

IN THE SUPREME COURT OF OHIO

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

**MERIT BRIEF OF AMICUS CURIAE JUSTICE FOR CHILDREN CLINIC
IN SUPPORT OF APPELLEE JOSHUA D. POLK**

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STATEMENT OF THE CASE AND FACTS

Amicus curiae hereby adopts the statement of the case and facts set forth in Appellee Joshua D. Polk's merit brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The **Justice for Children Clinic** at The Ohio State University Moritz College of Law combines legal education with zealous advocacy for the rights of children across a variety of systems. The Justice for Children Clinic provides law students with the opportunity to represent children in neglect and dependency proceedings, delinquency cases, immigration adjustments and educational issues. The students and faculty in the Clinic work to ensure that the expressed desires of their clients are heard, that juvenile rights are taken seriously, and that the juvenile system maintains its commitment to rehabilitating children and reunifying families. The Justice for Children Project, which houses the Clinic, hosts symposia and participates in the national discourse regarding children who may be directly and adversely affected by the issues in this case. It is critically important to the due process rights of our youth and the credibility of the juvenile justice system that the inherent differences between youths and adults be given sufficient weight under the law.

ARGUMENT

STATE'S 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.

Amicus curie supports the argument set forth in appellee's merit brief.

STATE'S 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.

- I. School Resource Officers perform law enforcement functions in school, therefore they should be held to the same standards as law enforcement officers.**

The appellant classifies school resource officers as school employees who are detached from the criminal justice system and have no need to follow the nuances of the Fourth Amendment. In reality, school resource officers function like police officers, not school employees in the traditional sense. The fact that school resource officers function like police officers in schools combined with the fact that harsh school disciplinary practices funnel many disadvantaged youth into the juvenile justice system means that rules protecting the rights of students, such as the exclusionary rule, should be applied to the searches they conduct on school campuses.

The Ohio School Resource Officers Association defines school resource officers (SROs) as law enforcement officers whose primary purpose is keeping peace in their assigned schools. Ohio School Resource Officers Association, *What SROs Are*, (1998), <http://www.osroa.org/sro/srosare.html>, (accessed Sept. 12, 2016). They can also function as law-related counselors who provide guidance to students, teachers, administrators, and parents and act as a link to support services inside and outside the school environment. *Id.* Even though SROs perform guidance and mentoring functions, their work at schools revolve around their law enforcement role. Ohio School Resource Officers Association, *What School Resource Officers Do in School*, (1998), <http://www.osroa.org/sro/srosdo.html>, (accessed Sept. 14, 2016). A survey of SROs

indicated that they spend 50% of their time on law enforcement duties such as foot patrols of their school campuses and site inspections to ensure the safety of their schools. *Id.* The same survey showed that 60% always wear their law enforcement uniforms and 97% are armed while providing service. *Id.* SRO programs are the product of a collaboration between school systems and law enforcement agencies. Ohio School Resource Officers Association, *How SRO Programs are Conducted*, (1998), <http://www.osroa.org/sro/conducted.html>, (accessed Sept. 12, 2016).

In his testimony, Robert Lindsey, the school employee who testified about the multiple searches of Joshua Polk, described his primary role in the school as a school safety and security officer. Hr'g Tr. at 16: 24-25; 17: 1-3. He admitted that he did not function as a teacher, administrator, counselor, or coach. *Id.* Lindsey testified that in his role as a security officer for the school he conducts security checks of the buildings, lockers, and the students; performs fire drills, and other functions that pertain to school safety and security. *Id.* at 5:8-10, 21-25. Although Officer Lindsey was not officially labeled an SRO, he essentially performed the same functions as an SRO.

Although the appellant tries to label SROs as public school employees, they perform the same essential functions as police officers, therefore the exclusionary evidence rule should apply to them. To disregard the rule in this situation would be to incentivize quasi-law enforcement officials in school settings carrying out law enforcement job duties to disregard students' fundamental rights. Lindsey's primary duty of maintaining school security parallels that which is expected of law enforcement both inside and outside of schools; it matters not that his title was not "School Resource Officer."

If this Court holds that the exclusionary rule does not apply to school employees acting in a law enforcement role, SROs would at best ignore and at worst trample on the Fourth Amendment rights of students to be free from unreasonable search and seizure. Although the school has the important interest of maintaining safety in their schools, that interest is outweighed by the fundamental constitutional rights of students.

