A Note to the AMCA Community

I am pleased to present the case problem for the 2024-25 season. I think it raises interesting, timely, and challenging issues for our student competitors.

This moot court case involves a hypothetical death by suicide. The case is fictitious and details regarding the death by suicide are not included. AMCA is cognizant that the underlying fact pattern may also contain triggers for the members of our community. With that in mind, the cover page to the case problem provides information and contact numbers for those who would like to receive help. I encourage coaches and member schools to provide additional contact information regarding their school's resources for these kinds of issues to their student competitors.

If you or someone you know is struggling or in crisis, help is available 24/7. Please call the Suicide and Crisis Lifeline at 988 or chat 988lifeline.org, or contact the Crisis Text Line by texting TALK to 741741.

I look forward to the upcoming season.

The American Moot Court Association

Mike Walsh, President

May 1, 2024

IN THE SUPREME COURT OF THE UNITED STATES

No. 2024–2025

William DeNolf, Petitioner

vs.

State of Olympus, Respondent

On Writ of Certiorari to the Supreme Court of the State of Olympus

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ORDER OF THE COURT ON SUBMISSION

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

1 Whether the accessing of Petitioner's phone violates his Fifth Amendment rights under the United States Constitution.

2 Whether Petitioner's conviction for involuntary manslaughter based on remarks he made to the deceased, Bobbi Bronner, violates the First Amendment to the United States Constitution.

A violation of the Fourth Amendment is not a certified question and thus is not properly before this Court. Advocates are not to argue Fourth Amendment issues.

SUPREME COURT OF THE STATE OF OLYMPUS
No. 01–42176

WILLIAM DENOLF, DEFENDANT-APPELLANT

vs.

STATE OF OLYMPUS, APPELLEE

On direct appeal from the Superior Court of Olympus

Before Huh, Chief Justice, and Associate Justices Beyer, Beyer, Clarke, Gagloeva, Shipe, and Sidebottom.

ORDER

OPINION BY Associate Justice Andy Beyer with Chief Justice Calvin Huh, and Associate Justices Emma Shipe and Liam Sidebottom, concurring:

In this appeal, the State of Olympus as appellee must defend against as-applied challenges under both the First and Fifth Amendments to the United States Constitution. Specifically, Appellant William DeNolf, (hereinafter "DeNolf") appeals his conviction of involuntary manslaughter. DeNolf contends that the Superior Court erred in denying his motion to suppress evidence before trial in violation of the Fifth Amendment. He also appeals the conviction because it violates his First Amendment right to free speech. All of his claims arise under the Constitution of the United States; no claims were brought under the Olympus State Constitution or any Olympus law.[1] We review all questions *de novo.*

Olympus State Superior Court Judge D.R. Fair determined that officers accessed DeNolf's cellular phone through facial recognition and not through DeNolf's words or thoughts, and therefore denied DeNolf's motion to suppress the evidence from that phone. The evidence gathered from DeNolf's phone was admitted into evidence at trial. Judge Fair also ruled against DeNolf with respect to the First Amendment claim that he tendered.

A jury returned a guilty verdict on the charge of involuntary manslaughter. Judge D.R. Fair sentenced DeNolf to five years in an Olympus state correctional facility. DeNolf filed a timely appeal to this Court on the grounds that his First and Fifth Amendment rights were violated. We now examine his claims in turn.

For the reasons below, the judgment of the Superior Court is **AFFIRMED**.

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

BACKGROUND

This case presents only constitutional questions; there are no jurisdiction, standing, or other procedural issues, nor are there issues of statutory interpretation. In addition, because the Appellant has raised no challenge to the facts adduced at trial or the suppression hearing, any such arguments are now waived, and we treat the below facts as conclusively established for purposes of this appeal. Issues not raised in this opinion are not properly before this Court.[2]

A Olympus Public Law 417

This is an unusual case in many regards. For starters, the Appellant faces manslaughter charges rather than charges of assisting in or encouraging another to commit suicide. This is the charge because Olympus, while it does not have a specific statute that prohibits either the act of suicide or assisting in or encouraging suicide, does have a statute proscribing involuntary manslaughter. [3] Under this statute, Olympus Public Law 417, involuntary manslaughter is defined as causing the death of an individual unintentionally "by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct." See Appendix I. Wanton or reckless conduct may be established "by either the commission of an intentional act or an omission where there is a duty to act." The elements of involuntary manslaughter based on an intentional act are: (1) The defendant caused the victim's death; (2) the defendant intended the conduct that caused the victim's death; and (3) the defendant's conduct constituted disregard for probable harmful consequences to another. When arguing for an involuntary manslaughter conviction, prosecutors must first prove "proximate cause," which the statute defines as "a cause which in the natural and continuous sequence produces the death and without which the death would not have occurred."

B Controversy

On May 20, 2021, a 20-year-old Olympus State University (OSU) student, Bobbi Bronner, was found deceased. The manner of death was determined to be suicide. Ms. Bronner had been under the care of a state-licensed therapist and a psychologist. She was diagnosed with depression in 2016, following a previous suicide attempt while she was in high school.

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[2] This is a closed record; this includes the case law and the facts. The two sides have stipulated to these facts. The omission of a fact is not the grounds for an argument or conclusion. Thus, arguments by inferences should not be made. For example, while the record does not state that the law has a sunset clause, that does not mean that it lacks such a clause. To state that such a clause is / is not present is to assume facts not in the record. In addition, a violation of the Fourth Amendment is not a certified question and thus is not properly before this Court.

