IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO,	Case No. 2016-0271
Plaintiff-Appellant,	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
-vs-	
JOSHUA POLK,	
Defendant-Appellee.	Court of Appeals Case No. 14AP-787

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First Proposition of Law: A search is constitutional if it complies with a public school's reasonable search protocol. The subjective motive of the public-school employee performing the search is irrelevant.

The ultimate question under the Fourth Amendment is always whether the search or seizure is reasonable, which is determined by balancing the "intrusion on the individuals' Fourth Amendment interests against its promotion of legitimate government interests." *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989). Balancing these interests, a public school's interest in emptying an unattended bag for safety purposes outweighs the student's limited privacy interests in the bag. The arguments of Polk and his amici fail to show otherwise.

I. The opinions below confirm that emptying an unattended book bag is reasonable, and reasonableness is all the Fourth Amendment requires.

The three lower-court opinions in this case confirm that, in a public-school setting, (1) it is reasonable to search an unattended book bag for safety purposes, and (2) emptying an unattended bag is a reasonable means of performing such a search. The trial court's decision states that it was reasonable to search the bag for "safety and security purposes," and that "no violation would have occurred" had Lindsey "dumped the entire contents of the bag in his initial search for safety purposes." R. 111, pp. 3-4. Similarly, the Tenth District's lead opinion and Judge Dorrian's partial concurrence and dissent both state: "[I]n a school setting, emptying the entire bag would have been an acceptable way to meet the two initial justifications for the search: safety and identification." Op. at ¶¶ 16, 32.

The lower courts thus weighed the competing interests and concluded that, in a public school, emptying an unattended bag for safety purposes is "acceptable" and results in "no violation." This conclusion was correct. First, Polk's privacy interests in the bag were doubly diminished—once by him being a student in a public school, *Board of Ed. of Ind. Sch. Dist. No.*

92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 830 (2002); *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring), and again by him leaving the bag unattended, thereby exposing it to search to determine ownership and that it posed no safety threat, Op. at ¶ 13.

Second, the character of the intrusion was minimal. Lindsey simply emptied the bag to determine that it contained no dangerous contents. He did not look through or disseminate any private letters, diaries, or photographs. *In re Adam*, 120 Ohio App.3d 364, 367 (11th Dist.1997) (explaining students' privacy interests in book bags). Nor did he turn on any electronic devices. *C.f.*, *Riley v. California*, 134 S.Ct. 2473 (2014). Emptying an unattended bag is nowhere near as intrusive as a school drug-testing policy, which involves "an excretory function traditionally shielded by great privacy." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995), quoting *Skinner*, 489 U.S. at 626. And emptying an unattended bag is less intrusive than stopping motorists at a sobriety checkpoint, which involves only a "slight" intrusion. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990).

Third, the school's concerns in emptying the bag were compelling. Teachers and administrators have a "substantial interest" in "maintaining discipline in the classroom and on school grounds." *T.L.O.*, 469 U.S. at 339; *see also*, *id*. at 340 (public schools have a "substantial need" to "maintain order in the schools"). Along with this substantial interest comes a "heightened obligation to safeguard students whom it compels to attend school." *Id*. at 353 (Blackmun, J., concurring). Public schools have an "obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern." *Id*. at 350 (Powell, J., concurring). The safety concerns here are twofold. A public school has a substantial interest in ensuring that an unattended back is not "an intentionally planted dangerous package." Op. at ¶

13. But even if an unattended bag is not planted with the intent to cause damage, it may nonetheless contain items that pose a danger to anyone possessing or near the bag. Bombs are just one of many items that can make an unattended bag potentially dangerous.

Having weighed the competing interests and concluded that emptying an unattended bag for safety purposes is "acceptable" and results in "no violation," the lower courts' analyses should have stopped right there. While the parties and their amici have engaged in extensive briefing regarding various issues—*i.e.*, the nature of the school's search policy, the inventory-search doctrine, the abandonment doctrine, the special-needs doctrine, the lost-or-mislead-property doctrine, *etc*.—the only issue that matters is whether emptying an unattended bag in a public school is *reasonable*. And the lower courts' "acceptable" and "no violation" findings conclusively answer this dispositive question.

II. The arguments of Polk and his amici that the search in this particular case was unreasonable do not withstand scrutiny.

A. Even after determining that the bag belonged to Polk, emptying the bag did not exceed the safety-related scope of the search.

