No. 83-712

In The

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

-vs-

T.L.O., a Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR PETITIONER

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625
(609) 984-4804

Attorney for Petitioner

Allan J. Nodes
Attorney of Record

Of Counsel & On the Brief
ALLAN J. NODES
VICTORIA CURTIS BRAMSON
Deputy Attorneys General
Division of Criminal Justice

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The question presented by this petition, the opinions below, jurisdictional statement, listing of applicable constitutional and statutory authorities and statement of the case are all enumerated in petitioner's brief filed with this Court on January 14, 1984, and are, therefore, not repeated herein.

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LEGAL ARGUMENT

POINT I

THIS COURT HAS JURISDICTION TO DECIDE THE ISSUE PRESENTED IN PETITIONER'S BRIEF.

In Point One of her response to petitioner's brief, respondent asserts that independent and adequate state grounds exist for the state court decision and, therefore, that this Court should dismiss the writ of *certiorari* as improvidently granted. On the issue of the application of the exclusionary rule to school searches, the opinion of the New Jersey Supreme Court relies solely on federal law. *State in the Interest of T.L.O., 94 N.J. 331, 463 A.2d 934 (1983).* Hence, this Court properly has jurisdiction to resolve the issue concerning application of the exclusionary rule. *Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469 (1983).*

The New Jersey Supreme Court framed the issue as "whether the Fourth Amendment exclusionary rule applies to student searches made by public school administrators," *id. at 336, 463 A.2d at 936,* and concluded that "the issue is settled by the decisions of the [United States] Supreme Court." *Id. at 341, 463 A.2d at 939.* The state court, therefore, relied upon federal law and the decisions of this Court in "accept[ing] the proposition that if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings." *Id. at 341-342, 463 A.2d at 939.*

Following this Court's granting of the State's petition for *certiorari* on November 28, 1983, respondent returned to the New Jersey Supreme Court to allege that the state court opinion in this matter was based upon unenunciated independent state grounds. Despite respondent's urging the New Jersey Supreme Court to issue a supplemental opinion clarifying this purported "ambiguity," the state court denied the motion for clarification.

As this Court held in *Michigan v. Long, ____ U.S. at ____, 103 S.Ct. at 3476,* jurisdiction will be exercised when a state court decision "appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." The New Jersey Supreme Court's holding in *State in the Interest of T.L.O.* is based on that court's interpretation of the

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applicability of the Fourth Amendment to searches by school officials. The opinion framed the issue solely in terms of the Fourth Amendment and, in reaching the conclusion that the Fourth Amendment exclusionary rule did apply to school searches, the state court relied solely upon interpretations of the federal Constitution. Indeed, the only state cases to which reference is even made in this portion of the opinion deal exclusively with questions pertaining to the Fourth Amendment of the United States Constitution without mention of the state Constitution.[1] *See State in the Interest of T.L.O., 94 N.J. at 341, 463 A.2d at 938-939.* Thus, respondent's assertion that the opinion is actually founded upon independent state grounds is refuted by the opinion itself.

Even were the opinion ambiguously worded in this regard, as respondent alleged in her unsuccessful motion to the state court for "clarification" of the opinion below, that fact would not divest this Court of jurisdiction. For, "it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940); accord, Michigan v. Long, ____ U.S. at ____, 103 S.Ct. at 3476.*

Nor can it be contended that the New Jersey Supreme Court was unaware of the requisites of *Michigan v. Long.* In *State v. Bruzzese, 94 N.J. 210, 463 A.2d 320 (1983),* issued the same day as the opinion under review, the state court was careful to specifically note that "[c]onsonant with the United States Supreme Court's directive in *Michigan v. Long ... we expressly observe that our decision rests, in part, upon state constitutional grounds* independent of federal law." *Id. at 217 n.3, 463 A.2d at 324 n.3* (citation omitted, emphasis supplied). Thus, had the state court intended to rely upon state constitutional grounds in reaching its decision in *T.L.O.*, it obviously would have expressly done so. Moreover, long before *Michigan v. Long* was decided, the New Jersey Supreme Court did not hesitate to expressly rely upon independant state grounds to reach the results it desired. *See, e.g., State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982); State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975); Robinson v. Cahill, 62 N.J. 473,*

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1 *In re Martin, 90 N.J. 295, 312, 447 A.2d 1290 (1982); State in the Interest of G.C., 121 N.J. Super. 108, 114, 296 A.2d 102 (J.D.R.C. 1972).* In fact, the portion of *In re Martin* cited by the state supreme court quoted directly from opinions of this Court.