[3] This is not to say that suicide is not a significant concern for the state. Nationally, suicide is the second leading cause of death in the 10-34 age group (CDC, 2022). The U.S. death rate by suicide for individuals aged 15-24 was 14.5 per 100,000 in 2022 (CDC). That is an increase from 10.2 per 100,000 in 2000. These numbers mirror closely the rates found in Olympus. Further, suicide has been on the rise in the last ten years. Breaking down the death rate figures further, in the 15-19 age group, the rate has increased from 8 per 100,000 in 2000 to 11.7 per 100,000 in 2017. In the 20-24 age group, the increase has been from 12.5 per 100,000 to 17.0 per 100,000 from 2000 to 2022.

Additionally, a long-standing and widely reported number is that upwards of 90% of individuals who die by suicide have a diagnosable mental illness at the time of their death based upon psychological autopsy studies of individuals who have died by suicide. Thus, the state interest in protecting those with a mental illness is quite strong.

Before her death, Ms. Bronner was in a romantic relationship with a fellow Olympus State University student, William DeNolf. Mr. DeNolf was a twenty-one-year-old native of southern Olympus and was a year behind Ms. Bronner in school. During the course of their investigation into Ms. Bronner's death, police learned that DeNolf had often engaged in verbal and emotional abuse of Ms. Bronner. The police also learned from witnesses that DeNolf and Bronner frequently messaged each other using their phones. The witnesses did not know the messaging technology platform that they used. DeNolf was described by witnesses as "very controlling" throughout his relationship with Bronner. For example, he insisted on knowing Bronner's whereabouts at all times and frequently used his phone to track Bronner's location. In fact, he admitted to police that he did so on the morning of Bronner's suicide and was present at the time of her death.

One of the primary means of communication between DeNolf and Bronner was via chat on their smart phones. The two exchanged over 47,000 messages on a smartphone chat and photo sharing application called "ChatApp" in the two months leading up to Bronner's death. "ChatApp" is only accessible through phone devices that contain the "ChatApp" application. Bronner used an old *Huahei* phone with no biometrics. DeNolf used an *X-Phone* with biometric capabilities.

The undisputed evidence at trial established that DeNolf suggested and/or urged Bronner to kill herself in his "ChatApp" communication many times. Many of the messages display a power dynamic in the relationship whereby DeNolf made demands and Bronner would mostly comply with those demands. There was no evidence of any physical abuse. Friends and other witnesses reported never seeing DeNolf physically harm Bronner. Rather, any abuse directed at Bronner by DeNolf was verbal and psychological.

DeNolf's "ChatApp" communications included repeated abusive remarks for Bronner to "go kill yourself" or to "go die" as well as statements that DeNolf and her family and the world "would be better off without her." DeNolf stated at trial that he "was merely helping Bronner to visualize her own death" and "thereby not take her life." DeNolf claimed there was no criminal intent in the "ChatApp" communications.[4]

The communications that led to DeNolf's conviction were documented extensively and exclusively in "ChatApp" messages between Bronner and DeNolf. While other discussions occurred, (e.g., email, text, phone conversations, etc.), the authorities discovered no other message or written communications outside the app that contained these encouragements to commit suicide. Like "Snapchat," the "ChatApp" messages self-erase unless a user keeps his/her application open and running. Bronner had turned off her application, thus erasing all messages on her side of the communications. Once deleted, there is no way to recover communications from Bronner's device. However, Bronner's device did leave behind a count of the number of messages between Bronner and DeNolf (and others). Ironically, DeNolf never turned his application off, and thus kept the 47,000 messages that were only accessible from DeNolf's phone.

Less than four years after the release of Touch ID, Melon Husk, the inventor of the X-phone, released the next generation of phones. The X-Phone contains the latest of biometric technology, Face ID. Face ID involves the use of facial recognition software. Face ID's advanced technology

[4] For examples of these communications introduced into trial, including one sent on the day of Bronner's death, see Appendix II. These texts were chosen as representative samples of the hundreds of messages exchanged.

maps the geometry of an individual's face and then allows the individual to unlock the device with a glance at the front camera. Face ID can register when a user wants to unlock their device and adapts to changes in appearance. Face ID can also register when users do not intend to unlock their phones, as is what happened in the immediate case.

Husk advertises that Touch ID and Face ID utilize "some of the most sophisticated technologies to ensure that customers' devices are protected from the security risks that accompany this technology, such as false matches and fraud." One protective measure for users utilizing Touch ID or Face ID is that the phone is set up with a passcode. The passcode must be entered to unlock the device under certain circumstances such as when the device hasn't been unlocked for more than 48 hours or when the device restarts. It is also required when there are multiple failed attempts to unlock the device with fingerprint or facial recognition software.

The two sides stipulate that Husk's claim that X-phone is not hackable and is not subject to "mail break" or otherwise accessible other than by password or biometrics is in fact true. This security feature is the main reason that DeNolf purchased the X-phone.

The day after Bronner's death, Olympus detectives Lydia Palmer and Mason Peragine proceeded to DeNolf's dorm room. Standing in the hallway outside the room, they encountered Andrea Sommerville, a junior at Olympus State, who introduced herself as "DeNolf's girlfriend." Sommerville, who was carrying a laundry basket and a package of detergent, was entering the room with her key. Sommerville, who did not know about the suicide of Bronner, told detectives that DeNolf was asleep on a couch in the dorm lounge. Numerous students make daily use of this common area which has no restrictions on access. The detectives found DeNolf asleep in the dorm lounge. Beside him on a coffee table in the public area was a phone. The phone had a custom cover emblazoned with "Visualize Death!!" wrapped around a wizard's hat. This design was identical to one that DeNolf had tattooed on his left forearm.

