



Supreme Court

OF THE OKLAHOMA INTERCOLLEGIATE LEGISLATURE

CHIEF JUSTICE: Zachary Helms
VICE CHIEF JUSTICE: Amy Vanderveer
ASSOCIATE JUSTICES, By Seniority:
Matthew Nieman
Courtney Driskell
Camille Schlemme
Will Flanagan
Izaak Thompson
Benn Garrett
Kathryn Kleiner



MOOT COURT CASE

Spring 2018

**Oklahoma Intercollegiate Legislature
Spring 2018**

Creed Scott, Petitioner

V.

The State of Oklahoma, Respondent

On writ of certiorari to the Supreme Court of the State of Oklahoma

ORDER OF THE COURT ON SUBMISSION

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

1. Whether the Functional Brain Mapping Exam (FBME) conducted by the State of Oklahoma facially violates the right against self-incrimination protected by the Fifth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment?
2. Whether the sentence of solitary confinement, as applied to Petitioner, violates the Cruel and Unusual Punishment Clause of the Eighth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment?

A. The Functional Brain Mapping Exam (“FBME”)

In an effort to crack down on crime in Oklahoma, scientists and crime scene investigators have teamed up to develop new diagnostic technology that will aid law enforcement officials during their investigations. The Functional Brain Mapping Exam (“FBME”), also known as forensic neuroimaging or brain finger-printing, is a brain mapping test that allows investigators to determine whether a suspect has memory of being at the scene of a crime. The exam applies a combination of neuroimaging techniques predicated on the mapping of biological quantities (neurons) onto spatial representations of the brain. In essence, certain areas of the brain will “light up” during an FBME exam if the subject has memories of being at a crime scene when he or she is shown pictures of it. The FBME uses an electroencephalograph to monitor activity of the brain. Electrodes are placed on the scalp and the temples. These electrodes are harmless and cause no pain to the subject. During the test, the subject is shown several images. The brain reacts to these images in certain predictable manners—meaning that the brain reacts in a noticeable manner when it views pictures of locations with which it is familiar. Thus, images, such as a loved one or a place that one has visited, will produce predictable activity in the brain that can be measured. This activity differs from the reaction to a photo of a person or place that is wholly unknown to the subject. Technicians are able to map or record the activity of the brain. High activity indicates the subject has vivid memory of a particular image, while low activity indicates the subject has little to no memory of a particular image. Investigators and law enforcement officials around the country are beginning to use the FBME as a way to retrieve information regarding criminal activity, including homicides.

According to all scientific studies, this brain mapping technique is very reliable. These studies are not included in the record. The parties before the Court have stipulated to the FBME’s accuracy and scientific validity, as well as to the fact the test is generally accepted by the relevant medical and scientific communities. In fact, Petitioner did not question the scientific validity of the FBME at trial. Thus, this issue was not preserved for this appeal. FBMEs are performed by trained technicians, often physicians, who work with law enforcement agencies as well as private industries. Typically, they are not law enforcement officers themselves. In this regard, they are similar to the polygraph examiners who perform polygraph tests, but are not themselves law enforcement officers. In this case, the use of the FBME was at the direction of Oklahoma law enforcement officers. The parties have stipulated and the trial court agreed that the FBME was admissible under the controlling standards for reliability and accuracy. The parties and the court further agreed that the test procedure and its result were within scientific standards and are accurate. Mr. Scott objected on Fifth Amendment – self-incrimination grounds to the admissibility of the evidence in question before us today.

B. The Case Facts

Ms. Pamela Halpert was a twenty-five-year-old woman who worked by day as a secretary in a major paper retail corporation, and by night, as a prostitute in Scranton, Ok. Mr. Creed Scott is a fifty-seven-year-old industrial engineer who recently moved to Oklahoma. On January 5, 2017, Mr. Scott met Ms. Halpert late at night in the parking lot at a local motel called Sleep Suites in the city of Scranton.

Jim Schrote and Angela Flax are detectives for the Scranton Police Department. They are members of a special state and local task force that was established to investigate prostitution in

Oklahoma. Detectives Schrute and Flax were parked under a Sleep Suites lamp post in an unmarked vehicle on the night that Mr. Scott and Ms. Halpert arrived at Sleep Suites. Detective Schrute recognized Ms. Halpert from past stakeouts and thought that the situation was suspicious. The detectives debated for a while about whether to intercede on suspicion that the woman was a prostitute. The detectives observed Ms. Halpert exit Mr. Scott's vehicle and visit the reservations office where she rented a room from the clerk. Meanwhile, Scott purchased two sodas from a vending machine. As Mr. Scott and Ms. Halpert met up at Mr. Scott's car, Detective Schrute observed that Ms. Halpert was handed a roll of money and walked with Mr. Scott to the motel. Detective Flax approached the two, identified herself as a City of Scranton Detective, and asked to see their driver licenses. Both parties produced their driver licenses, along with voter ID cards for Oklahoma. Mr. Scott and Ms. Halpert said they had just met and were only talking. Detective Flax returned their IDs and left the two outside the motel.

