such observation is unreasonable.”).

The Supreme Court later established additional factors that courts should consider when determining if helicopter surveillance constitutes a search. Riley, 488 U.S. at 452 (holding that helicopter flying 400 feet above property to observe plants with naked eye was not a search). Specifically, the Riley plurality opinion points to the helicopter’s compliance with FAA regulations, its altitude, its interference with property, the frequency of similar flights, whether the helicopter viewed the intimate details of the home, and whether the flight created undue noise, wind, dust, or threat of injury. Riley, 488 U.S. at 452. Because Riley was a plurality decisions, it is not binding on this Court, and this Court need not heavily weigh its factors. Even if this court decides to give weight to the Riley factors, the Quadcopter’s flight still does not constitute a search. Here, there is no question that the Quadcopter did not cause any undue noise, wind, dust, or threat of injury, and there is likewise no question that the Quadcopter was in full compliance with FAA regulations at all times. Thus, the only considerations for this Court are the frequency of similar flights at this altitude, and whether the Quadcopter observed the intimate details of the home.

* + - 1. The Quadcopter’s flight does not constitute a search under the Riley factors because drone or commercial aircraft flights are very common, and because its altitude was within FAA regulations.

The Supreme Court held in Ciraolo that “private and commercial flight in the public airways is always routine,” and as a result, it is unreasonable for an individual to expect the clearly visible contents of their back yard to be Constitutionally protection. 476 U.S. at 215. For that reason, the Fourth Amendment does not require the police traveling in navigable airspace to “obtain a warrant in order to observe what is visible to the naked eye.” Id. Although the Court has held that flights at 1,000 feet and 400 feet were not searches, it does not seem that altitude is a dispositive factor in the Court’s consideration—especially because the Court does not create a categorical level from which an aircraft can conduct surveillance without constituting a search. The Riley plurality opines that the Court “would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft.” 488 U.S. at 451 (1989). Justice O’Connor’s concurrence suggests that flights below 400 feet may violate reasonable expectations of privacy; however, if any part of Riley is most persuasive, it would be the plurality opinion.

The Quadcopter’s flight is not a search because similar flights are routine, and the altitude was in accordance with FAA regulations. Although Ciraolo and Riley discuss helicopters and airplanes, whereas this case involves a drone, the difference between them for this purpose is irrelevant. If a helicopter or airplane flight is undoubtedly routine, this would naturally extend to drone flights as well—nothing about the drone flight is more invasive than a large, noisy helicopter. Further, because the flight complied with FAA regulations at all times, its altitude is of no issue. See id. at 451. Just as the surveillance in Riley was not a search because “[a]ny member of the public could legally have been flying over Riley’s property . . . and could have observed Riley’s greenhouse,” the same is the case here. Id. at 451. Any member of the public could legally have been flying a Quadcopter-esque drone at this altitude and observed the marijuana. For that reason, the Quadcopter’s flight at such an altitude does not amount to a search under the Fourth Amendment.

* + - 1. The Quadcopter did not observe any intimate details of the home, and therefore its surveillance is not a search.

The helicopter surveillance in Riley was not a search because it did not observe any “intimate details connected with the use of the home or curtilage.” Id. at 452. In Riley, the defendant had taken precautions to surround their curtilage with a “wire fence” and a sign that read “DO NOT ENTER,” and the surveillance was still not a search. Id. at 448. Here, there were no such precautions taken to suggest that any “intimate” activities were happening in Appellant’s back yard. Further, the Court has held that “[t]he intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.” Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986). Although Appellant’s home was not a manufacturing plant, the principle remains the same—intimate activities of the home are not typically associated with an individual’s back yard. Although Appellant’s neighbors may have taken notice of the Quadcopter and were slightly unnerved by its presence, the Quadcopter did not observe any intimate details of their homes, either. Even so, this case is not concerned with the details of Appellant’s neighbors’ homes; because the Quadcopter’s surveillance could not observe any intimate details of Appellant’s home, it did not constitute a search.

* + 1. The technology used in the Quadcopter flight was not so novel as to render the surveillance a search because it is generally accessible by the public and merely enhanced the existing senses of the officers.