Again, this Court need look no further than the lower-court opinions to determine that a public school may search an unattended bag for safety purposes. Polk himself admits that "[t]he courts below correctly held that Lindsey possessed authority to inspect the bus book bag in order to identify its owner and to determine that it did not create a safety threat." Appellee Br., 18. Yet Polk and his amici argue that, after seeing Polk's name on some papers, both purposes of the search were satisfied and any further search of the bag was unjustified. This is wrong. As explained in the State's merit brief (p. 15), seeing Polk's name on the papers was not enough to determine the bag posed no safety threat. A more thorough search was needed to ensure that the bag contained nothing dangerous inside. *C.f.*, *United States v. Rabenberg*, 766 F.2d 355, 356-

357 (8th Cir.1985) (reasonable to search unopened package in an unattended suitcase to protect all persons concerned "from dangerous instrumentalities").

Indeed, dangerous items can take on all forms of shapes and sizes and may not be immediately visible upon opening a bag. *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983). A gun or knife can be easily hidden in a bag containing notebooks, binders, papers, and other items. An improvised explosive device (IED) "can come in many forms," including a "small pipe bomb," and "can be delivered in a package." *See*, www.dhs.gov/sites/default/files/publications/prep_ied_fact_sheet.pdf (last visited 9/29/16). Eric Harris—one of the students who perpetrated the Columbine massacre—made several "crickets" that were later found in his home. See www.cnn.com/SPECIALS/2000/columbine.cd/pages/BOMBS_TEXT.htm (last visited 9/29/16). A "cricket" is a small IED made from a CO_2 cartridge that is "easy to make, easy to conceal, and easy to set off." See www.nbc-2.com/story/10690142/cricket-bombs-causing-concern-for-deputies (last visited 9/29/16). And, as the present case proves, bullets may not be immediately visible upon opening a bag.

The lower-court opinions confirm that emptying an unattended bag is not unreasonably intrusive to address these safety concerns. They all state that Lindsey could have emptied the bag at the outset without any reasonable suspicion. If safety concerns would have justified emptying the bag *before* Lindsey saw Polk's name on the papers, then they justified emptying the bag *after* he saw Polk's name. And if safety concerns would have justified emptying the bag had Lindsey seen someone else's name, then they justified emptying the bag after he saw *Polk's* name. It does not matter whether less intrusive means were available. "We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Acton*, 515 U.S. at 663, citing *Skinner*, 489 U.S. at 629, n. 9.

B. Lindsey's subjective motive is irrelevant.

Polk and his amici argue that Lindsey's emptying of the bag was unconstitutional because the trial court found that his sole motive in doing so was Polk's reputed gang membership. The trial court found that Lindsey had two valid purposes for searching the bag: (1) to determine the bag's owner, and (2) to ensure that the bag posed no safety threat. Seeing Polk's name on the papers satisfied the former purpose, but not the latter. The safety concerns did not somehow disappear when he determined that the bag belonged to Polk.

Moreover, the trial court's "sole motivation" finding is consistent with searching the bag for safety purposes. Being motivated *by* something is not the same as being motivated *to do* something. Even if Lindsey was motivated by Polk's reputed gang membership rather than the school's policy, the purpose of the search remained to determine whether the bag posed a safety threat. In other words, Lindsey can be motivated by Polk's reputed gang membership and still search the bag for safety rather than investigatory purposes. While the trial court found that Polk's gang membership did not constitute reasonable suspicion, it never found that Lindsey's motive caused him to conduct an investigative rather than a safety search, or that his motive otherwise altered the manner in which he searched the bag. Whether motivated by following policy or by Polk's reputed gang membership, the bottom line is that Lindsey emptied the bag to ensure it posed no safety threat, which is a valid purpose for searching an unattended bag.

More importantly, Polk's motive is legally irrelevant. As explained in the State's merit brief (pp. 19-22), reasonableness is an objective inquiry; subjective motives are irrelevant. Even if emptying the bag is viewed as akin to a programmatic inventory search, motive is relevant only to the extent that the program was adopted for an improper purpose. The decision in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011), is not to the contrary. The Court in *al-Kidd* held that a

purpose inquiry was improper in that case, and in doing so it cited favorably *Indianapolis v. Edmond*, 531 U.S. 32 (2000). *al-Kidd*, 563 U.S. at 736. *al-Kidd* did not modify *Edmond*.