STATE'S THIRD PROPOSITION OF LAW

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

- I. This Court should apply the exclusionary rule to public school searches because zero tolerance policies, the presence of quasi-law enforcement officers in schools, and other harsh disciplinary practices lead to the criminalization of students.**

A school student's expectation of privacy, and the school's need to maintain a safe environment, are—at a glance—equally legitimate. *N.J. v. T.L.O.*, 469 U.S. 325, 340, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). However, recent and prevalent research on the school-to-prison pipeline demonstrates a clear line to criminal implications from school discipline practices. See Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 Wash U. L. Rev. 919 (2016) (data analysis shows regular police presence in schools increases referrals to law enforcement, even for low-level offenses); Amanda Merkwae, Note, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 Mich. J. Race & L. 147 (2015) (police presence in schools leads to increase in criminalization of disabled children); J. Chad Mitchell, Comment, *An Alternative Approach to the Fourth Amendment in Public Schools: Balancing Students' Rights with School Safety*, 1998 B.Y.U.L. Rev. 1207

(1997) (exploring application of the exclusionary rule to school administrative hearings); Neal I. Aizenstein, *Fourth Amendment—Searches by Public School Officials Valid on “Reasonable Grounds:” New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985), 76 J. Crim. L. & Criminology 898 (1985) (examining the Supreme Court’s departure from the probable cause standard in T.L.O.). Applying the exclusionary rule in school searches not only prevents school employees from recklessly, willfully, or negligently violating the fundamental civil rights of students, but it also prevents unnecessarily introducing children to the criminal justice system.

The school-to-prison pipeline refers to the national trend of criminalizing children, often impoverished and/or marginalized children, for misbehavior in school. Children's Defense Fund, *Zero Tolerance and Exclusionary School Discipline Policies Harm Students and Contribute to the Cradle to Prison Pipeline*, (November, 2012), available at <http://www.cdfohio.org/assets/pdf-files/issue-brief-zero-tolerance.pdf> (accessed September 13, 2016). The trend includes actions by schools such as zero tolerance policies – harsh school discipline policies that remove students from school, oftentimes for non-violent behavior – and other disciplinary measures, such as school-based arrests and sending disruptive children to alternative schools. *Id.*

Zero tolerance policies are school disciplinary policies and practices that call for the automatic removal (in-school suspension, out-of-school suspension, expulsion, or involuntary school transfer) of students who commit one or more listed offenses. *Id.* Facially, these policies are meant to be implemented equitably; however, research has shown that these disciplinary practices are disproportionately enforced on disabled students, impoverished students, and students of color. *Id.*

Nationally, a widely disparate number of youth with learning disabilities and emotional or behavioral disorders are adjudicated delinquent, and generally, youth in the juvenile justice system are three to seven times more likely to need special education services than children outside of the system. Merkwae, *supra*, at 152 (citing Peter Leone & Lois Weinbert, Center for Juvenile Justice Reform, *Addressing the Unmet Educational Needs of Children and Youth in the Juvenile Justice and Child Welfare Systems* 12 (2010)). The U.S. Department of Education, Office for Civil Rights, discovered in 2014 that “students with disabilities are more than twice as likely to receive an out-of-school suspension ... than students without disabilities.” Merkwae, *supra*, at 155. The study also revealed that black students are suspended at a rate three times greater than white students. *Id.* This racial imbalance is represented throughout every stage of the school-to-prison pipeline. Nance, *supra*, at 924. School administrators and teachers discipline minority students more often, and more severely, than white students for committing similar offenses, and children of color have higher arrest and conviction rates when they become involved with law enforcement and the justice system. *Id.* at 924-925.