Although it depends what type of technology was used when deciding whether surveillance constitutes a search, the technology used here was not novel enough for the Quadcopter flight to be considered a search. Generally, surveillance conducted with a form of technology does not constitute a search so long as that technology merely “augment[s] the sensory faculties bestowed upon [the officer] at birth with such enhancements as science and technology afforded them.” Knotts, 460 U.S. at 282 (holding that a beeper placed in a can of chloroform did not constitute a search because it merely tracked what the officers could have seen with their naked eye, e.g. the defendant’s public movements). Further, surveillance is not a search when the government uses a device that is “in general public use” to “explore details of the home that would previously have been unknowable without physical intrusion.” Kyllo, 533 U.S. at 40 (finding that government using a thermal imaging device to surveil a home constituted a search). Many lower courts have applied the “general public use” requirement by considering whether such technology is “available to the general public.” United States v. Norman, 448 F. App'x 895, 897 (11th Cir. 2011); see also United States v. Whitaker, 820 F.3d 849, 853 (7th Cir. 2016). Thus, surveillance through technology is not a search under the Fourth Amendment if the technology (1) merely enhances the officer’s natural abilities, (2) is in general public use or is available to the general public and (3) is not used to explore intimate details of the home not observable otherwise.

In this case, the Quadcopter flight is not a search because it merely enhanced the officers’ ability of sight, drones are in general public use, and it was not used to explore intimate details of the home. Drones, especially recreational drones, are rapidly increasing in popularity. It is irrelevant that the Weathersfield Town Council and local news reports noted that drone flights were not routine in the town of Weathersfield or Orange County, because drones are used more widely in the United States as a whole, and because drones are available to the general public. Jonathan Vanian, Here’s How Many People Have Registered Their Drones, Fortune (Jan. 6, 2016), https://fortune.com/2016/01/06/federal-drone-registration-system/. At the time of the search, the cost of the same Quadcopter drone was approximately $2,899, and consumers could purchase other drones for much less. [R. 3]. Any member of the public could purchase the same Quadcopter and conduct the same surveillance of what Appellant makes publicly visible from above, thus rendering his expectation of privacy unreasonable. See Kyllo, 533 U.S. at 40; Norman, 448 F. App'x at 897; Whitaker, 820 F.3d at 853. Further, because the drone only moved closer to what the officers could already see with their naked eye, the technology merely enhanced their natural ability. See Knotts, 460 U.S. at 282.

Even though the officers were not physically viewing the marijuana from the drone, and instead through a live stream onto a laptop, the observation is still equivalent to what the officers could have seen with their naked eye, if, for example, they had used a manned helicopter instead of an unmanned drone. Although the officer’s sight of the marijuana plants were initially obstructed partially by the leaves of a tree, the evidence of illegal activity was still plainly visible around the obstruction. [R. 3]. Finally, unlike the thermal imaging technology in Kyllo, the Quadcopter did not observe any intimate details of the curtilage that individuals could typically only observable through physical intrusion. See Kyllo, 533 U.S. at 40. Because anyone in the general public could easily access a similar Quadcopter and fly it above Appellant’s house to view his back yard, the surveillance was not a search subject to the Fourth Amendment.

* + 1. The eight-minute government surveillance here did not capture the “whole” of Appellant’s movements, and thus did not violate an objectively reasonable expectation of privacy.

Although the Supreme Court has not established any categorical rules about the duration of surveillance, the application of its precedent suggests that surveillance is only a search when the defendant is exposed to surveillance for an extended period of time. The Tenth Circuit found that silent video cameras installed on telephone poles did not violate any reasonable expectation of privacy. Jackson, 213 F.3d at 1281. Although a District Court held that a six-week long video surveillance constituted a search, the court focused heavily on the duration of the surveillance. United States v. Vargas, No. CR-13-6025-EFS, 2014 U.S. Dist. LEXIS 184672, at \*27 (E.D. Wash. Dec. 15, 2014). The government’s surveillance here differs drastically from that in Vargas—only eight minutes here as opposed to six weeks. The surveillance here was much shorter than even that in Jackson, which still did not constitute a search. The Supreme Court later found that “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.” Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018). As the lower court here recognized, Carpenter dealt mostly with the third-party doctrine and CSLI, neither of which are at issue here. Even if this Court finds Carpenter relevant, however, it is still distinguished by the fact that Carpenter’s reasonable expectation of privacy was in the in the “whole of his physical movement” over an extended period of time. Id. at 2219. Here, the eight-minute surveillance was significantly less comprehensive, and did not observe any of Appellant’s physical movement. Given the short duration of the Quadcopter’s surveillance and the narrowness of its observations, it did not violate any objectively reasonable expectation of privacy.

