

## **STATEMENT OF FACTS**

*Both parties stipulate that the following is an accurate representation of the facts.*

Concord Township is a small community of slightly under ten-thousand residents. With a modest population, the Concord Middle School (“Concord”) draws additional students from other neighboring small towns. The presence of drugs in Widenerville has been on the rise for the last several years, and drug related incidents in Concord Middle School have become more prevalent. Students have become more sophisticated in hiding drugs from school authorities. For example, drugs have been found hidden in remote places on school grounds and even taped to students’ bodies.

According to a national survey, almost two-thirds of high school students and one in five of middle school students say drugs are used, possessed, or sold on their school grounds. The survey also found that forty-four percent of high school students and sixteen percent of middle school students know a place near their school, but off school grounds, where kids go to use drugs.<sup>1</sup> During the 2007-2008 school year, there have been several incidents involving students’ use and distribution of marijuana. As a result, the school strengthened drug policy, and the sanctions have become more severe. The school implemented random drug checks by drug-sniffing dogs that patrol the school’s lockers and parking lots.

---

<sup>1</sup> National Survey of American Attitudes on Substance Abuse XIII: Teens and Parents, August 14, 2008, *available at* <http://www.casacolumbia.org/absolutenm/templates/PressReleases.aspx?articleid=533&zoneid=66>.

Jeffery L. Swartz (“Jeffery”) is a fourteen-year-old eighth-grade student at Concord Middle School in the fall of 2008. While attending Concord Middle School, Jeffery has consistently made the honor roll and participates in athletics. However, school officials became suspicious of Jeffery when they smelled alcohol and marijuana emanating from a group of about eight male students, including Jeffery, during a school dance in September of 2008. Teachers also found cigarettes, empty beer cans, and detected an odor of marijuana in the boys’ bathroom; however, nothing specifically linked Jeffery to any of the physical evidence.

On the morning of October 9, 2008, the middle school principal, Henry Campbell, received an anonymous note in his mailbox. The note stated that the writer overheard Amy Swanson asking Jeffery for some marijuana for the homecoming dance the next day. Jeffery agreed to bring Amy a few marijuana joints during lunch the next afternoon. The anonymous author further stated that Jeffery has smoked marijuana on school property, and shared the marijuana with other students. He/she knows that Jeffery keeps his marijuana in a brown paper lunch bag, and during lunchtime he goes to the bathroom to give marijuana to other students or to hide for later use.

With the note in hand, Principal Campbell called Mr. Beam, Jeffery’s homeroom teacher, into his office to investigate further because the homecoming dance was scheduled for that night. Mr. Beam informed Principal Campbell that Jeffery and Amy are in the same homeroom and have some mutual friends.

Around 12:30 p.m., Principal Campbell went to the lunchroom and found Amy and Jeffery sitting at tables next to each other. In front of Amy was a cafeteria tray, on which there was a slice of pizza, an apple and a bottle of soda. In front of Jeffery was a

Ziploc bag containing a sandwich, and a brown paper lunch bag. Principal Campbell observed Jeffery and Amy for approximately twenty minutes in the lunchroom. During those twenty minutes, Jeffery got up to go to the bathroom, but left the brown paper lunch bag at the table.

When Jeffery came back from the bathroom and sat down, Principal Campbell approached Jeffery, asked him to bring his lunch bag and to follow him to the Principal's office along with Mr. Beam. There, Jeffery denied ever having or using drugs. Principal Campbell asked to look into Jeffery's lunch bag and his locker. Jeffery refused saying, "this is America – I know my rights." Principal Campbell nevertheless searched the brown paper bag and found nothing indicating Jeffery had marijuana. In Jeffery's locker, Principal Campbell searched through his backpack and the pockets of his jacket where no marijuana was found. However, Principal Campbell did discover a crumpled brown paper bag with some green leafy residue substance. Principal Campbell suspected the residue might be marijuana.

