IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No. 2016-271
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County Court of
vs.	:	Appeals, Tenth Appellate
	:	District
Joshua D. Polk,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 14AP-787

APPELLEE'S MEMORANDUM OPPOSING JURISDICTION

RONALD J. O'BRIEN (0017245)
Prosecuting Attorney
Franklin County Ohio

SETH L. GILBERT (0072929)
Counsel of Record for Plaintiff-Appellant
373 South High Street / 13th Floor
Columbus, Ohio 43215
614-525-3555

And

YEURA R. VENTERS (0014879)
Public Defender
Franklin County Ohio

TIMOTHY E. PIERCE (0041245)
Counsel of Record for Defendant-Appellee
373 South High Street / 12th Floor
Columbus, Ohio 43215
614-525-8857

TABLE OF CONTENTS

WHY THIS CASE DOES NOT MERIT FURTHER REVIEW

In the well-reasoned decision of *State v. Polk*, 10th Dist. No. 14AP-787, 2016-Ohio-28 the Tenth Appellate District correctly affirmed the judgment of the trial court who suppressed as "fruit of the poisonous tree" evidence obtained as a result of an earlier unconstitutional search of Mr. Polk's book bag. Both the trial and appellate courts embraced current principles pertaining to searches which occur in a school setting, and by doing so properly balanced the security needs of public schools with the privacy rights of students. Though these rights may be limited they are not nonexistent, and it is important to recall that "[t]he Supreme Court explicitly recognized that school children have legitimate expectations of privacy in possessions brought with them to school." *In re Adam*, 120 Ohio App.3d 364, 372, 697 N.E.2d 1100 (1997); accord, *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). And "[i]n an often quoted statement, the Court said that students do not 'shed their constitutional rights . . . at the schoolhouse gate.'" *Id.* at 348 quoting *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 506 (1969). Contrary to the claims of the prosecution and its amici the appeals court did not break new ground in the case *sub judice* when it declared the evidence inadmissible as a result of the unreasonable actions of the school authorities, nor does the decision represent some radical expansion of the exclusionary rule. The coherence of the Tenth District's analysis insures that the efforts of school officials to neutralize threats to the safety of students and school employees are not imperiled. For these and other reasons this Court ought to reject the State's request for further review.

STATEMENT OF THE CASE AND FACTS

The Appellee Mr. Polk generally accepts the State's factual summary found at pages 7-8 of its memorandum but wishes to include a few additions/clarifications. Though he was not a police officer, Mr. Lindsey agreed that he was a "safety and security officer at Whetstone high

school." Hr'g Tr. at 16: 24-25; 17: 1. Contrary to what is implied in the government's rendition of the facts, Mr. Polk's book bag was actually subjected to two searches. The first search involved Lindsey opening and looking inside the bag after it had been handed to him by the bus driver. Hr'g Tr. 56: 1-8. The bus driver stood in front of him during this search. *Id.* at 56: 7-11. Lindsey observed therein "[p]apers, notebooks. . . one binder . . . stuff like that . . . something with his name on it inside" but no bullets. *Id.* at 56: 12-24; Horton, J., *Decision and Entry* at 2 ("initial inspection yielded 'seven or so books' and some papers"). Lindsey indicated he later "dumped" out the bag's contents as a result of him identifying Appellee as the bag owner. *Id.* at 20: 10-19. This second search took place in the office of Principal Barrett and the two of them emptied the bag and the bullets were observed. *Id.* at 57: 2-7. Lindsey, Barrett, and Officer Sykes later located and detained Mr. Polk. Lindsey searched the belongings he was carrying and recovered a firearm.

LAW AND ARGUMENT

Appellee's Response to the State's First Proposition of Law: The Tenth District Court of Appeals in *State v. Polk*, 10th Dist. No. 14AP-787, 2016-Ohio-28 correctly held that a search conducted by a public school official in violation of the institution's search protocol is unconstitutional and all evidence obtained as a result must be suppressed.

1. The Facts of *State v. Polk* Are Unusual and Not Likely To Be Replicated Provided School Officials Adhere To Their Own Search Protocols In The Future.