* 1. The surveillance did not constitute a search because the flight of the Quadcopter was not low enough to constitute a physical trespass of the curtilage.

The Quadcopter’s surveillance also does not amount to a search under the Fourth Amendment because the drone did not fly low enough to constitute a physical trespass of Appellant’s curtilage. As the Supreme Court has established, “the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience.” Oliver v. United States, 466 U.S. 170, 182 (1984). The concept of physical trespass as constituting a search arises in Florida v. Jardines, in which the use of trained police dogs to investigate the home’s surroundings constituted a search because of the physical intrusion on the curtilage. 569 U.S. 1, 11–12 (2013). For lack of an established standard, the Court should find that a drone surveillance only constitutes a physical trespass when an intrusion is “so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it.” United States v. Causby, 328 U.S. 256, 265 (1946) (dealing with takings clause of the Fifth Amendment but addressing aircrafts flying above property to the point of trespass).

The Quadcopter’s surveillance here is not a search unless its flight subtracted from Appellant’s enjoyment of the property or blatantly crossed the boundaries of his curtilage. See id; Oliver, 466 U.S. at 182. Even when the Quadcopter lowered to thirty feet above Appellant’s back yard, it did not cross the clear boundary into the curtilage; undoubtedly the “activity of home life” does not extend thirty feet above one’s back yard, and there are no clear markings delineating such an absurd concept. Further, Jardines’s discussion of trespass is not applicable here, because that case dealt with an officer’s actual physical intrusion on the defendant’s curtilage. See Jardines, 569 U.S. at 11-12. Because the Quadcopter hovered at least thirty feet above the curtilage at all times, and because the Quadcopter was not accompanied with an actual human officer, such a physical intrusion did not occur. The Quadcopter surveillance never trespassed on Appellant’s curtilage and therefore did not amount to a search under the Fourth Amendment.

1. THE APPELLANT’S SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE IT DOES NOT CONSTITUTE A *DE JURE* LIFE SENTENCE, WAS RENDERED WITH FULL CONSIDERATION OF THE APPELLANT’S YOUTH, AND IS PROPORTIONATE TO THE CRIME COMMITTED

Whether a lengthy, term-of-years sentence precluding the possibility of parole violates a juvenile’s Eighth Amendment rights is a question of law. This Court reviews the lower court’s legal decisions *de novo.* Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 508 n.27.

The Eighth Amendment to the United States Constitution proscribes the use of “cruel and unusual punishments” against criminal defendants at the hands of the government. U.S. Const. amend. VIII. This restriction enshrines into law the general principle that punishment for any crime should be proportional to the severity of the crime itself. Atkins v. Virginia, 536 U.S. 304, 311 (2002). While determining whether a punishment is cruel and unusual requires a judgment that reflects the evolving moral standards of the time, this Court has long tethered this analysis not to the punishment’s inherent severity, but to its proportionality to the crime. See Graham v. Florida, 560 U.S. 48, 59 (2010) (citing Weems v. United States, 217 U.S. 349, 367 (1910)). Regarding juvenile offenders, this Court has issued several opinions establishing the parameters for reviewing criminal punishments’ adherence to the Eighth Amendment.

In Graham v. Florida, this Court held that the Eighth Amendment forbids sentencing juvenile, non-homicide offenders to life imprisonment without parole. 560 U.S. at 75. The Graham Court further held that, regardless of the mandatory or discretionary nature of the sentence, juvenile non-homicide offenders must receive a “meaningful opportunity to obtain release.” Id. This Court next forbid mandatory sentencing laws imposing life without parole for juvenile homicide offenders in Miller v. Alabama. 567 U.S. 460, 465 (2012). Finally, in Montgomery v. Louisiana, this Court affirmed that Miller’s holding mandated a procedural step in juvenile offender sentencing, at which the offender’s “youth and its attendant characteristics” are considered as sentencing factors to illuminate whether the offender’s crime was a reflection of “transient immaturity” or serious enough for life without parole to be a proportionate sentence. 136 S. Ct. 723, 734-35 (2016).