C. Lindsey emptied the bag pursuant to school policy.

Polk argues that the trial court and the lead opinion analyzed the search under the lost-or-mislaid-property doctrine, rather than treating the search as pursuant to the school's search policy. This is splitting hairs. Both the school's policy and the lost-or-mislaid-property doctrine are premised in part on safety concerns. Whether assessing the search under the school's policy or under the lost-or-mislaid-property doctrine, what matters is that the lower courts found that emptying an unattended bag is "acceptable" and results in "no violation."

Polk is also mistaken in arguing that the State did not preserve its argument that Lindsey emptied the bag pursuant to policy. Lindsey testified that he followed "protocol" by searching the bag for "[s]afety and to find identification of who the—who it belonged to to return it." Tr., 8. Lindsey referred to the school's policy several times during his testimony. Tr., 15, 43, 45, 46. The prosecutor relied on the school's policy in his arguments to the trial court. Tr., 63-65.

Equally without merit is Polk's argument that the school's policy does not comply with the "'special needs' rubric." Appellee Br., 27. The defense did not take issue with the school's policy at the suppression hearing, and the trial court never made any finding that the policy did not exist or was unreasonable. To the contrary, the trial court found that it was reasonable to search the unattended bag for "safety and security purposes" and to "identify the book bag's owner," which is exactly what the policy dictated. The policy is reasonable precisely because it is consistent with the lost-or-mislaid-property doctrine that would apply when police find an unattended bag outside the public-school context. Indeed, the reasonableness balancing test weighs *more heavily* in favor of searching an unattended bag in a public school, given that (1)

public schools have a special need in maintaining safety in the school that exceeds the police's general interest in safety; and (2) public-school students have less privacy interests in an unattended bag than a non-student who leaves a bag unattended outside the school setting.

It is immaterial that the State did not admit any *written* policy. In the inventory-search context, it is enough that the police rely on "standardized procedure(s) or established routine." *State v. Hathman*, 65 Ohio St.3d 403 (1992), paragraph one of the syllabus; *see also, United States v. Betterton*, 417 F.3d 826, 830 (8th Cir.2005) (lack of written policy not dispositive). The same should be true of a public-school's search policies, and Lindsey's testimony clearly established a standard procedure or routine.

Polk wrongly claims that the policy is "meager as to the particulars." Appellee Br., 27. Lindsey testified that the policy permits searches of unattended bags to determine ownership and to ensure that it poses no safety threat. The policy thus defines the items to be searched and the proper scope of the search. The policy need not be any more particular than this. After all, no less so than a police's inventory-search policy, a public-school's search policy may allow for "sufficient latitude" to determine whether an item should be searched and "the exercise of judgment based on the concerns related to the purposes" of the policy. *Florida v. Wells*, 495 U.S. 1, 4 (1990); *see also, T.L.O.*, 469 U.S. at 339-340 (public schools need "flexibility" and "informality" to maintain security and order). Carrying out this policy is only one of Lindsey's job responsibilities. This policy does not govern Lindsey's *other* responsibilities that are not at issue in this case—*i.e.*, searching lockers, searching students, security checks, *etc*.

Contrary to Polk's assertion, the policy does not give Lindsey "unrestricted access" to any unattended bag. Appellee Br., 28. The policy allows searches only to the extent they are reasonably related to determining ownership and addressing safety concerns, and the trial court

found that emptying an unattended bag qualifies as a permissible means of performing such a search. Nor does the policy give Lindsey the authority to search any bag; the bag must be *unattended*. Here, there was no dispute that the bag found on the school bus was in fact an unattended bag, and the trial court repeatedly referred to the bag as unattended. R. 111, pp. 1, 3. The policy does not authorize all searches of all bags, and a search falling outside the scope of the policy would be unconstitutional absent some other valid reason for the search. *State v. Leak*, 145 Ohio St.3d 165, 2016-Ohio-154, ¶¶ 20-32 (policy to search impounded vehicles did not support the search because the vehicle was improperly impounded) (plurality). But emptying a bag left on a school bus is an "acceptable" means of determining that it poses no safety threat and results in "no violation."

Moreover, the school was not required to give notice of its policy that unattended bags are subject to search. Any reasonable person would know that leaving a bag unattended would expose it to search by whoever finds the bag (hence the lost-or-mislaid-property doctrine). Plus, there was no proof that the school's policy had the "specific purpose of incriminating" students. *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001). The policy was no more intended to incriminate than a police department's inventory-search policy is intended to incriminate those whose vehicles the police impound or whose bags the police take into possession upon arrest.