As to this case's unique facts, school safety and security officer Lindsey---a non-law enforcement official endowed with certain law enforcement-type responsibilities within the school---claimed to have searched Mr. Polk's book bag pursuant to certain "protocols." The court of appeals ruled that a search in conformity with school protocols would have been appropriate had Lindsey simply followed them---which he did not---thus making the second search of the lost bag unconstitutional. See *State v. Polk*, *supra*, ¶ 16. This key point has

unfortunately been ignored by the government. When a lost book bag was not a safety threat and/or its owner had been identified the protocol required that it be returned to its student-owner or, if ownership could not be established, to the school's "lost and found" (Hr'g Tr. 7: 21-25; 8: 24-25). But prior to doing either the protocol permitted an official to search such items for two neutral reasons: to determine the identity of the bag's owner and whether the bag created a safety threat to the searcher or others. Hr'g Tr. 8: 24-25. Lindsey effectuated *both* goals as a result of his first search of the bag, and the trial court so found. See Horton, J., *Decision and Entry* at 4; *State v. Polk*, *supra*, ¶ 14. And contrary to the State's characterizations, this search was detailed and intrusive enough for Lindsey to observe by opening and looking inside the bag the presence of "[p]apers, notebooks. . . one binder . . . stuff like that" (*id.* at 56: 19-20) as well as "something with his name on it inside" (*id.* at 56: 23-24); see also Horton, J., *Decision and Entry* at 2 ("[t]his initial inspection yielded 'seven or so books' and some papers"). Lindsey did not discover the bullets during the first search of the book bag. *Id.* at 56: 14-15. Noting that the protocol's identification/safety criteria had been satisfied at the conclusion of the first search the court of appeals stated

> [t]he justification for an intrusion or search expires when it is fulfilled, making further unjustified searches unlawful. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 323-25 (1987) (holding that a search for shooting victims or weapons following a shooting in an apartment building did not extend, without additional justification, to moving stereo equipment in order to record the serial numbers to determine if it was stolen). *In Polk's case no contraband was found during the initial search. Lindsey successfully determined both that the bag was not a bomb and that it was owned by Polk (a student at the school) during the initial search.* ***After the initial search, all justifications for examining the bag's contents were fulfilled and no further justification existed to search the bag.***

State v. Polk, *supra*, ¶ 14 (emphasis added). It is important to note that the prosecution and its amici fail to address, let alone refute, the correctness of these principles and their application to the *Polk* case. Lindsey violated these protocols by not returning Mr. Polk's book bag to him

once he satisfied the identification/safety requirements through the first search and instead performed a separate, second search based on his "possible" and "rumored" association with a gang. Hr'g Tr. at 9: 5-8. Neither the State nor its amici assert that Mr. Polk's rumored gang association provided a reasonable basis for conducting the second search. Indeed, the Tenth District rejected this as forming a reasonable basis for the bag's subsequent search. *State v. Polk*, *supra*, ¶ 17-18. Lindsey attested to no particularized facts to support such an opinion. See *United States v. Gilmore*, 945 F. Supp.2d 1211, 1219 (D. Colo. 2013) ("Lt. Gavito did not state any particularized facts that would lead a reasonable officer to believe that Defendant was a gang member. . ."). Lindsey never elucidated which gang he thought he was part of; the extent of his involvement, if any; the gang's activities at the school, if any; or their common practices. For these reasons Mr. Polk's "possible" gang contacts did not make the book bag any more of a threat than that of bag whose owner was unknown or whose owner was not thought to be part of a gang.

Once a protocol's neutral purposes have been achieved the further search or inspection of the item is unlawful. See *United States v. Flores*, 122 F. Supp.2d 491, 495 (S.D.N.Y. 2000) ("once the purposes of the inventory search have been met, a subsequent, purely investigatory search is improper"); *Bruce v. Beary*, 498 F.3d 1232, 1248 (11th Cir. 2007) ("'[t]o meet the test of reasonableness, an administrative screening search must be limited in its intrusiveness as is consistent with satisfaction of the administrative need that requires it'") (citation omitted); *United States v. Fofana*, 620 F. Supp.2d 857, 866 (S.D. Ohio 2009) (Marbley, J. "[t]he Court merely holds that where, as here, the evidence demonstrates that the intrusiveness of a passenger's search was ramped-up based on a desire to detect evidence of ordinary wrongdoing, after the presence of weapons and explosives had been ruled out, the search can no longer be justified