Notably, this Court has declined to prohibit consecutive, fixed-term sentences that would amount to the practical equivalent of life without parole, even for juveniles with multiple non-homicide offenses. See Bunch v. Smith, 685 F.3d 546, 553 (6th Cir. 2012). There is no prohibition on *de facto* life sentence without parole, and this case should not create one. Further, Judge Fring of the Orange County Superior Court complied with the mandates of Miller and Montgomery as he considered an appropriate punishment for the Appellant’s murder of a police officer. Such a crime is exactly the type of offense this Court left room for when it repeatedly declined to extend its rulings in Graham, Miller, and Montgomery to prohibit discretionary life without parole sentences for juvenile homicide offenders. Accordingly, this Court should affirm the Albers Supreme Court and deny Appellant’s motion to vacate his sentence.

* 1. The Appellant’s discretionary sentence does not constitute a *de jure* life sentence in violation of Graham and Miller.

Appellant’s sentence of sixty years imprisonment for murder without the possibility of parole does not constitute a “life sentence” in violation of Graham and Miller. In Graham, this Court established a bright-line rule that the Eighth Amendment prohibits life without parole sentences for juvenile non-homicide offenders. 560 U.S. at 75. This Court extended this rule to also prohibit life sentences without parole for juvenile homicide offenders where such sentences are part of mandatory sentencing schema. Miller, 567 U.S. at 465. Notably, the Miller Court did not hold that term-of-years sentences exceeding or matching a juvenile’s life expectancy, or *de facto* life sentences, were unconstitutional. Id. at 124 (Alito, J., dissenting). Circuit courts have since split in their application of Graham’s bright-line rule to these lengthy term-of-years sentences. Compare Bunch, 685 F.3d at 551 (holding that a plain reading of Graham does not prohibit consecutive term-of-years sentences without parole because it explicitly forbids only “the imposition of a life without parole sentence”) and United States v. Jefferson, 816 F.3d 1016, 1019 (8th Cir. 2016) (upholding a 600 month sentence for a juvenile homicide offender) with Moore v. Biter, 725 F.3d 1184, 1194 (9th Cir. 2013) (holding a 200-year sentence unconstitutional because it precluded the meaningful opportunity for release) and Budder v. Addison, 851 F.3d 1047, 1057 (10th Cir. 2017) (holding *de facto* life sentences violate Graham because they fail to provide juvenile offenders with meaningful opportunities for release).

* + 1. Extending the Graham rule to *de facto* life without parole sentences would be unworkable.

The Eighth Amendment prohibits the imposition of life without parole for juvenile non-homicide offenders because such offenders must receive a “meaningful opportunity to obtain release.” Graham, 560 U.S. at 75. Embodied in the Eighth Amendment’s ban on cruel and unusual punishment, at the same time, is the “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” Weems, 217 U.S. at 367 (1910). *De facto* life sentences without parole bring these two propositions into conflict.

While a lengthy term-of-years sentence exceeding an offender’s life expectancy may deprive him or her of a meaningful opportunity for release, a prohibition on such sentences risks divorcing the sentencing process from its stated objective, proportionality to the crime committed, by retraining its focus onto specific characteristics of the offender in question. Here, for example, Appellant challenges his term-of-years sentence as a *de facto* life sentence in violation of the spirit of Graham in part on the basis of his reduced life expectancy due to type-1 diabetes. In theory, had his sentence been for forty-five years instead of sixty, Graham’s rule would not have been implicated. Suppose Appellant had a juvenile accomplice without diabetes; would it have been consistent with the principles of justice and proportionality in sentencing to have sentenced that accomplice to sixty years, but Appellant to only forty-five for the same crime because of his illness? Should an offender with several homicide convictions be sentenced to only one year in prison where he is diagnosed with a serious illness cutting his life expectancy before sentencing? Individual characteristics that have no bearing on questions of culpability, rehabilitation, or deterrence should not play such a large role in sentencing considerations. Extending the Graham rule to term-of-year sentences would unjustly elevate such characteristics in sentencing and undermine the ability of fact-finding courts to mete out proportionate and fair punishments. This Court should therefore decline to extend Graham’s rule to lengthy term-of-years sentences.

* + 1. Even if Graham does extend to *de facto* life sentences, Appellant’s sentence does not violate Miller.