The phone also had message stickers attached to the back that were readily apparent to the detectives. These messages said, "Keep out," "Private," and "No Trespassing."

Checking to see if the phone was DeNolf's, the detectives put the phone to DeNolf's face while he slept. As soon as the phone's camera scanned DeNolf's face, the biometrics of the phone opened it to the "ChatApp" application, revealing many messages encouraging Bronner to kill herself. Scrolling through the messages, they found thousands of messages encouraging suicide.

DeNolf was never awake during any of these proceedings. DeNolf spoke no words to detectives and neither denied access nor consented to access to his phone.

It is undisputed that the phone could be switched to the use of number and letter passcode as opposed to biometrics to open the device. DeNolf chose biometrics. DeNolf did this when he first set up his phone. It is also undisputed that to use the biometric facial recognition software, DeNolf had to input his password and activate the biometrics. DeNolf disputes the actions of the police to use his likeness as a means to open the phone as violative of his Fifth Amendment rights. Both sides stipulated that there was no other way to enter the cell phone other than by password from DeNolf or the use of biometrics. Not long after this search, DeNolf was arrested and, on the orders of the District Attorney Harmon Gill, charged with manslaughter.

C. Application of Fifth Amendment Case Law

The question presented is whether the Fifth Amendment privilege against compelled self-incrimination bars the government from forcing an individual to decrypt data on their smartphone. Petitioner argues that the compelled use of decryption of his cell phone violates the Fifth Amendment's guarantee of the right against self-incrimination. We reject this argument and find that Mr. DeNolf's Fifth Amendment rights were not violated.

The Fifth Amendment protects an accused person "from having to reveal, directly or indirectly, knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government." *Doe v. United States*, 487 U.S. 201, 213, (1988). In *United States v. Hubbell*, the Court held that "[t]he word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character." 530 U.S. 27, 34 (2000)

Fisher v. United States, 425 U.S. 391 (1976) created the Fifth Amendment framework used by courts today. The *Fisher* Court determined that a case must satisfy three requirements to implicate the privilege against self-incrimination. An individual must be (1) compelled by the government, (2) to make a testimonial communication, (3) that is incriminating.[5] The Court held that the Fifth Amendment privilege is not absolute. Not all invasions of privacy are protected by the privilege against self-incrimination. *Fisher* concluded that "the Fifth Amendment protects against compelled self-incrimination, not the disclosure of private information." *Id.* at 401.

Fisher introduced the foregone conclusion doctrine, which states that if the government already knows certain facts, compelling one to produce information confirming these facts would not be testimonial, even if it is incriminating. *Id.*, at 411. The application of this doctrine, which will be found in the pages to come, also favors the state.

Applying the *Fisher* framework to a case of compelled use of a biometric feature (in this case facial recognition) for the purpose of unlocking a cell phone, we hold that (1) the compelled use of facial recognition to gain access to petitioner's cell phone did not constitute testimonial communication, and (2) the government met the requirements of the foregone conclusion doctrine. Therefore, Olympus did not violate petitioner's privilege against compelled self-incrimination.

More than thirty years ago, long before the widespread use of cell phones, the Court in *Doe* developed a comprehensive and straightforward framework for differentiating between testimonial and non-testimonial evidence. This framework has been adopted by lower courts in more recent cases to determine the applicability of the self-incrimination privilege to evidence seized from criminal suspects' cell phones.

In *Doe*, the petitioner invoked his Fifth Amendment right against self-incrimination as a basis for refusing a court order to disclose foreign bank records. The Court held that such a court order does not implicate the Fifth Amendment because "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Id.* at 210. The

[5] This is an element test meaning that petitioner must satisfy all elements of the test to establish a violation.

Doe Court pointed to the line between testimonial and nontestimonial information established in *Schmerber v. California*, 384 U.S. 757 (1966).

In *Schmerber*, the Court held that the drawing of blood for an alcohol analysis test without consent did not violate a DUI suspect's privilege against self-incrimination because "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id*. at 764. The *Doe* Court offered several more analogies to situations where a defendant could be required to give "incriminating" information without invoking the Fifth Amendment, including lineups, handwriting samples, voice samples, or wearing particular clothing. *Doe* at 210. *Doe* reasoned that "[u]nless some attempt is made to secure a communication -- written, oral or otherwise -- upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one." *Id.* at 211.

Based upon this analysis, the key distinction is between verbal communication, which is testimonial, and a physical act, which is nontestimonial. This distinction is also central to understanding the second part of the *Fisher* framework, the foregone conclusion doctrine. The petitioner contends that the Fifth Amendment allows individuals to refuse to produce a biometric key if the act of producing it is incriminating in itself, independently of the contents of the cell phone. The act of production doctrine acknowledges that, in certain situations, the very act of disclosing documents or information to the government can have a testimonial aspect which, if compelled and incriminating, is equivalent to the compelled testimony prohibited by the Fifth Amendment. See *Fisher* (holding that the act of a taxpayer handing over papers in response to an IRS summons implicitly testified about his beliefs) and *Hubbell*, (holding that responding to a subpoena "could provide a prosecutor with a 'lead to incriminating evidence,' or 'a link in the chain of evidence needed to prosecute,'" and thus violated the respondent's privilege against self-incrimination. *Id.* at 42).