under the administrative search doctrine and suppression is appropriate," citing *United States v. $124, 579 in U.S. Currency*, 873 F.2d 1240, 1247 (9th Cir. 1989); see also *United States v. Khoury*, 901 F.2d 948, 959 (11th Cir. 1990) ("Simpkins' initial inspection of the notebook was necessary and proper to ensure that there was nothing of value hidden between the pages of the notebook. Having satisfied himself that the notebook contained no discrete items of value and having decided that the diary entries themselves would have intrinsic value to [co-defendant] Kluver, Simpkins had satisfied the requisites of the inventory search and had no purpose other than investigation in further inspecting the notebook"); *Michigan v. Clifford*, 464 U.S. 287, 294 (1984) ("if, for example, the administrative search is justified by the immediate need to ensure against rekindling [of a fire], the scope of the search may be no broader than reasonably necessary to achieve its end") (bracketed material added).

The lower court noted that Lindsey could have fulfilled the protocol's neutral objectives by dumping the bag's contents out initially, but because those objectives were satisfied when he viewed the contents of the bag during the first search the second one was unnecessary and unlawful. *State v. Polk*, *supra*, ¶ 14, 16. The government makes much of this by arguing that since emptying the bag initially would have been a reasonable means of satisfying the neutral criteria it matters not that it occurred after the first search. This contention rests uneasily on the State's view that Lindsey was prepared all along to dump out the bag's contents without regard to the owner's identity. However, the trial court did not find this portion of Lindsey's testimony credible. *State v. Polk*, *supra*, ¶ 16 ("[i]t was not an abuse of discretion for the trial court to conclude that Lindsey's testimony that he always intended to empty the bag was not credible"). And as one court noted

> [a]s a general proposition, the assessment of witness credibility lies solely with the trier of fact; thus, an appellate court cannot substitute its judgment for the jury or the trial

> judge. *State v. Teague*, 11th Dist. Trumbull No. 2011-T-0012, 2012-Ohio-983, ¶ 30. As part of this discretion, the trier of fact is free to believe all, part, or none of a witness's testimony. *State v. Williams*, 11th Dist. Lake No. 2012-L-078, 2013-Ohio-2040, ¶ 21. 'The trier of fact is in the best position to evaluate inconsistencies in testimony by observing the witness's manner and demeanor on the witness stand---attributes impossible to glean through a printed record.' *Id.*

In re T.S.G., 11th Dist. No. 2014-L-051, 2014-Ohio-5708, ¶ 26; accord, *Ace Steel Bailing, Inc. v. Porterfield*, 19 Ohio St.2d 137, 138, 249 N.E.2d 892 (1969) (court "not required to accept the testimony of the sole witness simply because it was uncontradicted, unimpeached and unchallenged").

Questions regarding the rights of citizens under the Fourth Amendment often and frequently do turn on when and how searches are conducted. "The reasonableness of a seizure, however, depends on what the police in fact do." *Rodriguez v. United States*, __U.S.__, 135 S. Ct. 1609, 1616 (2015) citing *Knowles v. Iowa*, 525 U.S. 113, 115-117 (1998). For example, it is not lawful for authorities armed with probable cause to enter a home and search it and only later obtain a warrant, even though their actions *would have* been reasonable had they obtained the warrant before entering the residence. Or when certain items seized during an inventory search are then subjected to a second search to determine their evidentiary value are declared inadmissible despite the fact that their subsequent inspection *would have* been deemed lawful had their evidentiary value been apparent during the course of the valid inventory. See *United States v. Flores*, *supra*, at 494 ("[h]ere, Agent Ludowig merely inventoried the items in question during his 'cursory' initial [inventory] search of the vehicle and subsequently conducted a more thorough search of the seized items to assess which of them had evidentiary value, assisted by other agents. . . It is the second search that raises constitutional difficulties") (bracketed material added); cf. *Michigan v. Clifford*, *supra*, at 295 ("[i]f evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the 'plain

view' doctrine"). Or when a law enforcement official unnecessarily prolongs a traffic stop to facilitate a canine sniff the search is unconstitutional even though it *would have* been lawful if conducted in the time period it takes the officer to write a citation. *Rodriguez v. United States*, *supra*, at 1616. That Lindsey's actions *would have* been reasonable had he effectuated the protocol objectives by initially emptying the bag does not alter the fact that he did not do so, and in light of this the need for the second search was obviated due those objectives being fulfilled during the actual first search. No objective basis existed for Lindsey to subject the contents of the book bag to further scrutiny, and for this reason the second search of it was unconstitutional.