Even if this Court held *de facto* life without parole sentences to violate Graham, Miller extends Graham’s rule against life without parole to homicide offenders only when the sentence is the product of a mandatory sentencing schema. 567 U.S. at 465. Some courts, including the Fourth Circuit, that decline to rule on the issue of Graham’s applicability to *de facto* life without parole sentences have upheld those sentences for juvenile homicide offenders anyway because they were made under a judge’s discretion. See e.g., Contreras v. Davis, 716 F. App’x 160 (4th Cir. 2017).

Here, Appellant has been convicted of a homicide offense – murder of a police officer – and sentenced to sixty years without parole. In view of Appellant’s diabetes diagnosis, this sentence is expected to exceed Appellant’s life expectancy by just over eleven years, making it a *de facto* life sentence without parole. The Sixth and Eighth Circuits correctly distinguish between *de jure* life sentences without parole and *de facto* life sentences without parole because the Graham rule is directly inapplicable to juvenile homicide offenders, and therefore to the case before us. While it is indeed true that Graham explicitly prohibits only the specific sentence of “life without parole,” even more important here is the nature of the sentence levied. Judge Fring sentenced Appellant to sixty years for a homicide using a discretionary schema as provided by statute. Therefore, neither Graham nor Miller govern Appellant’s sentence.

* 1. The trial judge rendered Appellant’s sentence with full consideration of the Appellant’s youth and its attendant characteristics.

In his sentencing deliberations, Judge Fring of the Orange County Superior Court carefully and deliberately considered the mitigating weight of Appellant’s youth and its attendant characteristics, thereby satisfying the procedural requirements of Miller and Montgomery. A juvenile convicted of a homicide offense may not be sentenced to life without parole absent consideration of the juvenile’s “special circumstances in light of the principles and purposes of juvenile sentencing.” Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016). Juvenile offenders are to be considered “constitutionally different from adults” for sentencing purposes. Roper v. Simmons, 543 U.S. 551, 569 (2005). These constitutional differences reflect juveniles’ “diminished culpability and greater prospects for reform.” Miller, 567 U.S. at 471. They also diminish traditional penological considerations of deterrence and retribution to a degree. Id. at 472. In order to ensure that juvenile sentences reflect the Eighth Amendment prerogative of proportional punishment, sentencing judges must “take into account how children are different, and how those differences counsel against” unduly harsh punishments for juvenile offenders. Montgomery, 136 S. Ct. at 733. Ultimately, the judge’s formal consideration must take into account more than just the offender’s youth, but also the “distinctive characteristics of youth” that generally diminish the weight of an offender’s culpability. Id. One of these distinctive characteristics of youth is a juvenile’s “underdeveloped sense of responsibility” and its attendant lack of ability to “extricate themselves from horrific, crime-producing settings.” Miller, 567 U.S. at 471. Mandatory sentences of life without parole, even for juvenile homicide offenders, are therefore unconstitutional and only those discretionary sentences meeting these aforementioned standards of deliberation are permitted by the Eighth Amendment. Id. Judges may still sentence juveniles to life without parole, however, where their homicide convictions “reflect permanent incorrigibility.” Id. at 734. Deliberation prior to such a sentence need not include a separate fact-finding hearing. Id. at 735.

Here, Judge Fring wrote a ten-page memorandum describing his careful consideration of all the mitigating evidence presented by Appellant. He mentioned specifically his focus on “all mitigating factors relating to distinct features of the defendant’s youth, especially his difficult childhood.” Mitigating evidence that Appellant introduced during sentencing proceedings included Appellant’s parents’ acrimonious divorce, his premature cohabitation with his adult brother, his history of physical abuse, his delayed developmental status, his emotional disturbances, and his anti-social personality. These items of evidence are particularly relevant to an evaluation of Appellant’s underdeveloped sense of responsibility and attendant inability to extricate himself from crime-producing environments, one of the key considerations cited in Miller as essential to a constitutional sentencing process for a juvenile. See Miller, 567 U.S. at 471.

Judge Fring heard all of the mitigating evidence as well as the evidence of the crime itself personally. His deliberations were so meticulous that they produced a ten-page memorandum describing his process of evaluating an appropriate sentence for Appellant. Though his memorandum did not use the word “incorrigibility,” Judge Fring did comply with the requirements of Miller and Montgomery in the type of evidence he considered and the amount of time and attention he put into his deliberations. Further, Judge Fring appeals to the very penological justifications that Miller and Montgomery cite as diminished by juvenile characteristics. He states head-on that the probative mitigating evidence simply didn’t weigh heavily enough to shorten Appellant’s sentence in light of the extreme severity of his crime and his determination that Appellant *was* incorrigible, as least enough such that “the need to protect the public from future harm” was “too paramount” to justify a shorter sentence. Just because Judge Fring issued the type of sentence meant to be rare, doesn’t mean the process by which he issued it was illegitimate.