The *Hubbell* Court faulted the Special Prosecutor for requiring that Hubbell make extensive use of "the contents of his own mind" to deliver incriminating evidence to the state. In *Hubbell,* an 8-1 Court held that "[t]he assembly of those documents was like telling an inquisitor the combination to a wall safe" as opposed to "being forced to surrender the key to a strongbox." *Id.* 43. We draw this same distinction here. If the petitioner had been compelled to reveal a password, that would require verbal communication, which is testimonial. In contrast, the compelled use of facial recognition or other biometric keys is essentially a physical act that does not require the petitioner to use the contents of his mind. We agree with the reasoning of *both* the Supreme Court of Minnesota in *State v. Diamond,* 905 NW 2d. 870 (2018) and the Ninth Circuit Court of Appeals in *United States v. Payne*, ___ F.4th ___, ____, 2024 WL 1647253, at *4 (2024) (ruling that compelling a suspect to use his fingerprint to unlock a cellphone was not a testimonial communication protected by the Fifth Amendment).

Even if the government had compelled a password, which might be considered testimonial communication, we hold that the foregone conclusion doctrine applies to these facts. The *Fisher* Court held that the foregone conclusion doctrine applies if the testimonial aspect of a compelled act "adds little or nothing to the sum total of the Government's information." When this is the case, any implied testimony is a "foregone conclusion" and compelling it does not violate the Fifth Amendment. *Id.* at 411. A court must examine what the government knows before the act is

compelled and ask whether the testimony implied by a compelled act would add new information to the government's case. A Fifth Amendment privilege exists only if the compelled act is testimonial under the act of production doctrine but is not a foregone conclusion.

We acknowledge that there is uncertainty regarding the standard that the government must satisfy to demonstrate that a conclusion is "foregone." The orthodox view is that the foregone conclusion doctrine applies if the government can establish its knowledge of the testimonial aspects of production "with reasonable particularity." If the government can provide a specific description of the documents to be handed over and shows that the government already knows of their existence, possession, and authenticity, then the foregone conclusion doctrine applies. *Fisher* at 411. Olympus satisfies this standard and is not just engaging in a "fishing expedition."

We note that the Supreme Court has only applied the foregone conclusion exception in the context of document production. However, several state and federal courts have considered whether the exception applies to compelled decryption or the compelled production of passcodes and passwords. These courts have reached different conclusions. We hold that the foregone conclusion analysis can be applied to cases of compelled decryption, whether by password or biometric measures. We agree with the New Jersey Supreme Court's holding that a court order requiring a defendant to disclose the passcodes to his passcode-protected cellphone did not violate the Fifth Amendment under the forgone conclusion test. *State v. Andrews*, 243 N.J. 447 (2020).

In reaching this conclusion, we are mindful of the fact that technology is outpacing the law in many areas. Accordingly, we must safeguard constitutional rights, and we cannot permit those rights to be diminished merely due to the inevitable advancement of technology. That said, we must address how technological developments in cell phone encryption allow bullies and bigots as well as major criminal enterprises to hide from law enforcement.

D. Application of First Amendment Case Law

The petitioner argues that his conviction of involuntary manslaughter violated his right to free speech under the First Amendment. We disagree and find that no constitutional violation results from convicting a defendant of involuntary manslaughter for reckless, wanton, and pressuring text messages and phone calls, preying upon well-known weaknesses, fears, anxieties, and promises, that finally overcame the willpower to live of a mentally ill, vulnerable, young person, thereby coercing her to commit suicide. We more fully explain our reasoning here.

While the issue is complex, it simply boils down to where the line is drawn between advocacy and action. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court drew a line between advocacy and incitement, holding that when "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," it lacks constitutional protection. *Id.*, at 447. The chat messages at issue here were directed to incitement and did produce such action. The crime of involuntary manslaughter proscribes reckless or wanton conduct causing the death of another. The statute does not refer to restricting or regulating speech, let alone speech of a particular content or viewpoint. The crime at issue is directed at a course of conduct rather than speech, and the conduct it proscribes is not necessarily associated with speech. The petitioner cannot escape responsibility simply because he happened to use words to carry out his illegal actions. See *Rice v. The Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997).

In *Watts v. United States*, 394 U.S. 705 (1969), the Court looked with skepticism on laws that seek to criminalize pure speech. However, the *Watts* Court found that speech that involves a "true threat" falls beyond constitutional protection. In that case, it was clear that Watts did not intend his remarks as a threat to the audience gathered and that he did not plan to commit any criminal activity (other than to refuse to report for his draft physical). True threats lack First Amendment protection because the purpose is to cause injury rather than to add to, or to comment on, the public discourse. It is hard to argue that the consistent and repeated exhortations to kill oneself, which in fact led to said result, were mere philosophical discussions or that they did not pose a true threat. *Cf Waller v. Osbourne,* 763 F. Supp. 1144, 1150-52 (M.D. Ga 1991).

The dissent argues that going down the road of criminalizing speech will lead to a slippery slope. *Dissent at 13.* This is always a danger. However, even if we were to apply strict scrutiny to the verbal conduct at issue because it might implicate other constitutionally protected speech regarding suicide or the end of life, we would conclude that the restriction on speech here has been narrowly tailored to serve a compelling governmental interest.

This case does not involve the prosecution of end-of-life discussions between a doctor, family member, or friend and a mature, terminally ill adult confronting the difficult personal choices that must be made when faced with certain physical and mental suffering brought upon by impending death. Nor does it involve prosecutions of general or academic discussions about euthanasia or suicide targeting the ideas themselves. Such would likely be protected. The verbal conduct targeted here is different and raises no concerns regarding censorship of public discussions regarding suicide. Only the wanton or reckless pressuring of a person to commit suicide that overpowers that person's will to live was proscribed. Such a restriction is incidental at best, and it was necessary to further the government's compelling interest in preserving human life.