Principal Campbell went back to the office where Jeffery and Mr. Beam were waiting to ask Jeffery about the brown paper lunch bag. Jeffery denied using the lunch bag to conceal drugs. Principal Campbell ordered Mr. Beam to take Jeffery to the nurse's office to search his person. Jeffery went to the nurse's office, and the nurse had Jeffery turn his pant pockets inside out and found nothing. Mr. Beam then told Jeffery to take off his shirt, shoes and socks; nothing was found. Finally, Mr. Beam told Jeffery to take off his pants to see if he was hiding anything in his underwear. Jeffery took off his pants and nothing was found. Next, Jeffery was asked to shake his underwear, but no

observations were made of his private parts. Jeffery was then given permission to get dressed.

Subsequently, Jeffery's mother, Donna K. Swartz filed suit against Concord School District #12, Campbell and Beam (Petitioners). She claimed that the search of Jeffery was in violation of his Fourth Amendment rights. The School District moved for summary judgment, asserting there was no Fourth Amendment violation. The District Court for the District of Widenerville granted the motion on the grounds that there was no Fourth Amendment violation. A panel for the United States Court of Appeals for the Thirteenth Circuit on panel affirmed the District Court's judgment.

On rehearing en banc, the Court of Appeals reversed. The Thirteenth Circuit held that under *New Jersey v. T.L.O.*<sup>2</sup> the search was unjustified under the Fourth Amendment test for searches of children by school officials. The United States Supreme Court granted certiorari.

---

<sup>2</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

**EXHIBIT A**

Dear Principal Campbell,

Yesterday during lunch, I overheard Amy Swanson asking Jeffery Swartz for some marijuana to use for tomorrow night's Homecoming Dance. Jeffery said he would bring her a few joints. I have seen Jeffery give drugs to other students and sometimes smoke it during school. Jeffery usually keeps his stash of marijuana in his brown paper lunch bag, and he may hide it in other places. During lunch time, he goes to the bathroom with this bag, and takes some out to give other students or hide for later use.

## **EXHIBIT B**

### **CONCORD MIDDLE SCHOOL POLICIES AND PROCEDURES** *(Only selected sections relevant to this case)*

#### **MISSION STATEMENT**

The Educational Community of Concord Middle School encourages the growth, high aspirations, and quality standards of its students and staff. We respect responsible decision-making and risk taking, value individual differences, and recognize that learning never ends. In Concord, educators take pride in achievements of our community and provide an open and safe environment, which nurtures positive self-esteem and fosters mutual respect. Students are problem solvers who take ownership of their own learning. As an integral part of the educational process, parents and caregivers accept the responsibility for supporting their child's efforts to be successful. The educational community shall work together toward quality education.

**All students must comply with all policies and procedures of the Concord Middle School.**

#### **DRUG AND ALCOHOL POLICY**

There will be no possession or consumption of alcohol or drugs on the school grounds. No student shall be allowed to remain on school property under the influence of alcohol or drugs. Any student violating drug and alcohol rules shall face immediate suspension. Notification of parent/guardian and or appropriate authorities will also take place.

Use by a student of medication prescribed by a medical doctor, dentist or other health care provider authorized by law to prescribe medication for that student does not violate this policy. However, a student may not participate in school activities if the medication adversely alters or impairs their judgment or ability, which could result in illness or injury.

If a student who falls under this policy is at a party or gathering of people where alcohol, tobacco or illegal drugs are being used or school rules and/or state laws are being violated, he/she is expected to leave immediately.

## SEARCH AND SEIZURE

### *Search of Locker*

(a) When individual circumstances in a school dictate, a principal may order that vehicles parked on school property by students or visitors, containers, packages, lockers or other enclosures used for storage by students or visitors, and other areas accessible to students or visitors be searched in the principal's presence or in the presence of other members of the principal's staff.

(b) Individual circumstances requiring a search may include incidents on school property, including school buses, involving, but not limited to, the use of dangerous weapons, drugs, drug paraphernalia by students, which are known to the principal or other staff members, information received from law enforcement, juvenile or other authorities indicating a pattern of drug dealing or drug use by students of that school, and assault or attempted assault on school property with dangerous weapons, or any other actions or incidents known by the principal which give rise to reasonable suspicion that dangerous weapons, drugs, or drug paraphernalia are held on school property by one (1) or more students.

### *Search of Persons and Containers*

(a) A student may be subject to physical search based on the results of a locker search, or due to information received from a teacher, staff member, student, or other person if such action is deemed reasonable by the principal.