Neither the trial nor the appeals courts declared the Whetstone High School search protocol unconstitutional, and assuming it is faithfully adhered to in the future it should not result in unlawful searches of lost book bags at that school. Again, the Tenth District held that emptying an unattended book bag in the first instance to satisfy the two neutral criteria will comply with the school's protocol rendering the actions of the official who does so "reasonable." But where, as here, the safety and identification purposes are satisfied (as they were during the first search), the protocol itself requires that the student's book bag be returned to him. This further demonstrates why this matter does not constitute a matter of public or great general interest and does not involve a substantial constitutional question.

2. The Second Search of the Lost Book Bag Was Conducted For Reasons Other Than The Fulfillment of the Neutral Criteria of the School Search Protocol.

The government's insistence that the law does not concern itself with the intent of school officials who search student belongings under the milieu of the institution's protocols only takes it so far. The prosecution suggests that the search protocol is similar to police impoundment/inventory standards (memo at 11) whereas the Attorney General likens it to administrative inspection policies (memo at 11-12), but the law of each requires that such

searches not be conducted as a pretext solely to gather evidence of criminal activity. "The Supreme Court has thus 'repeatedly emphasized the importance of keeping criminal investigatory motives from coloring administrative searches.'" *United States v. Huguenin*, 154 F.3d 547, 554 (6th Cir. 1998) quoting *United States v. $124, 570 in U.S. Currency*, *supra*, at 1244. The *Polk* court ruled that Judge Horton "was well within [his] fact-finding discretion to conclude, based on the circumstances, the testimony and [his] ability to evaluate the officer's credibility, that the second search was based 'solely' on rumors of Polk's gang affiliation." *Id.* at ¶ 16 (bracketed material added); see also Hr'g Tr. 20: 10-19. Assuming, without agreeing, that the school protocol can be analogized to either an administrative search policy or impoundment/inventory procedures the second search by Lindsey was nevertheless unconstitutional under both. Again, by the time the second search was conducted he had already satisfied the protocol's neutral criteria. *State v. Polk*, *supra*, ¶ 14. In light of this Lindsey's second search was intended not to fulfill the search protocol but solely to gather evidence of criminal activity due to his belief that Appellee was possibly connected with a gang. See Hr'g Tr. 22: 14-19. But this is inconsistent with the objectives of administrative and inventory searches. Such searches must fulfill "an administrative function, not an investigative function." *State v. Klorer*, 6th Dist. No. WD-13-083, 2014-Ohio-3989, ¶ 11 citing *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976); see also *State v. Caponi*, 12 Ohio St.3d 302, 303, 466 N.E.2d 551 (1984) (inventory search unlawful because "the purpose of the search was to gather evidence and not to take an inventory"); *Florida v. Wells*, 495 U.S. 1, 4 (1990) (inventory searches ought not be turned into "a purposeful and general means of discovering evidence of crime"). Contrary to the State's claims, there was objective evidence in the record to support the trial court's ruling that the second search was conducted solely for investigative purposes unrelated to the protocol, to

wit, once Lindsey effectuated the neutral search criteria during the first search instead of returning the bag to Mr. Polk he subjected it to a separate, second search based only his belief that Mr. Polk could possibly be part of a gang. Moreover, Lindsey's claim (not accepted by the trial court) that he intended to dump out the bag's contents is belied by him not doing so when he initially received it but performing a less intrusive search instead.

