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## STUDENT SEARCHES – THE FOURTH AMENDMENT AND THE EXCLUSIONARY RULE

*State v. Young*<sup>1</sup>

Young and two other high school students were searched during school hours on school premises by an assistant principal. The basis for the search was that one of the students, on the approach of the assistant principal, jumped up and put his hand into his pants.<sup>2</sup> The three students were ordered to empty their pockets and Young produced marijuana. The Georgia Supreme Court held that the search was reasonable and, therefore, did not violate Young's fourth amendment rights.<sup>3</sup> The court further stated that if the search had violated the fourth amendment, the evidence would still have been admissible because the exclusionary rule applies only to fourth amendment violations by law enforcement officers.<sup>4</sup>

Student search cases have arisen from the widespread student unrest of the late nineteen-sixties and early seventies and the concomitant phenomenon of increased drug use by students.<sup>5</sup> Most of the cases have upheld the constitutionality of student searches.<sup>6</sup> In doing so, some cases held that a public school official was not a government official. These cases maintained that the school official acts as a private person when he is searching a student and is not restrained by the fourth amendment.<sup>7</sup> This position may be correct in the case of officials of private schools, but it is questionable if the searcher is a public school official.<sup>8</sup> Other cases have acknowledged that a school official is a government official to whom the fourth amendment applies and have based the constitutionality of the search on the special relationship existing between student and school official.<sup>9</sup> These cases reason that the school official acts *in loco parentis*<sup>10</sup> to the student and, therefore, a lesser fourth amendment

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1. 234 Ga. 488, 216 S.E.2d 586, *cert. denied*, 423 U.S. 1039 (1975).

2. *Id.* at 488, 216 S.E.2d at 588.

3. *Id.* at 494-95, 216 S.E.2d at 592.

4. *Id.* at 494, 216 S.E.2d at 591.

5. See Note, *Balancing In Loco Parentis and the Constitution: Defining the Limits of Authority Over Florida's Public High School Students*, 26 U. FLA. L. REV. 271 n.116 (1974).

6. See Annot., 49 A.L.R.3d 978 (1973); Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974).

7. E.g., *In re W.*, 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); *People v. Jackson*, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (1971), *aff'd*, 30 N.Y.2d 734, 333 N.Y.S.2d 167, 284 N.E.2d 153 (1972); *Ranninger v. State*, 460 S.W.2d 181 (Tex. Civ. App. 1970); *Mercer v. State*, 450 S.W.2d 715 (Tex. Civ. App. 1970); *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969); *People v. Overton*, 24 N.Y.2d 522, 301 N.Y.S.2d 479, 249 N.E.2d 366 (1969).

8. See note 14 *infra*.

9. E.g., *Moore v. Student Affairs Comm.*, 284 F. Supp. 725 (M.D. Ala. 1968); *In re C.*, 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972); *State v. Baccino*, 282 A.2d 869 (Del. Super. 1971); *In re G.C.*, 121 N.J. Super. 108, 296 A.2d 102 (1972).

10. The expression means: "In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 896 (rev. 4th ed. 1968).

standard applies. To derive the appropriate fourth amendment standard, the student's interest in his fourth amendment rights is balanced against the state's interest in school officials carrying out their *in loco parentis* function of maintaining order, discipline, and security in the schools.<sup>11</sup> This line of cases indicates that if the official has a "reasonable suspicion"<sup>12</sup> that the student has contraband, then the search is constitutional. Only Louisiana has given its public school students the full panoply of fourth amendment protection. In *State v. Mora*,<sup>13</sup> the Louisiana Supreme Court decided that a search of a student without a warrant based on probable cause was unconstitutional.