(b) All of the following standards of reasonableness shall be met:

There is a reasonable suspicion that a particular student has violated school policy; the search will yield evidence of the violation of school policy or will lead to disclosure of a dangerous weapon, drug paraphernalia or drug; the search is in pursuit of legitimate interests of the school in maintaining order, discipline, safety, supervision, and education of students;

The search is not conducted for the sole purpose of discovering evidence to be used in a criminal prosecution; the search shall be reasonably related to the objectives of the search and not excessively intrusive in light of the age and gender of the student, as well as the nature of the infraction alleged to have been committed.

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRTEENTH CIRCUIT**

DONNA K. SWARTZ,	:	
Petitioner,	:	No. <u>08-169</u>
	:	
v.	:	
	:	
CONCORD SCHOOL DISTRICT #12,	:	
Respondent.	:	
	:	

**OPINION OF THE COURT**

O’NEILL, Circuit Judge:

Petitioner contends that the search of her son and his property by school authorities was not justified at its inception and was not reasonably related in scope to the circumstances. The District Court granted the School District’s Motion for Summary Judgment, holding that there was no Fourth Amendment violation. A panel of this court affirmed, and we granted an application for rehearing en banc. We now reverse.

**I. FACTS**

(Factual background is omitted from this opinion).

**II. DISCUSSION**

The Petitioner contends that the search was unjustified at its inception and was unreasonable in its scope. The Fourth Amendment of the United States Constitution states that the “people have the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” by the federal government.<sup>3</sup> The Fourteenth Amendment extends that right to protection against violation by state actors.

---

<sup>3</sup> U.S. Const. amend. IV.

Accordingly, students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969). For school searches, the courts must balance the students' interest in privacy against the substantial need of educators to maintain discipline and order in school and ultimately adopt a reasonableness standard that stops short of probable cause. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). In New Jersey v. T.L.O., the Court established a lesser standard of reasonable suspicion for searches and seizures in a school context as opposed to the more stringent standard of probable cause in the criminal context. T.L.O. set forth a two pronged test for reasonableness: (1) the search was justified at its inception; and (2) as conducted, it was reasonably related in scope to the circumstances. Id. at 326.

*1. The Public School Officials' Search Was Not Justified At Its Inception.*

Anonymous tips occur frequently in the criminal context, but no court has addressed the impact they have in school settings. As previously stated, search and seizure in a school context requires the lesser standard of reasonable suspicion. In Alabama v. White, the Court held there was reasonable suspicion where an anonymous telephone tip was corroborated by independent police work exhibiting sufficient indicia of reliability to provide reasonable suspicion to conduct a search. Alabama v. White, 469 U.S. 325, 326 (1990). The Court applied the totality of circumstances test established in Illinois v. Gates, 462 U.S. 213, 230 (1983), emphasizing that the tip predicted the future movements of Ms. White, which were substantially corroborated by the police.

However, the United States Supreme Court has held that an anonymous tip by itself does not create reasonable suspicion due to its unreliable nature. For example, in

Florida v. J.L., a caller reported to the police that a young black man, wearing a plaid shirt and standing at a certain bus stop was carrying a gun. 529 U.S. 266, 268 (2000). The police officer went to the bus stop and saw J.L. who fit the description. Id. Other than the anonymous tip, the police had no reason to suspect anything out of the ordinary. Police frisked J.L. and felt a gun, which they seized. Id. The Court held that police may not initiate a search merely to confirm an anonymous tip. Id. at 271. The tip lacked moderate indicia of reliability. Id. The anonymous call provided no predictive information and, therefore, left the police without means to test the informant's knowledge or credibility. Id.

Concord Middle School did not have reasonable suspicion arising from the anonymous tip. The instant case is similar to Florida v. J.L. The anonymous tip did not contain specific information which gave an indication of reliability. The information that Jeffery would have lunch in the cafeteria and would go to the bathroom is a prediction that can be applied to any student and is knowledge available to any student. Lunch is a set activity and it can be said that all students will be at lunch during lunchtime. Although the tip predicted that Jeffery would go to the bathroom with a lunch bag containing drugs, the tip was not fully accurate. Moreover, the fact that Jeffery would use the bathroom during lunch was highly predictable. Under these circumstances, the facts of the case do not rise to the level of evidence that display specific indicia of reliability for there to be reasonable suspicion.