3. The State Previously Acknowledged Mr. Polk's Book Bag Was Lost, Not Abandoned.

The book bag left on the bus by Mr. Polk was not abandoned but rather lost or mislaid. This had been previously acknowledged by the trial prosecutor. See R. 82 (State's June 20, 2014 Memo *Contra* at 3 ["lost bag"]; 4 ["lost item of property]; 7 ["lost backpack"]); see Hr'g Tr. 15: 14, 18 (book bag referred to as "lost"). Lindsey himself testified it was not uncommon for students to leave their book bags and other personal property on buses and around the school, and when this happens he and others attempt to return these items to the student. Hr'g Tr. 7: 21-25; 8: 24-25; 21: 12-24; 22: 1-4. Citizens retain an expectation of privacy in lost or mislaid property. *Maine v. May*, 608 A.2d 772, 775-76 (1992); *Hawaii v. Ching*, 67 Haw. 107, 678 P.2d 1092-93 (1984); *Knight v. Virginia*, 61 Va. App. 297, 309 n. 5, 734 S.E.2d 716 (2012). The State never raised an abandonment argument before the trial court. In fact State's appellate counsel before the court of appeals even noted at page 6 of his April 14, 2015 reply brief "[a]lthough the State briefly mentioned abandonment in its brief. . .*it is not relying on abandonment to justify the search*" (emphasis added). Unfortunately the Attorney General at page 11 of its memorandum now raises for the first time on appeal the claim that the book bag search was justified under the alternate theory that Mr. Polk had abandoned it on the school bus. But "[h]aving failed to raise this issue in the trial court, appellant has waived his right to raise it on appeal." *State v. Jackson*, 10th Dist. No. 06AP-1004, 2007-Ohio-2470, ¶ 10 citing and quoting

State ex. rel. Zollner v. Indus. Comm., 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993) ("[a] party who fails to raise an argument in the court below waives his or her right to raise it" on appeal). Appellee respectfully submits that the Attorney General's abandonment argument does not comprise an appropriate basis for this Court's further review of this case.

For all these reasons the State's first proposition of law must be discarded.

Appellee's Response to the State's Second Proposition of Law: The exclusionary rule is intended to exclude evidence obtained by public officials in violation of the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the Ohio Constitution. For this reason it does apply to unreasonable searches conducted by Ohio public-school employees.

1. The High Costs of Not Applying the Exclusionary Rule to Illegal Searches Conducted By Public School Officials.

Despite the Court in *New Jersey v. T.L.O.*, *supra*, declining to address whether the exclusionary rule precludes the admission of evidence obtained unlawfully by a public school official one justice noted the impact its absence would have on the student being trained in citizenship:

> [s]chools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot but feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that 'our society attaches serious consequences to violations of constitutional rights,' andthat this is a principle of 'liberty and justice for all.'

Id. at 373-74 (Stevens, J., concurring and dissenting in part). In the context of public schools "[t]he State cannot compel attendance at public schools and then subject students to unreasonable searches of the legitimate, noncontraband items that they carry onto school grounds." *Illinois v. Dilworth*, 169 Ill.2d 195, 205, 661 N.E.2d 310 (1996) citing *New Jersey v. T.L.O.*, *supra*. "[T]he Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment." *Safford v. Unified School Dist. No. 1 v.*

Redding, 557 U.S. 364, 377 (2009). The government's second proposition of law in no uncertain terms advocates for the elimination of the exclusionary rule from the public school setting. The State's arguments favoring the demise of the exclusionary rule based on students' diminished privacy expectations when compared to school safety and disciplinary considerations envisions a future educational milieu not all that different from that of inmates in a penitentiary. The *T.L.O.* Court clarified that student privacy expectations are wholly different from those of prison inmates. *Id.* at 338-39 ("[w]e are not yet ready to hold that the schools and prisons need be equated for purposes of the Fourth Amendment"). Permitting school officials to perform unreasonable, random searches by rummaging through a student's personal belongings has the unintended consequence of eroding their understanding and faith in the right of privacy, and may curtail their willingness to assert such rights in the future, even when they have been victimized by such a violation. Addressing the constitutionality of R.C. 3313.20(B)(1)(b) Justice O'Neill in his former position as a member of the Eleventh District Court of Appeals echoed the position taken by Justice Stevens in *T.L.O.* when he said