The *Young* court conceded that a school official is a government official to whom the fourth amendment is applicable.<sup>14</sup> However, the court placed heavy emphasis on the official's duty to maintain a safe and secure environment for all students and determined that a search directed toward that end is reasonable, although based on less than probable cause, under the fourth amendment.<sup>15</sup> The *Young* court concluded that if a school official searches a student in the "good faith" exercise of his school function, the search is constitutional.<sup>16</sup>

This standard is lower than the "reasonable suspicion" standard adopted by the majority of the courts which have held that the school official is a government official subject to the fourth amendment.<sup>17</sup> In the cases which adopted the "reasonable suspicion" standard, the school official had some cause for belief that a particular student possessed a specific kind of contraband.<sup>18</sup> In *Young*, however, the principal searched three students because one of them acted "suspiciously." The court did not say whether *Young* was the student who behaved suspiciously or what kind of contraband the principal thought he might have had.<sup>19</sup> Under the standard for student searches applied in *Young*, the school official does not have to suspect that a particular student possesses a particular kind of contraband in order for his search of the student to

11. See *State v. Baccino*, 282 A.2d 869 (Del. Super. 1971).

12. "Reasonable suspicion" is the normal standard for stop and frisk searches, but this standard is ordinarily not applied to full searches. See *Terry v. Ohio*, 392 U.S. 1 (1968).

13. 307 So. 2d 317 (La. 1975), *vacated*, 423 U.S. 809 (1975).

14. The court stated: "[I]t [is] too plain to be controverted that school officials are state officers acting under color of law. . . ." 234 Ga. at 494, 216 S.E.2d at 591.

15. *Id.* at 496, 216 S.E.2d at 592.

16. *Id.* at 496, 216 S.E.2d at 592-93.

17. Like "probable cause" and the "reasonable man" standards, the "reasonable suspicion" standard is an objective standard subject to review by the courts.

18. *E.g.*, *State v. Baccino*, 282 A.2d 869 (Del. Super. 1971) (Principal knew student was out of class illegally and was known to the principal to have used drugs. After student resisted principal's attempt to take his coat, principal felt a bulge in the coat and searched it).

19. The court's only statement was, "as the principal approached 'one of the fellows jumped up and put something down, ran his hand in his pants.'" The court record fails to say whether *Young* did anything which could be construed as "suspicious."

be reasonable. The court implied that if one student among a group of students appears to a school official to behave somewhat peculiarly, then the official can search that student and the other members of the group without violating the students' fourth amendment rights. The search in *Young* clearly would not have been constitutional under the "reasonable suspicion" standard as applied by the courts which have adopted that standard.

Since *Mapp v. Ohio*,<sup>20</sup> evidence seized in violation of the fourth amendment has been inadmissible under the exclusionary rule in a criminal prosecution. The United States Supreme Court justices have differed in their views as to the primary purpose of the exclusionary rule. Some have said its primary purpose is to preserve the integrity of the judicial system,<sup>21</sup> while others have said its most important function is to deter the police from violating the fourth amendment by conducting illegal searches.<sup>22</sup> The *Young* court accepted the current majority view that the rule's primary purpose is to deter the police from violating the fourth amendment.<sup>23</sup> The court stated that the exclusionary rule had been applied only to fourth amendment violations by law enforcement officers and was not applicable to fourth amendment violations by public school officials.<sup>24</sup> The *Young* court reasoned that recent decisions of the Supreme Court tend to limit the application of the rule and that they would be holding against these cases if they extended the rule to apply to violations by school officials.<sup>25</sup> In support of this position, the court quoted from a law review article<sup>26</sup> which asserted that *United States v. Robinson*,<sup>27</sup> *Gustafson v. Florida*,<sup>28</sup> and *United States v. Calandra*<sup>29</sup> indicated that the Supreme Court would not be willing to extend the exclusionary rule beyond its present application.<sup>30</sup>

*Calandra* indicated that the Supreme Court was limiting the application of the exclusionary rule but not in the manner suggested by *Young*.

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20. 367 U.S. 643 (1961). *Mapp* extended the exclusionary rule to the states. *Weeks v. United States*, 232 U.S. 383 (1914), formulated the exclusionary rule, but it was applicable only to the federal courts until *Mapp*.