Therefore, since the tip was uncorroborated, the information was bare boned, and the tipster did not indicate any insider knowledge or demonstrate knowledge of

defendant's affairs, there was no reasonable suspicion to search Jeffery. School officials cannot initiate a search merely to confirm an anonymous tip.

2. *The Search of Jeffery Was Not Reasonable In Scope And Was Overly Intrusive.*

A search that is justified at its inception will nevertheless be unreasonable if it is not reasonably related in scope to the circumstances that justified the inference in the first place. T.L.O., 489 U.S. at 341. A search will be permissible in its scope when the “measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” Id. at 342.

Here, the public school authorities' search of Jeffery was not reasonably related to the search for marijuana. In T.L.O., a teacher caught T.L.O., a fourteen-year-old female high school freshman smoking in the bathroom with another student. 469 U.S. at 328. The second student confessed to smoking, while T.L.O. denied allegations. Id. The assistant vice-principal asked T.L.O. to step into his private office and demanded to see her purse. In her purse, the vice-principal found cigarettes, cigarette rolling papers and other evidence implicating T.L.O. in the purse. Id. The Court held that the search of the purse was reasonable based on the suspicion that T.L.O. was using marijuana from the rolling papers. Id.

Considering Jeffery's age, the lack of particularized suspicion that marijuana would be found in Jeffery's underwear, the trauma of the search, and the lack of investigation, the school officials adopted a disproportionately extreme measure that was impermissible in scope. Similar to T.L.O., the most logical place to search for marijuana would be in Jeffery's locker and in his brown paper lunch bag. However, the school

officials went beyond that reasonable scope when they asked Jeffery to turn his pockets inside out and found nothing. There was no specific information indicating that marijuana was hidden under his pants. Thus, the search was excessively intrusive. Jeffery's age and the dangers posed by his suspected marijuana possession or selling to others are non-immediate which makes the search unreasonable in scope.

The search of fourteen year old Jeffery Swartz and his property did not satisfy either prong of T.L.O. and, therefore, was conducted in violation of his Fourth Amendment Rights. Accordingly, we reverse the District Court's determination that there was no violation of Jeffery's constitutional rights.

For the foregoing reasons, the panel decision of the Court of Appeals for the Thirteenth Circuit is hereby REVERSED.

**PROUT, Circuit Judge, Dissenting.**

The prevalence of drug use among school-aged children creates serious risks to the health and safety of all students. The Court has recognized that school years are the time when physical, psychological and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are, children's losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults and their road of recovery is depressingly poor." Vernonia Sch. Dist. 47J v. Action, 515 U.S. 646, 661 (1995)(quoting Hawley, *The Bumpy Road to Drug-Free School*, 72 Phi Delta Kapan 310, 314 (1990)). In certain limited circumstances, the need to discover such latent or hidden conditions such as drug use or possession is sufficiently compelling to justify the intrusion on privacy entailed by

conducting searches without any measure of individualized suspicion. Bd. Of Educ. Of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 122 S.Ct. 2559, 2564 (2002)(quoting Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989)).

Considering Jeffery Swartz's history, the predictive value and corroboration of the tip, and the danger of marijuana use, the search was justified at its inception and did not exceed its scope.

*1. Concord School Officials' Search Was Justified At Its Inception.*

The school had enough information for reasonable suspicion in order to conduct the initial searches. School officials suspected Jeffery and his friends of drinking and smoking. These suspicions were corroborated by the anonymous tip and the further investigation revealing that Jeffery and Amy are friends with mutual friends. Looking to the totality of the circumstances set forth in Gates, it is clear that these facts rise to the level of reasonable suspicion needed for the search to be justified at its inception.