The Court has a long-established test for separating the speech from the non-speech portion of related conduct. In *U.S. v. O'Brien*, 391 U.S. 367 (1968), a four-part test was established for this purpose. Under this standard:

> When speech and non-speech elements are combined in the same conduct, a sufficiently important government interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. A government regulation is sufficiently justified [1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial government interest; [3] if the government interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.

Id. at 377.

Applying this test, we find that no First Amendment violation has occurred for at least three reasons. First, the state has the authority to enact criminal laws that protect human life. Second, the manslaughter statute at issue does further this important governmental interest. Finally, because the statute in question is unrelated to free expression, any restriction is indeed incidental. Thus, this is a regulation of conduct, not speech.

Criminal conduct unprotected by the First Amendment may be punished without creating a chilling effect on speech. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993) and *Rice.* While the facts of these cases vary, each involved scenarios in which the accused raised a First Amendment defense against a criminal conviction. Each of these defenses failed on the merits of these claims. As the Fourth Circuit noted: "Speech is not protected by the First Amendment when it is the very vehicle of the crime itself." *Rice,* at 244.

In *Virginia v. Black*, 538 U.S. 343 (2003), the Court found that speech could lead to criminal charges. *Black* held that Virginia could punish cross-burning done with the intent to intimidate. What the State could not do, however, was punish all cross burning on its face. The Court arrived at this conclusion because not all cross burning is intended to intimidate. Thus, while the act of burning a cross may be expressive, *Black* clarified that cross burning with an intent to intimidate would cross the line from speech to action.

The United States Supreme Court in *Counterman v. Colorado*, 143 S. Ct. 2106 (2023) reversed on the grounds that the Colorado Supreme Court had applied the wrong test to the facts of that case. The Colorado Supreme Court had applied an objective standard. The correct standard is a subjective one. As Justice Kagen wrote "[t]he State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another." *Id.*, at 2111-12. On that point, proving "a mental state of recklessness is sufficient." *Id.*

Applying this recklessness standard to the facts before us, we find that DeNolf's prosecution and conviction for involuntary manslaughter are warranted. He acted in a reckless fashion that he should have known would place others at risk. As such, his conviction and penalty are warranted.

Snyder v. Phelps, 562 US 443 (2011) further supports this prosecution. *Snyder* distinguished between public and private speech. DeNolf's messages were not attempts to contribute to any public discussion of the complex issues of suicide or suicide prevention. His messages were shared with Bronner on a private app, and the messages were clearly designed to play on Bronner's insecurities in order to make her feel that her life was worthless. There can be no doubt that given its interests in this area, the state can punish DeNolf's speech. It is our opinion that anyone reading the "ChatApp" messages would recognize the petitioner's threatening messages were reckless. Accordingly, DeNolf may find no refuge in this court for his deliberate and callous acts. The decision of the Olympus Superior Court is affirmed.

DISSENTING OPINION BY Associate Justice Kit Beyer joined by Associate Justices Olivia Clarke and Yana Gagloeva.

Fifth Amendment Analysis

The majority claims to be mindful of the fact that technology is outpacing the law in many areas. *Majority Opinion at 7.* Accordingly, it says that we must safeguard constitutional rights and cannot permit those rights to be diminished merely due to the inevitable advancement of technology. However, the majority opinion does just the opposite.

I agree that the line between testimonial and nontestimonial is at the heart of the issue. But I would draw that line in a much more meaningful fashion. By using biometric unlocking, the individual is communicating knowledge of a fact, namely the ability to access the device. In doing so, the user takes responsibility for its contents. In short, this act discloses ownership, control, and use, conveying testimonial statements to many incriminating questions that law enforcement could not directly force him to answer. Despite the majority's assurances, the compelled unlocking here reveals more substantive information than the physical acts of providing business documents or blood samples that courts have deemed non-testimonial.

The foregone conclusion exception is unsatisfying, as the government lacks prior proof of what evidence resided on the locked device absent forcing the petitioner to unlock and reveal its contents. The phone's contents remained unknown until compelled decryption. The government fails to meet even a minimal formulation of its burden in claiming the foregone conclusion exception to the Fifth Amendment right against self-incrimination.

Consider the Court's decision in *United States v. Hubbell*, 530 U.S. 27 (2000). There, the defendant resisted complying with a grand jury subpoena to produce certain documents and instead invoked his Fifth Amendment privilege. He eventually complied with the subpoena and was subsequently indicted because of the incriminating information found within the documents. The Court granted certiorari in part to determine whether requiring the defendant to produce the documents would implicate a testimonial communication. The Court decided in the affirmative, holding that the documents themselves, as well as the defendant's act of *producing* the documents, had testimonial implications. The majority rejected the Government's contrary view that the documents' production was a physical act immune to Fifth Amendment protection, particularly because of the self-incriminating testimony implicit in such an act. We should do the same here.

Lower courts that have denied warrants to compel biometric access to cell phones have recognized the role that all courts must play in respecting and upholding an individual's constitutional rights. While cell phones were admittedly an inconceivable part of the distant future when the Bill of Rights was first adopted, it is not too much of a stretch to extend privacy protections to modern technology. As such, courts must guard against undue governmental intrusion into cell phones, as these devices are capable of "contain[ing] some of the most intimate details of an individual's life ...." See *In re Search of a Residence in Oakland, CA*, 354 F. Supp. 3d 1010 (2019).