> one cannot envision any rule that minimizes the value of our Constitutional freedoms in the minds of our youth more dramatically than a statute proclaiming that juveniles have no right of privacy in their personal possessions. The contents of a student's book bag in all likelihood represent the most personal of all student belongings. Included within this ever-present repository would be letters which are never meant to be sent, diaries which are not intended to be read by anyone, photographs of long lost friends or pets, and any other unmistakable evidence of the particularly unique stages of growing up. The government simply has no right to proclaim that, contrary to the right of privacy guaranteed by the United States Constitution, these personal articles will be subject to observation and dissemination by the adult community at will. *It is hypocritical for a teacher to lecture on the grandeur of the United States Constitution in the morning and violate its basic tenets in the afternoon.*

In re Adam, *supra*, at 375-76 (emphasis added). For these reasons the exclusionary rule is actually *more* suited for the school search setting. See *Gordon J. v. Santa Ana Unified School Dist.*, 162 Cal. App.3d 530, 542 (1984) ("[i]t is no less offensive to the Constitution to permit the

introduction of unlawfully obtained evidence in a juvenile or criminal prosecution simply because the site of its improper acquisition happened to be a high school campus. *Arguably, it is more so*") (emphasis added). One commentator observed that excluding evidence obtained unlawfully in the public school context is "especially compelling" and observed "[i]f a court tolerates official lawlessness by allowing the use of tainted evidence seized by a school authority, students 'cannot help but feel that they have been dealt with unfairly,' and their once well-founded respect for the judiciary may be lost forever. Hardin, *Searching Public Schools:* T.L.O. *and the Exclusionary Rule*, 47 Ohio St. L.J. 1099, 1112 (1986).

2. Other States Have Applied The Exclusionary Rule To Suppress Evidence Unlawfully Obtained By School Officials.

The government has cited decisions from two states to support its view that there should be no exclusionary rule to address illegal school searches. The first, *State v. Young*, 216 S.E.2d 586 (Ga. 1975), has been criticized for resurrecting a variant of the long-since repudiated "silver platter" doctrine whereby school officials are insulated from the exclusionary rule because they are not law enforcement officials and could act as surrogates for the police and prosecutorial authorities by delivering to them evidence they have obtained unlawfully. *State v. Polk*, *supra*, ¶ 21 discussing *In the Interest of L.L.*, 90 Wis.2d 585, 592 n. 1 (1979). The viability of the second, *D.R.C. v. Alaska*, 646 P.2d 252, 258 (1982), is subject to challenge in light of *Lowry v. Alaska*, 707 P.2d 280, 285 (Alaska App. 1985) where the court there questioned *D.R.C.*, a pre-*T.L.O.* decision, by noting "this aspect of *D.R.C.* was incorrectly decided. In *New Jersey v. T.L.O.* [citation omitted], the Supreme Court squarely held that school teachers are state agents subject to the restrictions of the fourth amendment." At ¶ 22 of *Polk* the Tenth District collected eight (8) decisions from various states where the exclusionary rule was applied to an unlawful school search. To these may be added *In re David F.*, Cal. App. No. B251543, 2014 WL 6675188, * 3

(Nov. 25, 2014) (unpublished) and *In re Dominic W.*, 48 Md. App. 236, 239, 426 A.2d 432 (1981).

3. Exclusionary Rule Applicable To State Officials Other Than Police.

Courts have ruled that evidence unlawfully obtained by non-police government officials is subject to exclusion. These include by way of example fire investigators (*Michigan v. Clifford*, *supra*, at 298-99), zoning inspectors (*New York v. Muttontown Acres LLC*, 37 Misc.3d 1202(A) at *4, 964 N.Y.S.2d 61 (2012)), and TSA airport screeners (*United States v. McCarty*, 648 F.3d 820, 836 (9th Cir. 2011) and *United States v. Fofana*, *supra*, at 866). The State in its memoranda repeatedly invokes the "special needs" doctrine to justify Lindsey's actions, yet the "special needs" rubric cannot be used to "uphold the collection of evidence for criminal law enforcement purposes." *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n. 20 (2001); *id.* at 88 (Kennedy, J., concurring in the judgment) ("The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes"). In contrast to the case *sub judice* the school officials' actions in *Bd. of Education of Independ. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 833 (2002) were upheld because "the test results were not turned over to any law enforcement authority" and that the only consequence of the failed urine test was to limit students' participation in extracurricular activities. Lindsey testified his responsibilities included "security checks," checking "the building," "kids," "lockers," doing anything "that has anything to do with safety and security," and searching "book bags" and "lockers" (Hr'g Tr. 5: 6-10, 20-25; 8: 13-15), duties less concerned with educating schoolchildren and more akin to law enforcement and evidence gathering. This, combined with the requirements of 20 U.S.C. § 7151(h)(1), the "Gun-Free Schools Act," that no federal monies will be disbursed "to any local

educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school," along with the fact he and Barrett disclosed to Officer Sykes the results of the second search, all demonstrate that because Lindsey's duties serve a law enforcement function exclusion of evidence will deter him and others similarly situated from performing future unlawful searches. See *California v. Willis*, 28 Cal.4th 22, 41-42 (2002) discussing *Penn. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 369 (1998) (exclusionary rule appropriate to deter actions of state officials [in *Willis*, parole officers] who serve a "law enforcement function," are imbued with a "general law enforcement character," and that when they "act like police officers and seek to uncover evidence of illegal activity, they (like police officers) are undoubtedly aware that any unconstitutionally seized evidence that could lead to an indictment could be suppressed in a criminal trial"). For these reasons the exclusionary rule is applicable to searches conducted by school officials and the State's second legal proposition must therefore be denied.

Appellee's Response to the State's Third Proposition of Law: The "good faith exception" to the exclusionary rule does not apply where the official conducting the search is alone responsible for assuming it is reasonable and conforms with governing law when in fact it is neither.

Courts have generally held that the "good faith" exception does not apply to warrantless searches besides those types of warrantless searches identified in *Arizona v. Evans*, 514 U.S. 1 (1995) and *Illinois v. Krull*, 480 U.S. 340 (1987). The exception is inapplicable to an official who mistakenly concludes that the facts known to him will make the search reasonable. See *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) ("there is no good faith exception to the exclusionary rule for police who do not act in accordance with governing law. To create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they

are entrusted to enforce and obey"); accord, *United States v. Stokely*, 732 F. Supp.2d 868, 906 (E.D. Tenn. 2010). Lindsey violated the very search protocols developed by his employer and with whom he claimed familiarity. The good faith exception is not available for searches conducted in violation of administrative or inventory/impoundment procedures. See *Abel v. United States*, 362 U.S. 217, 226 (1960) ("[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts"); *State v. Leak*, Slip. Op. No. 2014-1273, __N.E.3d__, 2016-Ohio-154, ¶ 37 (good faith exception not applied; "[t]he search of the car. . .was not a reasonable search incident to a lawful impoundment . . . The fact that the arresting officer used established police procedure to conduct the inventory search does not overcome the unlawfulness of the impoundment in the first place"). For these reasons the government's third legal proposition must also be dismissed.

CONCLUSION

Having applied current legal principles regarding searches of personal belongings by school officials, as well as concluding that the good faith exception to the exclusionary rule is unwarranted under these facts, the Tenth District Court of Appeals correctly upheld the trial court's grant of the Appellee's suppression motion. All three of the State's legal propositions must therefore be discarded.

Respectfully submitted,

Yeura Venters
Franklin County Public Defender

By /s Timothy E. Pierce
Timothy E. Pierce 0041245
Counsel for Appellee
373 South High Street/12th Floor
Columbus, OH 43215

Phone: (614) 525-8857

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing memorandum in opposition was delivered by regular U.S. mail to the following individuals this 21st day of March, 2016:

Franklin County Prosecuting Attorney
Attn: Mr. Seth Gilbert
373 South High Street/13th Floor
Columbus, OH 43215

Ohio School Boards Association
Attn: Ms. Jennifer Flint
Bricker and Eckler LLP
100 South Third Street
Columbus, OH 43215

Ohio Prosecutors Association
Attn: Ms. Heaven DiMartino
Summit County Safety Building
53 University Avenue
Akron, OH 44308

Ohio Attorney General Mike DeWine
Attn: Eric Murphy, State Solicitor
30 East Broad Street/17th Floor
Columbus, OH 43215

/s Timothy E. Pierce
Timothy E. Pierce 0041245
Counsel for Appellee