D. The school's policy serves interests distinct from law enforcement.

Polk argues that the school's policy was not supported by the school's special needs but rather was "closely connected with that of general law enforcement." Appellee Br., 29. According to Polk, any item that would pose a threat to safety would also constitute criminal activity, so the school's safety-related purpose is really just a law-enforcement purpose. But public schools' special need in maintaining safety was established in *T.L.O.* and its progeny. To

say now that schools have no special need in safety would be to assume that the Supreme Court was somehow oblivious of the obvious overlap between safety and law enforcement.

Despite this overlap, there are any number of items that are legal to possess (even in a school) but pose a safety hazard. Consumer fireworks are legal to possess in Ohio (they must be transported out of state within 48 hours, R.C. 3743.45(A)) but pose a safety threat. Knives are obviously dangerous, but a knife may be legal to possess in a school if it does not qualify as a deadly weapon. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 19 (listing factors for whether a knife is a deadly weapon). Some chemicals are legal to possess but may be dangerous if not handled properly. Even when a student possesses items for a legitimate school purpose, he or she may nonetheless possess them in a manner that creates a risk for anyone near the bag. Given the variety of items (legal and illegal) that can pose a safety threat, a public school in possession of someone else's bag has a compelling interest in knowing what items are inside the bag. Not every discovery of a dangerous item will result in law-enforcement involvement. But when the search of an unattended bag leads to the discovery of a gun, it is hardly unreasonable to initiate criminal proceedings.

Moreover, Polk is wrong that the special-needs doctrine does not apply when the results of the search are forwarded to law enforcement. The term "special needs" first appeared in Justice Blackmun's concurrence in *T.L.O.*, which of course was decided in the context of a criminal prosecution. *Ferguson*, 532 U.S. at 75, n. 7, citing *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring). The Court has upheld special-needs searches in other cases involving criminal prosecutions. *Samson v. California*, 547 U.S. 843, 853 (2006) ("overwhelming interest" in supervising parolees); *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (special need to supervise probationers). Inventory searches address special needs beyond law enforcement, yet the results

of inventory searches are frequently used in criminal prosecutions. Police have a special need to search unattended bags under the lost-or-mislaid-property doctrine, yet nothing prohibits the results of such a search from being the basis of a criminal prosecution.

Polk makes much of the fact that the urinalysis results in *Acton* and *Earls* were not forwarded to law enforcement. The Court referenced this fact only in discussing the "character of the intrusion." *Acton*, 515 U.S. at 658; *Earls*, 536 U.S. at 834. The Court never said the absence of criminal prosecution was dispositive. In any event, the reasonableness balancing test will operate differently depending on the type of search involved and the nature of the competing interests. Urinalysis and emptying unattended bags are two different types of searches involving different levels of intrusiveness and addressing different government interests. Even if the absence of criminal prosecution was dispositive in *Acton* and *Earls*, this has no bearing on whether it is required when a public school adopts a policy to search unattended bags for safety purposes. The effect criminal prosecutions will have on the reasonableness test will necessarily depend on factors that vary from case to case. *See, e.g., Doe ex rel. Doe v. Little Rock School Dist*., 380 F.3d 349, 351, 355 (8th Cir.2004) (criminal prosecutions was relevant in assessing policy that allowed "random, suspicionless searches of [students'] persons and belongings by school officials" and had "no apparent limit to the extensiveness of the search").

This case is different from *Ferguson*. That case addressed the constitutionality of a state hospital's policy to conduct drug testing on certain pregnant patients. The Court stated that "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." *Ferguson*, 532 U.S. at 80. "[A]n initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers." *Id*. at 81-82 (quoting lower-court dissent). Police and prosecutors were heavily involved in

developing and administering the policy. *Id*. at 82. "[T]he immediate objective of the searches was to generate evidence *for law enforcement purposes*." *Id*. at 83 (emphasis sic). The policy did not address any "special need" because its "primary purpose" was law enforcement, and law enforcement was "extensive[ly] involved at every stage of the policy." *Id*. at 84; *see also, id*. at 88 ("as a systemic matter, law enforcement was a part of the implementation of the search policy") (Kennedy, J., concurring).

Ferguson confirms that a search policy is removed from the special-needs doctrine only if the "policy is *designed* to obtain evidence of criminal conduct." *Id*. at 86 (emphasis added); *see also, Edmond*, 531 U.S. at 44 ("primary purpose" of narcotics checkpoints was crime control). But when a policy is designed to address a legitimate special need—such as school safety—the after-the-fact decision to turn over evidence of criminal activity to law enforcement does not retroactively render the search unreasonable.