This case is similar to Alabama v. White, where an anonymous telephone tip claimed that a woman would be leaving an apartment at a specific time, in a specific car and going to a hotel with an ounce of cocaine in her bag. 496 U.S. at 326-27. Officers went to the location and saw the woman get into the car and head towards the hotel. Id. at 327. She was stopped and police asked permission to search the car for cocaine. Id. During the search they found marijuana and cocaine in her purse. Id. The Court agreed that the officer had reasonable suspicion to believe that the woman possessed drugs given the specificity of the information of the tip with regards to future movement of the suspect, which was substantially corroborated by her actions. Id. at 332.

Here, the anonymous note predicted that Jeffery would sell marijuana to Amy during lunch and that he would go to the restroom to try to conceal the drugs. In addition, the faculty knew that Jeffery was previously suspected of using marijuana at a school dance. The investigation revealed that Jeffery and Amy are friends, and they were in the lunchroom at the same time and that Jeffery left the lunchroom to go to the bathroom, as predicted. This information amounted to sufficient reasonable suspicion to justify a search.

Furthermore, the Court in Gates and Alabama found probable cause or reasonable suspicion based on an anonymous tip despite the minor variances in the tip's information. Like Gates and Alabama, there is no requirement that the anonymous tip in this case to be completely accurate. Even though Jeffery did not take the lunch bag into the bathroom, the note had other correct predictive information that rose to the level of reasonable suspicion.

The situation in this case is distinguishable from Florida v. J.L. in that the tip was simply that the defendant had a gun and was wearing a plaid shirt at a bus stop. The police went to that location and saw J.L. at a bus stop. The present case would be similar if the tip only stated that Jeffery is at lunch and will have drugs in a brown paper bag. Here, more information was provided. The note explained how Jeffery planned to conceal drugs and Jeffery going to the bathroom during lunch further corroborated the note. In addition, a previous incident caused the faculty to believe Jeffery was involved with illegal drugs and there were reports that students were hiding drugs by taping them to their bodies. Looking at the totality of the circumstances, the school had reasonable suspicion to conduct the search.

The Supreme Court has recognized a strong governmental interest in deterring drug use among school-aged children. With the increase of drug use and possession in schools, ignoring anonymous tips in order to protect students' privacy would be irresponsible in light of the laws and policies against such drug use and possession. The effects of drugs reach far beyond the addictive effect on any individual student. In addition, drugs affect the entire student body, faculty, and community when the educational process is interrupted by such actions.

*2. The Search Of Jeffery Was Reasonable In Scope And Was Not Overly Intrusive.*

Notwithstanding Jeffery's age and sex, the search was not beyond the scope when one considers the nature of the infraction. This is because the purpose of the school's search was to preserve school order, maintain the safety of other students, and create a proper educational environment.

The search of Jeffery was reasonable in scope. Checking Jeffery's locker resulted in finding a paper lunch bag with a substance that appeared to be marijuana. Upon confirming the anonymous author's credibility, Principal Campbell asked Mr. Beam to escort Jeffery to the nurse's office with the door closed. It was reasonable to assume that Jeffery could hide more drugs underneath his clothes just as others have done in the past. Moreover, the search was reasonable in terms of intrusiveness. The search was conducted privately and lasted only long enough to ensure that Jeffery did not have any marijuana before his clothes were returned. The search was conducted without any offensive touching or observation of his private parts.

Finally, school officials should have the greatest latitude when responding to behavior that threatens the health and safety of students or teachers. Thus, when school

officials reasonably believe a student is possessing or distributing drugs, it should rarely be unreasonable for the school to do what they can to neutralize the danger. Accordingly, I respectfully dissent and find that the school had reasonable suspicion to justify the search at its inception and, as conducted, the search was reasonably related in scope to the circumstances.

**IN THE SUPREME COURT OF THE UNITED STATES**

CONCORD SCHOOL DISTRICT #12,	:	
Petitioner	:	No. <u>08-169</u>
	:	
v.	:	
	:	
DONNA K. SWARTZ,	:	
Respondent	:	
	:	

**ORDER GRANTING CERTIORARI**

Comes now, Petitioner, Concord School District #12, petitioning this Court for a Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit. Certiorari is hereby GRANTED for argument concerning the following question:

Whether there was reasonable suspicion to search the property of a student suspected of marijuana use and distribution, and if so, whether the search of his person was reasonably related in scope to the circumstances.

**IT IS SO ORDERED.**  
**DATED: JULY 15, 2009.**