21. *E.g.*, *United States v. Calandra*, 414 U.S. 338 (1974). In dissent, Justice Brennan said:

[T]he exclusionary rule . . . [enabled] the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people . . . that the government would not profit from its lawless behavior. . . .

*Id.* at 357.

22. "The rule is calculated to . . . deter . . . by removing the incentive to disregard . . . [the fourth amendment]." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

23. *United States v. Calandra*, 414 U.S. 338, 347 (1974), stated that, "the rule's prime purpose is to deter future unlawful police conduct."

24. 234 Ga. at 489, 494, 216 S.E.2d at 589, 591.

25. *Id.*

26. Note, *Death Knell of the Exclusionary Rule?*, 1 HASTINGS CONST. L.Q. 179, 212 (1974).

27. 414 U.S. 218 (1973).

28. 414 U.S. 260 (1973).

29. 414 U.S. 338 (1974).

30. 234 Ga. at 491, 216 S.E.2d at 590.

*Calandra's* refusal to extend the rule to a grand jury proceeding supports the conclusion that the Supreme Court may be willing to limit the application of the rule to criminal proceedings in which the defendant's guilt or innocence is to be determined.<sup>31</sup> However, nowhere in its opinion did the Court suggest that evidence seized in violation of the fourth amendment may be admissible in a criminal prosecution of the person whose rights were violated.<sup>32</sup> The court in *Young* misconstrued the nature of the limitation the Supreme Court seems willing to place on the rule. *Calandra* suggested only that the Court may limit the type of proceedings to which the rule will apply.<sup>33</sup> It did not suggest that the rule would be applied to unlawful searches by law enforcement officers but not to unlawful searches by other government officials. In both *Robinson* and *Gustafson* the evidence was admissible because the search, as incident to an arrest, was reasonable.<sup>34</sup> These cases suggest that the Supreme Court is limiting the use of the exclusionary rule by narrowing the scope of the fourth amendment. They do not, however, suggest that evidence seized by the government in violation of the fourth amendment may be used in a criminal prosecution of the person whose rights were violated.

The analysis of the scope of the exclusionary rule in *Young* is unsound. The thrust of the exclusionary rule is that evidence seized in violation of the fourth amendment cannot be used in a criminal prosecution

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31. The Court's discussion of the exclusionary rule supports the conclusion that the rule applies in every case where illegally obtained evidence is sought to be introduced in a criminal prosecution. The Court stated:

[S]tanding to invoke the exclusionary rule has been confined to situations where the *Government* seeks to use such evidence to incriminate the victim of the unlawful search. [The] standing rule is premised on a recognition . . . [of a] . . . need for deterrence. . . . [The] rationale for excluding the evidences are strongest where the *Government's* unlawful conduct would result in imposition of a criminal sanction on the victim of the search.

414 U.S. 338, 348 (emphasis added).

32. *Calandra* did, however, suggest that presented with the proper case the Court may decide whether the rule should be retained. The Court said, "We have no occasion in the present case to consider the extent of the rule's efficacy in criminal trials." *Id.* at n.5.

33. *Calandra* would be applicable if *Young* had involved the use of the evidence against the student in an administrative disciplinary proceeding. Neither administrative disciplinary proceedings nor grand jury proceedings amount to a criminal prosecution. In *Young*, however, the evidence was used to obtain a criminal conviction. The holding in *Calandra* seems wholly irrelevant to that situation.