There is no evidence that Whetstone developed its policy to search unattended bags in conjunction with police or prosecutors. The search of the unattended bag found on the school bus was "carried out by school authorities acting alone and on their own authority"; it was not "in conjunction with or at the behest of law enforcement agencies." *T.L.O.*, 469 U.S. at 341, n. 7. Nor is there any proof that Whetstone's policy "was designed as a pretext to enable law enforcement authorities to gather evidence of penal law violations." *Skinner*, 489 U.S. at 652, n. 5, citing *New York v. Burger*, 482 U.S. 691, 716-717 (1987), n. 27. Absent a "persuasive showing" that the policy is pretextual, the policy should be "assessed in light of its obvious administrative purpose." *Skinner*, 489 U.S. at 652, n. 5.

To be sure, the school resource officer was involved in detaining Polk and in searching the second book bag. But this does not detract from the school's special needs in searching the

first bag. The search of the second bag was not conducted pursuant to the school's policy to search unattended bags; it was based on reasonable suspicion (based on the bullets found in the first bag) that Polk had a firearm in the school. The school employees were not acting at the behest of the officer; just the opposite, the officer was acting at the behest of the school. *In re Sumpter*, 5th Dist. No. 2004-CA-00161, 2004-Ohio-6513, ¶ 30. When faced with potentially dangerous situations, public-school employees *should* involve trained police officers. In such circumstances, the search remains a "school" search as long as the police do not "initiate the investigation." *Id*. Contrary to Polk's assertion (Appellee Br., 35-36), that a school to obtain federal funding must adopt a policy to report to police the discovery of any gun does not make the school an agent of law enforcement. *C.f., Ohio v. Clark,* 135 S.Ct. 2173, 2182-2183 (2015).

In sum, the issue boils down to reasonableness. As the lower courts found, emptying an unattended bag found in a public school is "acceptable" and results in "no violation." That is exactly what Lindsey did— he emptied an unattended bag. And he did so pursuant to an established policy that serves the school's special need in maintaining safety and order at the school. The lower courts erred in finding this search violated the Fourth Amendment.[1]

> **Second Proposition of Law:** The sole purpose of the federal exclusionary rule is to deter police misconduct. As a result, the exclusionary rule does not apply to searches by public-school employees.

As explained in the State's merit brief (p. 24), the federal exclusionary rule exists for one purpose: To deter future police misconduct. Polk and his amici fail explain how applying the exclusionary rule to searches conducted by public-school employees would result in any

[1] One of Polk's amici asks this Court to affirm based on Article I, section 14, of the Ohio Constitution. Ohio Association of Criminal Defense Lawyers (OACDL) Br., pp. 8-13. But neither of the lower courts relied on the Ohio Constitution. Only the Fourth Amendment question is properly before this Court.

deterrence—let alone police deterrence—and they fail to show that any deterrence value would outweigh the substantial societal costs of suppression.

I. Applying the exclusionary rule to searches by public-school employees will result in no deterrence—let alone police deterrence.

A. Law enforcement is not within a public-school employees' "zone of interest."

Polk and his amici argue that the exclusionary rule applies in this case because public-school employees in general and Lindsey in particular are closely connected to law enforcement. But, as explained in the State's merit brief (pp. 26-29), public-school employees are not adjuncts to law enforcement. Public-school employees do not have the same adversarial relationship with students that police have with criminals, and so exclusion of evidence in criminal proceedings will result in no deterrence—let alone *police* deterrence—that would outweigh the substantial costs of suppression. As for Lindsey, he is a civilian employee of the school. Lindsey's job duties entail maintaining safety and security at the school, but he does not have the powers of a police officer. As explained above (*infra*, p. 9), while there is undoubtedly overlap between safety and law enforcement, maintaining safety at a public school often will not implicate any law-enforcement interests. Public schools have an obligation to maintain safety at the school, not because they are responsible for apprehending and prosecuting offenders, but because they are responsible for the well-being of students entrusted in their care, and because safety is a prerequisite for learning. Appellant Br., 8-9. Maintaining safety in a school is at bottom an *educational* interest, not a law-enforcement interest. Although Lindsey does not participate in classroom instruction, he is nonetheless an integral part of Whetstone's educational mission. Even for someone like Lindsey who is in charge of a school's safety and security, a public-school employee's "zone of primary interest" is education, not law enforcement. *United States v. Janis*, 428 U.S. 433 (1976).