Local statistics very closely parallel those of national, as demonstrated by the significant impact on Ohio’s youth that zero tolerance policies have made. In Ohio’s eight largest school districts, for example, students diagnosed with emotional disturbances or other mental health issues are over *three times* more likely to be suspended than a student with no disability. Children’s Defense Fund, *supra*. Ohio students who are economically disadvantaged are *four times* more likely to be suspended than students who were not economically disadvantaged. *Id.* Finally,

students of color in Ohio's eight largest school districts are *four times* more likely to be suspended than White students as well as more likely to be suspended for minor infractions than White students. *Id.*

If these policies made students safer in school, it might appear that they have served their purpose. Unfortunately, there is little to no evidence to support such a claim. Nance, *supra*, at 934 (“[n]ot only is there no evidence that zero tolerance policies have made schools safer, these policies have also pushed more students out of schools and into the juvenile justice system”); see Advancement Project, Harvard University, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* 17 (2000), <https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf> (stating that after four years of implementation, schools that used zero tolerance policies were less safe than those that did not use them) (accessed September 12, 2016). As an example, one 2013 study found no decrease in assaultive or property crimes in schools that implemented new SRO programs. Merkwae, *supra*, at 160 (citing Chongmin Na & Denise Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, 30 Just. Q. 619, 620 (2013)). Zero tolerance policies do not make schools safer; however, they prepare certain students for a lifetime of involvement with the criminal justice system. Russ Skiba and Reece Peterson, Phi Delta Kappa International, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* (1999),

http://curry.virginia.edu/uploads/resourceLibrary/dark_zero_tolerance.pdf (accessed September 12, 2016).

Research shows that students who are not in school have a greater chance of staying home unsupervised which increases the risk of those students being victims of crime or being criminalized. Children's Defense Fund, *supra*. Students who are suspended or expelled from school have a higher dropout rate, which further increases the risk of incarceration. Nance, *supra*, at 924; see Elizabeth D. Cramer et al., *From Classmates to Inmates: An Integrated Approach to Break the School-to-Prison Pipeline*, 47 Equity & Excellence in Education 461 (2014); Catherine Y. Kim et al., *The School-to-Prison Pipeline: Structuring Legal Reform* 1 (2010). This is especially true if the student appears in court. Nance, *supra*, at 924. Such disciplinary actions also decrease the odds that a student will succeed academically and have future stable employment opportunities. *Id.*

The criminalization of students in schools is also impacted by the use of law enforcement officers, or quasi-law enforcement officers, to address inappropriate or disruptive behavior in schools. Children's Defense Fund, *supra*. This leads to students being arrested for oftentimes non-violent infractions. *Id.* In recent years, students have faced charges for wearing too much perfume, Chris McGreal, *The U.S. Schools With Their Own Police*, The Guardian (January 9, 2012, 1:00 PM), <https://www.theguardian.com/world/2012/jan/09/texas-police-schools> (accessed September 12, 2016), eating chicken nuggets from a classmate's lunch tray, Eugene Kane, *Chicken Nugget Arrest is Half Baked*, Journal Sentinel (July 17, 2010, <http://archive.jsonline.com/news/milwaukee/98681399.html>) (accessed September 12,

2016), doodling on a desk, Stephanie Chen, *Girl's Arrest for Doodling Raises Concerns About Zero Tolerance*, CNN (February 18, 2010, 10:22 AM), <http://www.cnn.com/2010/CRIME/02/18/new.york.doodle.arrest/index.html> (accessed September 12, 2016), and performing a science experiment without teacher approval, Alex Hobson, *Arrested for "Science Project Gone Wrong," Bartow High School Student Talks*, ABC News (May 23, 2013, 5:28AM) (accessed September 12, 2016), <http://www.abcactionnews.com/news/region-polk/arrested-for-science-project-gone-wrong-bartow-high-school-student-talks>. "In 2012 alone, schools referred 260,000 students to law enforcement agencies, and 92,000 students were arrested for school-related matters." Merkwae, *supra*, at 154. Such extreme reactions create an imbalance in those "equally legitimate" interests (student's expectation of privacy and the school's need to maintain a safe environment), tipping the scale towards schools and away from students' fundamental rights.

Furthermore, SROs' propensity for arresting students demonstrates a lack of understanding of the negative consequences associated with such arrests. Nance, *supra*, at 951. SROs have even admitted that they view increased arrests within schools as a positive result of their work. *Id.* According to the U.S. Department of Justice, this perspective suggests a failure of training (especially regarding mental health, counseling, and the development of the teenage brain); a lack of priority given to de-escalation and conflict solution; and insufficient appreciation for the negative educational and long-term outcomes that can result from treating disciplinary concerns as crimes and using force on students. *Id.*; Civil Rights Division, U.S. Department of Justice, Investigation of the Ferguson Police Department 38 (2015). These traits of

SROs are especially concerning given the split-second decision about a student's conduct—which may be influenced by conscious or unconscious racial or disability-related biases—determining whether that student receives a warning, a suspension or expulsion from school, a municipal ticket, or even delinquency charges following an arrest. *Merkwae, supra*, at 149-150. Although the allegations against Mr. Polk are serious, to reject the lower courts' decisions is to perpetuate that one-sidedness against the interest in preserving students' constitutional rights.

Evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial. *Elkins v. U.S.*, 364 U.S. 206, 224, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960). The purpose of this exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” *Elkins*, 364 U.S. at 217. The inadmissibility of such “fruits of an unconstitutional search” applies to both state and federal courts. *Mapp v. Ohio*, 367 U.S. 643, 658, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). Further, when a defendant in a criminal proceeding alleges to be the victim of an illegal search by a school administrator, the application of the exclusionary rule is a simple corollary of that *Mapp* principle. *T.L.O.*, 469 U.S. at 373 (Stevens, J., concurring in part and dissenting in part).

The exclusionary rule should be applied to searches done in school settings in order to ensure equity of interests between students and schools. Even though school employees are not agents of the juvenile justice system, the juvenile courts are

increasingly becoming involved in matters that should be handled primarily by school administrators. Nance, *supra*, at 949; see Michael P. Krezmien, *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 *Journal of Contemporary Criminal Justice* 273, 275 (2010), available at <http://youthjusticenc.org/download/juvenile-justice/juvenile-and-criminal-representation/Juvenile%20Court%20Referrals%20and%20the%20Public%20Schools%20-%20Nature%20and%20Extent%20of%20the%20Practice%20of%20Five%20States.pdf> (accessed September 13, 2016). School disciplinary methods that create an environment akin to a criminal justice institution—like bag searches and the use of dogs, video cameras, and metal detectors—warrant extra precautions. Merkwae, *supra*, at 155 (citing Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 *Theoretical Criminology* 79, 80-82 (2008)). Such a precaution is found with the exclusionary rule, which has been used across the nation in application to school settings. See e.g. *In re Fisher*, 8th Dist. No. 35375, 1977 Ohio App. LEXIS 7380 (Feb. 17, 1977) (citing with approval *New York v. Scott D.*, 358 N.Y.S.2d 403, 405 (N.Y. 1974)); *In re Appeal in Pima County Juvenile Action*, 733 P.2d 316, 318 (Ariz. App. 1987); *T.J. v. Florida*, 538 So.2d 1320, 1322 (Fla. App. 1989); *G.M. v. Alabama*, 142 So.3d 823, 829 (Ala. 2013); *C.G. v. Florida*, 941 So.2d 503, 504 (Fla. App. 2006); *Pennsylvania v. Williams*, 749 A.2d 957, 958 (Pa. Super. 2000); *Dumas v. Pennsylvania*, 515 A.2d 984, 986 (Pa. Super. 1986); *In re William G.*, 709 P.2d 1287 (Cal. 1985); *Gordon v. Santa Anna Sch. Dist.*, 162 Cal. App.3d 530 (Cal. App. 1984); *In re Dominic W.*, 426 A.2d 432 (Md. App. 1981); *Louisiana v. Mora*, 307 So.2d 317 (La.

1975); *T.S. v. Florida*, 100 So.3d 1289 (Fla. App. 2012); *S.V.J. v. Florida*, 891 So.2d 1221 (Fla. App. 2005).

Zero tolerance policies, the presence of law enforcement officials on campus, and the routine arrests of students in public school settings all have the effect of pushing students out of schools and into the criminal justice system. To fight this occurrence, this court should affirm the lower courts' decisions, which will hold school officials—especially school officials who perform quasi-law enforcement functions—accountable to the nuances of the Fourth Amendment.

CONCLUSION

The exclusionary rule serves to protect individuals' constitutional rights by deterring misconduct by public officials, specifically law enforcement. Public school employees who perform law enforcement functions, such as School Resource Officers or other officials in positions of safety and security, should be held to the same standards as law enforcement officers in following the Fourth Amendment. Failing to apply the exclusionary rule would only perpetuate the school-to-prison pipeline. We respectfully request that this Court uphold the decisions of the Tenth District Court of Appeals and the Franklin County Court of Common Pleas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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