34. The police officer in *Robinson* had probable cause to arrest the defendant for driving while his license was revoked. The officer made a full custody arrest of the defendant and then conducted a full search of his person. 414 U.S. 218, 220-23. The Supreme Court held that the search did not violate the fourth amendment, and the heroin seized was admissible in evidence against the defendant. *Id.* at 236. In *Gustafson*, a companion case to *Robinson*, the defendant was placed under arrest for failure to have his operator's license in his possession. The Court held that upon arresting the defendant the officer was entitled to make a full search of defendant's person as incident to the lawful arrest. 414 U.S. 260, 266.

of the person whose rights have been violated.<sup>35</sup> In maintaining that the rule applies only to an unlawful search by a "law enforcement officer," the court in *Young* completely ignored the view that at least one purpose of the rule is to protect judicial integrity. The essence of this view is that the judiciary should not appear to condone lawless government conduct by permitting the government to use unlawfully obtained evidence in a court of law.<sup>36</sup> A school official's violation of a student's fourth amendment rights constitutes unlawful governmental conduct. Evidence seized thereby should not be admissible in a court of law. Permitting the government to use unlawfully seized evidence in a criminal prosecution of the person whose rights it violated impairs the integrity of the judiciary whether the evidence was seized by a law enforcement officer or some other government official. In either case the judiciary is tacitly condoning unlawful governmental conduct.

*Young's* interpretation of the "deterrent purpose" of the exclusionary rule is too narrow. The court placed too much emphasis on the literal language of the United States Supreme Court justices who take the view that the primary purpose of the exclusionary rule is to deter unlawful police conduct. The *Young* court is not justified in construing the justices' use of the word "police"<sup>37</sup> to mean that they are not concerned with deterring the unlawful conduct of other government officials. The exclusionary rule can deter all governmental officials. A school official who suspects that a student possesses drugs or other unlawful contraband is probably interested in a criminal conviction of the student. If he knows that evidence seized in violation of the student's fourth amendment rights will not be admissible in a criminal prosecution of the student, he will probably be more concerned with observing those rights.

The minimal fourth amendment standard for student searches applied in *Young* and its holding that the exclusionary rule is inapplicable to student searches give the Georgia student little protection from arbitrary searches by school officials. A fourth amendment standard based on the searcher's "good faith" is practically no standard at all. "Good faith" is an entirely subjective standard. There is no objective criterion by which the court can measure the reasonableness of the search. Only the searcher's motive for conducting the search is questioned. If the searcher's motive for conducting the search is to insure that the school is a safe and secure environment for the students, it does not matter that the search was prompted by the school official's completely irrational sus-

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35. See *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Byars v. United States*, 273 U.S. 28 (1927), the Court stated: "[T]he doctrine . . . [cannot] be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search. . . .

*Id.* at 29-30.

36. See note 18 *supra*.

37. See note 22 and accompanying text *supra*.

pitions.<sup>38</sup> Under this standard, "shake-down" searches, such as those shown by the record in *Mercer v. State*,<sup>39</sup> would be constitutional even if the school official irrationally believed that drugs were on the school premises. The "good faith" standard adopted by *Young* gives the school official no incentive to observe the rights of students. Because of the great unlikelihood that a court would find that he conducted the search in bad faith, the official has no inducement even to learn what rights the students have.

The "reasonable suspicion" standard should be the minimal standard for student searches. This standard adequately serves the state's interest of maintaining order, discipline, and security in the school while it gives the students something more than token fourth amendment protection from arbitrary searches by school officials. Unless the school official has some basis for believing that a particular student probably possesses a specific kind of contraband, the fourth amendment should prohibit his search of the student. A mere rumor that a student uses drugs or a school official's good faith "hunch" that the student possesses drugs should never be enough to cloak the search of that student with constitutionality. If the search does not meet the "reasonable suspicion" standard, the evidence seized by the search should be excluded in a criminal prosecution of the student. Allowing the government to use evidence in a criminal prosecution which it seized in violation of the fourth amendment amounts to tacit judicial approval of unlawful government conduct. Judicial integrity cannot be protected by applying the exclusionary rule to only the "law enforcement" element of government. To accomplish this purpose the rule must be applied to all government officials.

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38. See text accompanying note 15 *supra*.

39. 450 S.W.2d 715 (Tex. Civ. App. 1970). The search in *Mercer* was not a "shake-down" search, but the record before the court showed that it was the practice of the principal to conduct "shake-down" searches of large groups of students when he deemed it necessary. *Id.* at n.3.