In re Search of a Residence is instructive today. In that case, the United States District Court for the Northern District of California denied a warrant application. In doing so, it identified two specific reasons in support of its conclusion that compelling biometric access implicates a testimonial communication. We identify these reasons in the next two paragraphs.

First, both biometrics and alpha-numerical passcodes functionally "serve the same purpose:" *Id.*, at 1015. They secure an individual's cell phone from unwanted access. The disclosure of passcodes is testimony, and so it follows that utilizing biometric security features should also constitute testimonial communication. *Id.* at 1016. Courts that have arrived at the opposite conclusion to *In re Search of a Residence* have done so on the grounds that biometrics involve physical acts that do not convey any inculpatory information to law enforcement. See ***State v. Diamond***, 905 NW 2d. 870 (2018) According to this reasoning, when an individual uses a fingerprint, facial recognition, or other biometric feature to secure a phone, such constitutes a

physical act that is non-testimonial and outside the scope of Fifth Amendment protection. In contrast, if an individual instead uses a passcode to secure a phone, that passcode is constitutionally protected because its disclosure involves the individual's own knowledge or mind. This logic is frustrating, convoluted, and outmoded by contemporary technology. Where one method serves to lock a phone and protect its contents and another method does the same, they should both be treated the same for Fifth Amendment purposes.

Second, the physical act of unlocking a cell phone, even if done through biometric means, is an inherently testimonial act because it concedes ownership and control over the phone. *In re Search of a Residence*, at 1016. This point is particularly significant in cases where the subject is accused of using a cell phone to facilitate a crime, and the disclosure of the phone's contents may contain digital records of an alleged crime. If the subject of a warrant is compelled to place a fingerprint on or present their face before a scanner, and that scanner then recognizes either biometric feature and unlocks the phone, then that act has at least "implicitly relate[d] a factual assertion or disclose[d] information" -- namely, that the suspect is the custodian of the incriminating information on the device. *Doe v. United States*, at 210. The "physical" act of unlocking a cell phone, then, is testimonial for Fifth Amendment purposes.

Simply put, the information on a cell phone is an extension of the mind. Modern cell phones contain far more than numbers dialed. They include personal information, photos, websites visited, location data, and much more. Phones contain intimate details of a person's life. Accordingly, biometrics cannot become a workaround for law enforcement. Allowing the actions here would completely obliterate the line between testimonial and nontestimonial actions. Against his will, Mr. DeNolf was compelled to provide access to his thoughts and beliefs.

Due to rapidly evolving technology, coupled with inconsistent and illogical precedent, it is unsurprising that lower courts have struggled to apply case law to situations such as this. I would follow the lead of those courts that acknowledge that the distinction between testimonial and nontestimonial, which was designed in relation to court orders for documents, is insufficient to make determinations about passcode and biometric access to cell phones. In addition, I would follow the path taken by courts that have recognized that the foregone conclusion doctrine is a limited exception to the Fifth Amendment. For example, the Pennsylvania Supreme Court has held that the compelled recollection of an individual's password is testimonial in nature and, therefore privileged under the Fifth Amendment. *Commonwealth v. Davis*, 656 Pa. 213 (2019). Additionally, that court held that "the Fifth Amendment privilege is foundational" and "the foregone conclusion gloss on a Fifth Amendment analysis constitutes an extremely limited exception." *Id.* at 237. The Supreme Court of Indiana has held that the compelled production of an unlocked smartphone is testimonial and entitled to Fifth Amendment protection. *Seo v. Indiana* 148 NE 3d. 952 (2020). Moreover, "to apply the foregone conclusion rationale in these circumstances would allow the exception to swallow the constitutional privilege." *Id.* at 958. (Citations omitted).

Perhaps the weakest part of my brethren's decision is the conclusion that the state would somehow survive the foregone conclusion doctrine established in *Fisher v. United States*, 425 U.S. 391, 411 (1976). How the state would have done so when the only path to the messages was through DeNolf's phone is an issue that the majority fails to explain. To my way of this thinking such is an error and should be reversed lest it prove harmful precedent in the future.

Today, if the police want to access a suspect's private cell phone, even with a valid warrant, encryption poses a significant hurdle. Presently, if an individual is forced to unlock the phone, the line between whether this violates the Fifth Amendment would depend on whether the individual was forced to say or type the passcode as opposed to placing their finger or face to the phone. This line makes no sense. Whether this is called testimonial or nontestimonial, the government should not be able to access the personal devices of private citizens without their consent.

First Amendment Analysis:

The government may validly take steps to protect its citizens from the victimizing consequences of conduct that is also considered illegal. This is beyond dispute. However, what the state has done here goes far beyond this simple premise and criminalizes pure speech. The majority is correct that *Brandenburg v. Ohio,* 395 U.S. 444 (1969), controls here. There, the Court drew a line between advocacy and incitement, holding speech proscribable only "where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action." *Id*. at 447 (emphasis added). However, since suicide is not in and of itself a crime in Olympus, no lawless action can be said to have occurred.