The following morning on January 6, 2017, Scranton Law Enforcement officials were called to the scene of a homicide. Two maids at Sleep Suites found Ms. Halpert dead inside room 205 at Sleep Suites—the same room she had rented the night before. Emergency responders quickly arrived at the scene of the crime, but were unable to revive Ms. Halpert. Mr. Scott was not present. Detectives Flax and Schrute were contacted and informed of Halpert's death and that she may have been tortured before she was murdered. The killer had written "whore" in the victim's blood on the walls of the room.

Detectives Flax and Schrute drove to Mr. Scott's home and asked if he would be willing to accompany them to the Scranton police department for questioning in connection with the murder of Ms. Halpert. Mr. Scott asked if he was under arrest and if he needed an attorney. Detective Schrute responded, "You are not under arrest—whether you want an attorney is up to you." Mr. Scott agreed to accompany the detectives. He did not call an attorney because in his words, "I am 100% innocent and I want to help you arrest the killer." The detectives transported Mr. Scott to the Scranton Police Department and took Mr. Scott into a room where investigators began interrogating him. Before doing so, they reminded him that he was not under arrest and was free to leave or stop talking if he wished. When asked if he had ever been inside any rooms at Sleep Suites, Mr. Scott answered "no." Mr. Scott was asked a few questions about being inside Sleep Suites, specifically room 205. He answered all their questions. Mr. Scott stated quite clearly that he had not been inside the motel, but that he had visited the exterior of the motel.

Mr. Scott admitted that he intended to pay Ms. Halpert for sex, but he consistently denied having killed or harmed her in any way. Mr. Scott stated that the transaction had not even occurred between himself and Ms. Halpert because he received a phone call from his wife telling him to "get home now!" Mr. Scott further said, "We didn't even have time to get into the motel room before my wife was yelling at me!" After answering these questions cooperatively, Mr. Scott informed the detectives that "I do not like the tone, or the direction of your questions." He also stated "I no longer want to speak with you and I will not say anything else to you guys." At this point, the detectives told Mr. Scott that they were done questioning him, but wanted to administer a test. The detectives requested a warrant for an FBME, which was granted by an Oklahoma trial judge. The parties stipulate that the warrant was valid.

After the warrant was issued, Mr. Scott was asked to accompany the detectives from the police department to an Imaging and Screening facility. Mr. Scott did not respond, but he did walk with the detectives to the facility located two buildings away from the police department.

Mr. Scott was not handcuffed and he walked alongside the detectives. He had his wallet and identification. They walked past a bus stop and a few taxicabs that were parked outside the building. Once they reached the facility, Detectives Flax and Schrute left Mr. Scott alone with two FBME technicians. The technicians, Michael Howard and Kevin California, are both medical doctors who work by contract for the Scranton Police Department and were acting at the detective's discretion. They identified themselves to Mr. Scott as physicians. He asked, "Are you cops?" to which one answered, "No, but we work with the police in certain investigations such as this one today." Mr. Scott did not ask to leave or to speak to an attorney. Drs. Howard and California explained the FBME to Mr. Scott. They informed him that the FBME was "purely procedural, much like drawing blood or taking fingerprints." They also informed him that the test would not require any needles, unlike a blood test. Mr. Scott expressly said that he would not answer any questions or say anything more. Drs. Howard and California conducted the FBME test without asking Mr. Scott any further questions. The test took less than thirty minutes. The test does not involve any communication, verbal or otherwise, between the technicians and Mr. Scott. They simply show him a photograph and measure his brain response. He did not speak or make any faces or gestures nor did the technicians. There was no recording of the process.

Mr. Scott did not resist the FBME and was cooperative during it. During the FBME, the technicians used images from the scene of the crime, including from room 205 and from other locations in and around the motel, as well as images from non-crime scenes in and around other hotels. In the image of room 205, Ms. Halpert's corpse had been removed from the area but there was still blood about the room. The results of the FBME demonstrated high activity when images from Sleep Suites were shown, indicating that Mr. Scott had memory of being at the hotel and being in room 205. The results demonstrated low activity for all the other hotels that were shown. The test indicated that Mr. Scott only recognized one other hotel. Based on these results, the police arrested Mr. Scott and he was arraigned for the murder of Ms. Halpert.