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303 A.2d 273 (1973), cert. den. 414 U.S. 976 (1973). It is thus abundantly clear that, if the New Jersey Supreme Court had intended to rely on state grounds as the basis for its opinion in this case, it would have done so expressly.[2]

The issue before this Court is simply whether the Fourth Amendment exclusionary rule requires the suppression in a court proceeding of evidence of criminality uncovered by school officials acting in furtherance of their official duties. The state court opined that the decisions of this Court require suppression whenever an unreasonable official search occurs. As detailed in petitioner's brief previously filed with this Court, whether to exclude evidence must be determined by balancing the societal costs against any deterrent benefits of exclusion. In the case of a school search, the costs of application of the exclusionary rule far outweigh any possible derivative benefits; thus, the state court erred in failing to recognize that exclusion is not uniformly mandated by the Fourth Amendment.

Respondent details each state law citation referenced in the state opinion. Yet none of these state law references formed the basis for the New Jersey Supreme Court's holding on application of the exclusionary rule, and thus the references have no bearing whatsoever on the issue before the Court. The issue of what standard of reasonableness exists to govern searches undertaken by school officials in the pursuit of their duties is not before the Court.[3] Hence, it is irrelevant that the state court opinion notes that seven state statutes

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2 Furthermore, it was assumed by all parties to the proceedings in the state court, including those participating as *amici curiae*, that the state Constitution afforded no greater remedy than the federal Constitution under the circumstances of this case.

3 While recognizing that the standard of reasonableness governing a school search is not here at issue (respondent's brief at 31 n.18), respondent nevertheless notes that petitioner makes "no attempt to demonstrate that the search was legal." (Respondent's brief at 16). Although petitioner does not concede the illegality of the search undertaken below, it is fruitless to suggest that this Court alter the state court's error in applying the facts to the correct legal standard. Respondent also asserts that use of less than the probable cause-warrant requirement violates the Constitution. This is incorrect.

This Court has previously articulated a flexible standard for assessing the reasonableness of a search, balancing the need to search against the invasion which the search entails. *See, e.g., Bell v. Wolfish, 441 U.S. 520, 559 (1979); Camara v. Municipal Court, 387 U.S. 523, 536-537 (1967).* The majority of courts have applied the rationale of *Wolfish* and *Camara* to the school search situation and rejected the criminal case standard of probable cause. Such courts have determined, as did the state court in the present matter, that the balance requires application

(cont'd)

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exist to charge school officials with the duty to maintain order, safety and discipline in the schools. *See State in the Interest of T.L.O., 94 N.J. at 342-343, 463 A.2d at 940.* It is similarly irrelevant that the need to insure order and thereby provide a "thorough and efficient education" and the individual's need for privacy are balanced by the state court in order to arrive at the standard to govern the reasonableness of school searches. *94 N.J. at 344, 346, 349, 464 A.2d at 940, 942, 943.* Furthermore, it has no bearing on the single

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(Footnote 3 Continued)

of a "reasonable grounds" standard. *See State in the Interest of T.L.O., 94 N.J. at 345 n.7, 346, 463 A.2d at 941 n.7, 941-942.*

This standard makes far more sense as applied to the school search situation than does the probable cause standard espoused by respondent. *See In re G., 11 Cal.App.3d 1193, 1196-1197, 90 Cal.Rptr. 361, 362-363 (Ct. App. 1970).* Indeed, the probable cause standard cannot effectively regulate decisions to search which result from attempts to enforce school regulations. A teacher suspecting, perhaps on the basis of anonymous information, that a student possesses a copy of an examination which has not yet been given, could not reasonably be required to meet a standard of probable cause before undertaking measures to correct the situation. Decisions to search made on the basis of suspected violations of school regulations cannot be separated, with a lower standard of reasonableness applied, from decisions based on suspected criminal violations, such as possession of a weapon on school grounds.