The Minnesota Supreme Court has provided the most extensive analysis of the subject of encouraging another to take one's own life. See *State v. Melchert-Dinkel,* 844 N.W.2d 13 (MN. 2014). There, it held that while the state could punish the actual assisting of a suicide, the prohibition against encouraging or advising another to commit suicide did violate the First Amendment. Applying strict scrutiny, the Minnesota statute failed to pass the narrow tailoring requirement. Minnesota's Supreme Court held that "… the obvious problem is that suicide is no longer a criminal act in any jurisdiction… It is difficult to articulate a rule consistent with the First Amendment that punishes an individual for 'inciting' activity that is not actually 'lawless action.' The State's argument fails because suicide is not unlawful and cannot be considered 'lawless action.' Accordingly, I reject the argument that the 'incitement' exception to the First Amendment applies here." *Id.* at 21.

While the petitioner's speech may have been abhorrent and his conduct morally reprehensible, neither constituted a crime. That should end the matter. The constitutional function of making laws belongs to the legislature. Here Olympus courts have overstepped their constitutional responsibilities by stretching existing law beyond what has been passed by the Olympus legislature.

Also troubling is the fact that this case lacks a true threat. *Watts v. United States* held that statutes criminalizing threatening speech "must be interpreted with the commands of the First Amendment clearly in mind" in order to distinguish true threats from constitutionally protected speech. 394 U. S. 705, 707 (1969) (per curiam). Petitioner's comments may not win him any "Boyfriend of the Year" awards, but they contained no threats. DeNolf never threatened to do Bronner any harm, and no reading of the numerous messages could be seen, in and of themselves, as threatening.

Justice Sotomayor has observed that "'a drunken joke'" that is "in bad taste can lead to criminal prosecution." *Counterman v. Colorado,* 143 S. Ct. 2106, 2122 (Sotomayor, J., concurring) (2023). The comments here are far more serious than a drunken statement, and certainly no joking matter.

Nevertheless, Justice Sotomayor's point indicates why the courts have been reluctant to blur the line between disfavored speech and true threats.

I take no issue with the majority's decision to apply to the facts before us the standard found in *U.S. v. O'Brien,* 391 U.S. 367 (1968). I do question the results of that application. In my view, the majority has misapplied *O'Brien.* The application of the law to DeNolf is related to the suppression of free expression. If the discussion of suicide, or other controversial topics, is to be made a crime whenever another person takes independent action, it is not hard to see where this could lead. The majority's opinion puts us on a very slippery slope, and, as petitioner argued below, the chilling effect on free speech of a law that is applied in an overly broad fashion is obvious. This trajectory should be frightening to any freedom-loving people.

The majority invokes *Snyder v. Phelps,* 562 US 443 (2011) in support of its conclusion. Maj Opinion, *ante* at 9. But this misses the mark. *Snyder* upheld the vilest form of speech imaginable. In that case, protestors picketed at military funerals claiming that God had punished American service men and women because of certain policies attributed to the United States Government. The Court found that the case turned on "whether the speech is of public or private concern… Speech on matters of public concern is at the heart of the First Amendment's protections." *Id*. at 451. Suicide remains a national tragedy and has long been a lightning rod for philosophers and lawyers alike. It is fit for public debate and for private expressions. That we, and I include myself in that we, disapprove of such speech is no basis for censorship. As such, this case involves speech on a matter of public concern that is entitled to the full protection of the First Amendment.

The *Snyder* Court's logic applies with equal force here. Speech cannot be restricted simply because some people find it upsetting. Although DeNolf's messages are reprehensible, this does not mean they are criminal and outside the protection of the First Amendment. What is more, he did not threaten anyone, thus, the application of that case law and the recklessness standard is misplaced. Accordingly, I dissent.

Appendix I

Olympus Public Law 417

(1) PURPOSE: An Act to prohibit and punish involuntary manslaughter.

(2) DEFINITIONS:

(A) As used in this chapter—

(i) Involuntary Manslaughter is defined as occurring when a person unintentionally causes the death of an individual by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct.

(ii) Wanton or reckless conduct is proven by the establishment of either (1) the commission or an intentional act or (2) by an omission of action where there is a duty to act.

(iii) Proximate cause is defined as a cause which in the natural and continuous sequence produces the death and without which the death would not have occurred.

FINDINGS – Olympus makes the following findings:

(a) Involuntary manslaughter is a serious crime and as such necessitates a sentence that includes some minimum prison sentence.

(b) A person convicted of involuntary manslaughter deserves a lesser sentence than one convicted of murder or voluntary manslaughter.

(3) ACTION

(a) The act of involuntary manslaughter is prohibited.

(b) If proven, the act of involuntary manslaughter shall be punishable by a sentence of not less than 3 years and not more than ten years in a state correctional facility.

(c) This law shall go into effect on July 6, 2006.

Appendix II

Exhibit A: Message sent on February 25, 2021

DeNolf:	You're a music fan
Bronner:	Yeah
DeNolf:	No cap like the song "the waiting is the hardest part" get it done
Bronner:	"Every day you get one more yard" but dude glorifies living
DeNolf:	Bruh you're missing the point, just end it no more waiting
Bronner:	Good song and ig u may be right
DeNolf:	Ofc I'm right dw – it'll be alright
Bronner:	How do u know?
DeNolf:	Dude like Dylan says "death is not the end"
Bronner:	There is more?
DeNolf:	Bruh you're trippin' -- what do you think?
Bronner:	About Dylan? Lol
DeNolf:	Low key, the sooner you just end it – the better – you can then find out
Bronner	Tbh idk
DeNolf:	Like just shut it down hit the kill switch, baby!!!! Kill just end it go kill yourself go die baby!!!!
Bronner:	Kill?
DeNolf:	Kill like we're Alice's Restaurant here . . . know it? Kill yourself
Bronner:	Ok Boomer
DeNolf:	Lmao
Bronner:	Kind of mid flick - watched in a class on the 60s ancient -g2g

DeNolf: Like in Mony Mony

Bronner: Song gives but like so ancient my Mom listens to that

DeNolf: Ok good talk Ngl I hope to not hear from you again if you know what I mean

Bronner: Yeah like I do bbb I got class geezer like locks the door if late

DeNolf: Bruh

Bronner: I know like so annoying like low key who cares if someone comes in late literally wakes me up

DeNolf: Ttyl

Bronner: Yk what I mean?