That public-school employees notify law enforcement of criminal activity occurring at the school does not make them law-enforcement actors for purposes of the Fourth Amendment. *C.f.*, *Clark*, 135 S.Ct. at 2182-2183. Law enforcement frequently obtains information from other government actors. But even when the other government actor is responsible for a Fourth Amendment violation, the exclusionary rule applies to deter law enforcement, not the other government actor. Appellant Br., 24-25. Notifying law enforcement of criminal activity does not make public-school employees any more connected to law enforcement than an appellate court that establishes precedent authorizing a warrantless search, *Davis v. United States*, 564 U.S. 229 (2011); a legislature that enacts a statute authorizing a warrantless search, *Illinois v. Krull*, 480 U.S. 340 (1987); or a judge who signs a warrant directly authorizing a search, *United States v. Leon*, 468 U.S. 897 (1984). The government actors in these cases were no doubt aware that their conduct would lead to searches by law enforcement, Juvenile Law Center (JLC) Br., p. 17, but in each case the Court held that the exclusionary rule's focus remains police deterrence.

Polk points to cases stating that the exclusionary rule applies to various non-law enforcement government actors. Appellee Br., 42-43. But these cases either (1) treated suppression as an automatic consequence of a Fourth Amendment violation, (2) did not address how applying the exclusionary rule would deter future police misconduct, or (3) discussed the exclusionary rule only in dicta. Two cases cited by Polk involve arson investigators. *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978). These cases did not separately analyze the exclusionary-rule question, but in any event they offer little help to Polk. Even if employed by the Fire Department, an arson investigator is a perfect example of a government actor that is an "adjunct to the law enforcement team engaged in the often

competitive enterprise of ferreting out crime." *Arizona v. Evans*, 514 U.S. 1, 15 (1995). In this respect, arson investigators differ significantly from public-school employees.

Two of Polk's amici discuss the "school to prison pipeline," which results in the criminalization of school misconduct. JLC Br., 15-17; Justice for Children Clinic (JCC) Br., pp. 4-10. These concerns, however, have little to do with the Fourth Amendment exclusionary rule and are best addressed "by policymakers and social scientists." *Hawker v. Sandy City Corp*., 774 F.3d 1243, 1246 (10th Cir.2014) (Lucero, J., concurring); *see also, A.M. v. Holmes*, ___ F.3d. ___, ___ (10th Cir.2016), n. 15 (in rejecting Fourth Amendment challenge to arrest of juvenile, court acknowledged the "school to prison pipeline" phenomenon but stated it "is not our place to question or undermine the New Mexico legislature's policy choice to * * * proscribe the kind of classroom misconduct that led to F.M.'s arrest"). Anecdotal evidence about juveniles being arrested for non-violent infractions like wearing too much perfume and stealing chicken nuggets, JCC Br., pp. 8-9, offer no guidance on whether the exclusionary rule should apply when a search by a public-school employee results in an adult being charged with a felony offense of bringing a gun to school (Polk was 18 when he committed his offense).

B. That the State seeks to admit evidence in a criminal proceeding is not dispositive on whether the exclusionary rule applies.

Polk argues that, because the State is seeking to admit evidence in a criminal (as opposed to civil) proceeding, the exclusionary rule must apply. While the nature of the proceeding is of course relevant in determining the applicability of the exclusionary rule, equally—if not more—relevant is the identity of the government actor responsible for the Fourth Amendment violation. Again, the Supreme Court has stated repeatedly that, even in criminal cases, the exclusionary rule's focus remains on deterring police, not other government actors who may be responsible for the Fourth Amendment violation. When law enforcement turns over evidence to other

government actors for use in a non-criminal proceeding, the exclusionary rule does not apply because the costs of suppression outweigh the benefits of deterrence. *Janis*, 428 U.S. at 455. It only follows that the converse be true—*i.e.*, that the exclusionary rule not apply when non-law enforcement actors turn over evidence to law enforcement for use in a criminal proceeding. Even if the State seeks to use evidence in a criminal proceeding, suppression will do nothing to deter police misconduct if police are not responsible for the Fourth Amendment violation.