Mr. Scott filed a motion to suppress the results from the FBME. The trial judge, Gabriel Vance, denied the motion. During trial, evidence was presented against Mr. Scott, including the results of the FBME and his statement to the police that he had not been inside Sleep Suites or in room 205. There were no witnesses other than Detectives Flax and Schrute who witnessed Mr. Scott at Sleep Suites, as the reservation clerk only interacted with the deceased. No DNA evidence was introduced at trial. The technicians who performed the FBME testified at Mr. Scott's trial. At trial, Judge Vance found that Mr. Scott showed no signs of mental deficiency (a point he did not contest). Neither at trial nor at sentencing did he present any mitigating factors that should be considered in assessing his guilt or penalty. Mr. Scott did not testify at his trial and instead invoked his Fifth Amendment right against self-incrimination.

A jury found Mr. Scott guilty of the murder of Ms. Halpert. After Mr. Scott was convicted, Judge Vance, pursuant to Oklahoma law, sentenced him to 30 years of solitary confinement within a Supermax prison known as "The Helm House". This was not a mandatory penalty, and under the terms of the statute the judge could have sentenced Mr. Scott to death or to a longer or shorter term of years. The judge did not explain why he chose this exact period of years rather than a longer sentence, but he indicated that he sentenced Mr. Scott to solitary confinement because "he tortured his victim." In 20 states, inmates can be kept in solitary without definite release dates. While it is not unheard of for inmates to serve 15 to 30 years in solitary confinement, such a term is not the most common outcome. In fact, a few of these 20 states have no inmates serving without definite release dates. Mr. Scott entered prison on May

23, 2017. He has been in solitary confinement, without exception, since that date. Petitioner, Creed Scott, appeals the constitutionality of his conviction for murder and his subsequent sentence to the Supreme Court of the State of Oklahoma. Certiorari has been granted.

C. Oklahoma Law and Petitioner's Sentence

Under Oklahoma law (passed through the state congress in November of 2016), the sentencing authority possessed by judges includes the authority to sentence convicts to a variety of forms of what the state labels "restrictive housing." Oklahoma is the only jurisdiction that grants judges this authority. Trial judges have the additional authority to determine how long an inmate will serve in restrictive housing and the level of that restrictive housing. Although Oklahoma does not grant parole to persons convicted of murder, a warden may elect to move a prisoner from solitary confinement back into the general prison population once the inmate has served half of the sentence. This can be important as studies find that inmates who are released directly from solitary confinement as opposed to from general population are more likely to reoffend and likely to do so quicker (12 vs 27 months) and that inmates who have served in solitary confinement are more likely to reoffend than those who have not. Oklahoma law provides six levels of restrictive housing, the most extreme of which is solitary confinement. This penalty tends to be reserved in Oklahoma for the most violent criminals. Under Oklahoma law, inmates who "torture" their victims are eligible to be sentenced by a judge to solitary confinement at trial. Mr. Scott is one of 100 inmates in prison in Oklahoma who tortured a murder victim.

In Oklahoma, solitary confinement is defined in the state code as "the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day with no environmental or sensory stimuli and almost no human contact for a period of up to 30 consecutive days." Inmates are kept in a 10 foot by 10 foot cell with no windows and one locked door with a small sliding window for food delivery. Cells contain a bolted down bed and toilet. Inmates in solitary confinement are allowed up to one hour of recreation time alone. Presently, 7.8% of the Oklahoma inmate population, are in some form of restrictive housing: .4% inmates in protective custody, .8% inmates in segregated housing due to mental health issues, 1.2% inmates in segregated housing due to non-mental health medical issues, .4% in investigative segregation, .5% in disciplinary segregation, and 4.5% in solitary confinement. Oklahoma does not subject juveniles to solitary confinement. The decision to sentence inmates to solitary confinement is based on their offenses for which they are serving a prison sentence.

D. Petitioner's Appeal

Mr. Scott alleges Fifth Amendment and Eighth Amendment violations of his constitutional rights as they are applied to the states through the Due Process Clause of the Fourteenth Amendment. We review the substantive merits of the constitutional arguments raised below. The parties to the case have stipulated to the aforementioned facts. We review all questions de novo.

Cases Cited:

- Trop v. Dulles, 356 U.S. 86 (1958)
- Schmerber v. California, 384 U.S. 757 (1966)
- Hutto v. Finney, 437 U.S. 678 (1978)
- Rhode Island v. Innis 446 U.S. 291 (1980)

- Estelle v. Smith, 451 U.S. 454 (1981)
- Doe v. United States, 487 U.S. 201 (1988)
- Pennsylvania v Muniz, 496 U.S. 582 (1990)
- Harmelin v. Michigan, 501 U.S. 957 (1991)
- Hudson v. McMillian, 503 U.S. 1 (1992)
- Kyllo v. US, 533 U.S. 27 (2001)
- Ewing v. California, 538 U.S. 11 (2003)
- United States v. Weber, 451 F.3d 552 (9th Cir. 2006)
- Commonwealth v. Knoble, 42 A.3d 976 (Pa. 2012)