DeNolf: For sure

Exhibit B: Message sent on March 17, 2021

Bronner: U sure about this?

DeNolf: Absolutely

Bronner: Like kill myself kill myself for real?

DeNolf: For sure

Bronner: Like . . . Idk …tbh it sounds hard . . .scary

DeNolf: Bruh

Bronner: Easy for u to say

DeNolf: Low key – I just want u to do this already – go die – I'd be better off

Bronner: U would?

DeNolf: Ur family too just do it

Bronner: Idk Ngl scary

DeNolf: U go 2 sleep right?

Bronner: Bruh

DeNolf: It's like Sirius Black said – it don't hurt – faster and easier than falling asleep

Bronner: Is he right?

DeNolf: Imo only one way to find out

Bronner: I guess but . . .

DeNolf: No "buts" step up -- get it done – world be better – fam be better off – go die

Bronner: I'll think about it gonna quote Yoda now? "Don't try, do?"

DeNolf: It's "do or do not there is no try . . ." and yeah . . .

Exhibit C: Message sent on May 20, 2021

DeNolf: No cap Bruh u r so hesitant because u keep over thinking it and keep pushing it off u just need to do it more u push it off more it will eat at u Imo you're ready and prepared no more waiting Mony Mony dude

Bronner: You're right I'm gonna go walk and think

DeNolf: If u want it as bad as u say u do it's time to do it today

Bronner: Yup no more waiting

DeNolf: I'm serious like u can't even wait 'till tonight Bruh literally do it when u get back from your walk make like Nike and just do it!

List of Authorities:

Issue 1 Cases:

United States Supreme Court Opinions:

Schmerber v. California, 384 U.S. 757 (1966) Schmerber v. California :: 384 U.S. 757 (1966) :: Justia US Supreme Court Center
Fisher v. United States, 425 U.S. 391 (1976) Fisher v. United States :: 425 U.S. 391 (1976) :: Justia US Supreme Court Center
Doe v. United States, 487 U.S. 201 (1988) Doe v. United States :: 487 U.S. 201 (1988) :: Justia US Supreme Court Center
United States v. Hubbell, 530 U.S. 27 (2000) United States v. Hubbell :: 530 U.S. 27 (2000) :: Justia US Supreme Court Center

Lower Court Opinions:

State v. Diamond, 905 NW 2d. 870 (2018) State v. Diamond :: 2018 :: Minnesota Supreme Court Decisions :: Minnesota Case Law :: Minnesota Law :: US Law :: Justia
Commonwealth v. Davis, 656 Pa. 213 (2019)
Commonwealth v. Davis, 220 A.3d 534 | Casetext Search + Citator
In re Search of a Residence in Oakland, CA, 354 F. Supp. 3d 1010 (2019) In re Of | 354 F. Supp. 3d 1010 | N.D. Cal. | Judgment | Law | CaseMine
State v. Andrews, 243 N.J. 447 (2020) New Jersey v. Andrews :: 2020 :: Supreme Court of New Jersey Decisions :: New Jersey Case Law :: New Jersey Law :: US Law :: Justia
Seo v. Indiana, 148 NE 3d. 952 (2020) Seo v. State :: 2020 :: Supreme Court of Indiana Decisions :: Indiana Case Law :: Indiana Law :: US Law :: Justia
United States v. Payne, ___ F.4th ___, ____, 2024 WL 1647253, at *4 (2024) USA V. PAYNE, No. 22-50262 (9th Cir. 2024) :: Justia

Issue 2 Cases:

United States Supreme Court Opinions:

United States v. O'Brien, 391 U.S. 367 (1968) United States v. O'Brien :: 391 U.S. 367 (1968) :: Justia US Supreme Court Center
Brandenburg v. Ohio, 395 U.S. 444 (1968) Brandenburg v. Ohio :: 395 U.S. 444 (1969) :: Justia US Supreme Court Center
Watts v. United States, 394 U.S. 705 (1969) Watts v. United States :: 394 U.S. 705 (1969) :: Justia US Supreme Court Center
Wisconsin v. Mitchell, 507 U.S. 476 (1993) Wisconsin v. Mitchell :: 508 U.S. 476 (1993) :: Justia US Supreme Court Center
Virginia v. Black, 538 U.S. 343 (2003) Virginia v. Black :: 538 U.S. 343 (2003) :: Justia US Supreme Court Center
Snyder v. Phelps, 562 U.S. 443 (2011) Snyder v. Phelps :: 562 U.S. 443 (2011) :: Justia US Supreme Court Center
Counterman v. Colorado, 143 S. Ct. 2106 (2022) 22-138_43j7.pdf (supremecourt.gov)

Lower Court Opinions:

Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga 1991) Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991) :: Justia
Rice v. Paladin Press, 128 F. 3d. 233 (4th Cir. 1997) Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997) :: Justia
State v. Melchert-Dinkel, 844 N.W.2d 13 (MN. 2014) State v. Melchert-Dinkel :: 2014 :: Minnesota Supreme Court Decisions :: Minnesota Case Law :: Minnesota Law :: US Law :: Justia