C. There was no law-enforcement involvement in the search of the first bag.

Polk relies heavily on *United States v. Payne*, 181 F.3d 781 (6th Cir.1999), which held that the exclusionary rule applied to a search conducted by parole officers. But the Sixth Circuit has explained that *Payne* involved "overtones that regular law enforcement officers, in effect, usurped a parole officer's ability to conduct a special needs search based on less than probable cause." *United States v. Loney*, 331 F.3d 516, 522 (6th Cir.2003). In *Payne*, "the arrest and search were conducted by three parole officers and three state police officers, one of whom viewed the arrest as an opportunity to have a probation/parole officer help him get into the defendant's trailer." *Id.*, citing *Payne*, 181 F.3d at 784. It is no wonder, then, that the court in *Payne* stated that the "zone of interest" of the parole officers in that case included general law enforcement. *Payne*, 181 F.3d at 788.

Citing *Payne* and *Elkins v. United States*, 364 U.S. 206 (1960), Polk argues that applying the exclusionary rule to public-school searches is necessary to prevent the "expedient of law enforcement officials relying on illegal investigative searches conducted by [public-school employees]." Appellee Br., 45. The State in its merit brief (pp. 30-32), explained that *Elkins* does not justify extending the exclusionary rule to searches conducted by public-school employees without any law-enforcement involvement. Here, there was no police involvement in

the search of the unattended bag. And Lindsey did not become a police agent merely by seeking the assistance of the school resource officer after discovering the bullets. Unlike in *Payne*, Lindsey's "zone of interest" in searching the unattended bag was safety, not law enforcement. *Compare*, OACDL Br., pp. 7-8 (describing New Hampshire case where police officer would pass information along to school employees to circumvent constitutional restraints).

D. There is no evidence that public-school employees are systematically violating Fourth Amendment rights.

Polk claims that Lindsey "routinely and unlawfully violates the privacy interests of students." Appellee Br., 39. Polk seems to think that simply by performing searches at the school, Lindsey frequently violates the Fourth Amendment. But the record says nothing of when and under what circumstances Lindsey conducts the various searches required under his job duties. This Court should not blindly assume that Lindsey in particular or public-school employees in general are systematically violating students' Fourth Amendment rights. Appellant Br., 25-26. That Polk resorts to manufacturing an image of Lindsey as a serial Fourth Amendment violator only underscores the weakness in Polk's deterrence argument.

II. Polk's and his amici's reliance on non-deterrence rationales for extending the exclusionary rule to searches by public-school employees are unpersuasive.

Apparently recognizing that applying the exclusionary rule to public-school searches will achieve no deterrence, Polk and his amici rely on other non-deterrence rationales for extending the exclusionary rule to the public-school setting. None of these arguments has merit.

To start, Polk and his amici argue that suppressing evidence from searches by public-school employees is necessary to teach students constitutional values. It is odd to say that suppression is necessary to teach constitutional values when the constitution itself does not require suppression. *Leon*, 468 U.S. at 906. One of Polk's amici argues that applying the

exclusionary rule to public-school searches is necessary to teach students respect for "civic responsibilities." JLC, p. 9. One would think that a student's most basic "civic responsibility" is to *not bring a gun to school*. Allowing a student like Polk to escape criminal punishment for committing a dangerous felony will do far more to "erode [students'] appreciation for civil values," *id*. at 20, n. 5, than applying the exclusionary rule. Rather than "nurturing respect for Fourth Amendment values," applying the exclusionary rule "may well have the opposite effect of generating disrespect for the law and administration of justice." *Stone v. Powell*, 428 U.S. 465, 491 (1976). Contrary to Polk's assertion (Appellee Br., 48), the social costs of admitting evidence obtained in violation of the Fourth Amendment is not the "incongruity between the ideals of the Constitution and their application in the 'real world.'" The *real* cost of the exclusionary rule is "letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'" *Herring v. United States*, 555 U.S. 135, 141 (2009), quoting *Leon*, 468 U.S. at 908. These costs are no more apparent than when a student who brings a gun to school escapes criminal punishment.

Polk's amici also argue that the exclusionary rule should apply to public-school searches to "ensure equity of interests between students and schools," JCC, p. 10, and to prevent students from falling "victim to the 'school-to-prison pipeline,'" JLC, p. 20, n. 5. But whether "juvenile courts are becoming involved in matters that should be handled primarily by school administrators," JCC, pp. 10-11, is a policy issue beyond the purview of the Fourth Amendment or its exclusionary rule. As stated above, the "school to prison pipeline" is best addressed by policymakers—*i.e.*, those who define what conduct is appropriate for criminal prosecutions or delinquency proceedings. *Hawker*, 774 F.3d at 1246; *A.M.*, ___ F.3d at ___, n. 15. Whether

school discipline makes schools less safe or has detrimental effects on students, JLC, p. 24-26, is a policy issue, not an exclusionary-rule issue.