* 1. The Appellant’s sentence is proportionate to the crime committed and reflects the Appellants Intransigence.

Murder of a police officer is a crime serious enough for a life without parole sentence, and certainly a lengthy term-of-years sentence, under the foundational reasoning of Roper and Graham. The Graham Court drew an explicit line between homicide and non-homicide juvenile offenders, noting the moral depravity, injury to the person and to the public, and the irrevocability of homicide offenses. Id. at 69 (citing Kennedy v. Louisiana, 544 U.S. 407, 437 (2008)). Previously, in Roper v. Simmons, this Court itself suggested life without the possibility of parole as a severe but appropriate sentence for the most serious juvenile crimes. 543 U.S. at 572. This Court has long buttressed this position, recognizing that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. Graham, 560 U.S. at 69; Kennedy v. Louisiana, 544 U.S. 407, 433 (2008); Tison v. Arizona, 481 U.S. 137, 154 (1987); Enmund v. Florida, 458 U.S. 782, 797 (1982); Coker v. Georgia, 433 U.S. 584, 598 (1977). There is a legal and moral line between homicide and other serious violent crimes. Kennedy, 544 U.S. at 438. Serious nonhomicide crimes “may be devastating in their harm…but in terms of moral depravity and of the injury to the person and to the public…they cannot be compared to murder in their ‘severity and irrevocability.’” Id. (quoting Coker, 433 U.S. at 598. The line exists because life ends for the victim of a murder, but the victim of other serious non-homicide crimes has a life that is “normally not beyond repair.” Id. Violent non-homicide crimes like robbery, assault, or rape are serious crimes deserving serious punishment, but differ from homicide in a moral sense. Enmund, 458 U.S. at 797.

* + 1. Homicide of a police officer is exactly the type of crime to warrant life without parole

Appellant, here, committed felony murder of a police officer while trying to escape arrest, a crime of the highest level of severity. Though this Court conducts an appellate review and not every fact made available at trial is before the Court here, aspects of intentionality can be inferred from the facts in the record. Appellant was packing drugs for sale when the police arrived at his house. He kept a gun in plain view in his kitchen while he did so, and reached for it when the police arrived. He then shot at them repeatedly instead of surrendering, his reflexive indifference to human life on display. While Graham prohibited issuing the law’s most severe penalty on non-homicide juvenile offenders, its language regarding the moral and legal line between murder and other violent offenses suggests that murder’s moral weight at least allows life without parole as an appropriate punishment. Officer Schrader will never get her life back, never complete a career, and never see her family or loved ones again. The Appellant does not suffer the same predicament, and even a life without parole sentence allows him the chance to repair his life within prison that he denied his victim. Parsing between different types of murder and delineating significance to infinitely complex moral situations involving multiple murder victims and methods of killing as a matter of law is not something this Court should engage in, if only to avoid the inevitable legal Quagmire that would result.

* + 1. Appellant’s sentence serves the penological goals for punishment envisioned by this Court

Retribution is a legally and morally legitimate reason to punish. Graham, 560 U.S. at 71. Society is entitled to impose severe punishments upon juvenile offenders to express its condemnation of the crime and “to seek restoration of the moral imbalance caused by the offense.” Id.

Here, a life without parole sentence fails to “restore the moral imbalance,” at least in a metaphysical sense, caused by Appellant’s actions. Officer Schrader will never get her life back. It is, however, the closest retributive tool available to society to address the kind of crimes for which Appellant was convicted.

Overall, this Court should affirm the trial court’s denial of both Appellant’s motion to suppress the evidence obtained as a result of the Quadcopter surveillance, and his motion to vacate his sixty-year sentence for felony murder.

**CONCLUSION**

For the foregoing reasons, Respondent respectfully requests that this Court AFFIRM the judgment of the Albers Supreme Court.

Respectfully Submitted,

State of Albers

By its attorneys

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Attorney 1

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