Finally, Polk and his amici argue that the exclusionary rule is necessary in the public-school setting because civil remedies are inadequate. But, as explained in the State's merit brief (pp. 35-36), the exclusionary rule does not exist to compensate for the perceived deficiencies of other remedies. The exclusionary rule does not apply to searches by public-school employees.

Third Proposition of Law: Suppression is proper only if the deterrence benefits of suppression outweigh its substantial social costs.

As stated in the State's merit brief (p. 37-39), even in the law-enforcement context suppression is proper only if the benefits of exclusion outweigh the costs of suppression. The exclusionary rule serves to deter only deliberate, reckless, or grossly negligent conduct, or in some cases recurring or systemic negligence. Even if the exclusionary rule potentially applies to a search performed by a public-school employee, suppression should be governed by the same standard as would govern police. But neither of the lower courts ever held that Lindsey's conduct was sufficiently culpable that the deterrence value outweighs the costs of exclusion.

Polk and his amici argue that the good-faith exception applies only when the official conducting the search relies on some "external source." But the Court has never held that some Fourth Amendment violations require automatic suppression, while others do not. To the contrary, *Davis*, *Herring*, and the other exclusionary-rule cases use broad language in referring to the need to deter police misconduct. The need for deterrence to outweigh the costs of suppression applies *anytime* a defendant invokes the federal exclusionary rule, not just when the official relies on an external source in performing the search. Even when a police officer is directly responsible for a Fourth Amendment violation, suppression will yield minimal

deterrence if the violation was the result of simple negligence rather than flagrant misconduct. *Utah v. Strieff*, 136 S.Ct. 2056, 2063 (2016).

There is an element of irony to the "external source" argument. The State has maintained throughout this case that the search of the second bag was a school search because the school resource officer was acting at the behest of the school employees. *In re Sumpter* at ¶ 30. But if the search of the second bag is classified as a *police* search, then the exclusionary rule would not apply under Polk's "external source" framework. Lindsey's informing the officer that he discovered bullets in the first bag would constitute an "external source" that allows the officer to search the second bag. The officer would have no way of knowing whether Lindsey's discovery of the bullets violated the constitution, especially if the violation hinged on Lindsey subjective motives. The officer thus could rely on this information in good faith. *Evans*, 514 U.S. at 14-16 (no exclusion when officer relied on erroneous information from court employee); *Herring*, 555 U.S. at 144-145 (no exclusion when officer relied on erroneous information from other police agency). Given that the sole purpose of the exclusionary rule is to deter police misconduct, it is more than a little strange to say that involving the police in a search makes the exclusionary rule *less* likely to apply than if the police are not involved in the search at all.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the State's merit brief, the Tenth District's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Baldwin's Ohio Revised Code Annotated
Title XXXVII. Health--Safety--Morals
Chapter 3743. Fireworks (Refs & Annos)
Purchasers

R.C. § 3743.45

3743.45 Ohio resident as purchaser; prohibited sales

Effective: September 29, 2015
Currentness

(A) Any person who resides in this state and who intends to obtain possession in this state of 1.4G fireworks purchased in this state shall obtain possession of the 1.4G fireworks only from a licensed manufacturer or licensed wholesaler.

Each purchaser of 1.4G fireworks under this division shall transport the fireworks so purchased directly out of this state within forty-eight hours after the time of their purchase.

This division does not apply to a person who resides in this state and who is also a licensed manufacturer, licensed wholesaler, or licensed exhibitor of fireworks in this state.

(B) No licensed manufacturer or licensed wholesaler shall sell 1.3G fireworks to a person who resides in this state unless that person is a licensed manufacturer, licensed wholesaler, or licensed exhibitor of fireworks in this state.

CREDIT(S)

(2015 H 64, eff. 9-29-15; 2008 H 562, eff. 9-23-08; 2001 H 161, eff. 6-29-01; 1997 H 215, eff. 6-30-97; 1995 S 2, eff. 7-1-96; 1989 H 111, eff. 7-1-89; 1986 H 428, S 61)

R.C. § 3743.45, OH ST § 3743.45
Current through File 123 of the 131st General Assembly (2015-2016).

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