The school's interests in carrying out searches include the duty to provide a safe educational atmosphere free from disruption, and the absence of less intrusive alternatives to an immediate search. *See In re L.L., 90 Wis.2d 585, 600-601, 280 N.W.2d 343, 350-351 (1979).* The student has a lessened expectation of privacy while in school because of the expected restraint exercised over students for security or discipline and the constant interaction among students, faculty and administrators. *Id.; see also Doe v. Renfrow, 475 F.Supp. 1012, 1022 (W.D. Ind. 1979).* In this regard, it is pertinent to note that *N.J. Stat. Ann. 18A:37-1 (West 1968)* provides that pupils in the public schools must comply with the school rules and submit to the authority of the school officials. This legal duty of students to submit to authority and obey rules contains an implied consent to a diminished expectation of privacy while in the school. *Cf. United States v. Biswell, 406 U.S. 311 (1972),* and *Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)* (certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise). Indeed, the very authority which justifies the state in compelling students to attend school empowers it to subject students to the level of supervision and control necessary to ensure that the goals of the educational system will be fulfilled and that students' health and safety will not be jeopardized during their attendance. *See Ingraham v. Wright, 430 U.S. 651 (1976).* The same reasoning used in *Ingraham* to justify the use of corporal punishment of students would obviously apply to the less severe intrusion of a search.

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issue before this Court that *N.J. Stat. Ann. 2A:4-60 (West 1952)* exists and provides that juveniles have the same rights and defenses available as do adults. We do not distinguish, for purposes of this case, between adult and juvenile students attending public schools.[4]

Prior to this Court's decision in *Michigan v. Long, supra,* when the Court was unsure about whether an opinion was based upon federal or state constitutional grounds, it would remand the matter to the state court and request a clarification. *See, e.g., Louisiana v. Mora, 423 U.S. 809 (1976).* More recently, the Court has refused to remand and, instead, has examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision reached. *Michigan v. Long, ____ U.S. at ____, 103 S.Ct. at 3475. See Texas v. Brown, ____ U.S. ____, ____, 103 S.Ct. 1535, 1538 (1983).* Indeed, even where the federal and state grounds for decision may be intermixed, this Court has felt required to reach the merits. *See Oregon v. Kennedy, 456 U.S. 667, 671 (1982).* In *Michigan v. Long, supra,* the Court, however, observed that this *ad hoc* method of dealing with cases was unworkable "to achieve the consistency that is necessary." *Id. at ____, 103 S.Ct. at 3475.* This Court therefore determined to exercise jurisdiction unless a plain statement of an independent state ground appears on the face of the state court opinion.

In the instant case, the state court did not indicate by a "plain statement" that its decision was based upon state law, even though it was well aware of the requirements of *Michigan v. Long. See State v. Bruzzese, 94 N.J. at 217 n.3, 463 A.2d at 324 n.3.* Indeed, in its opinion in *T.L.O.*, the state court set forth federal law and the decisions of this Court as the basis for its holding that the exclusionary rule applies to evidence obtained in a search conducted by school officials. Furthermore, when confronted, by respondent's motion to clarify the state court opinion, with its "omission" of state grounds, the New Jersey Supreme Court declined to interject such an alternative basis for its decision. Hence, it is clear that this matter involves

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4 Indeed, one of the two students considered in the state court opinion, Jeffrey Engerud, was 18 years of age at the time of the search. The significant factor justifying the state court's decision establishing the standard of reasonableness for school searches was the setting of the search, not the chronological age of the student. Once the state court determined that the searches were unreasonable, it deemed application of the exclusionary rule to be mandatory without reference to the student's age.

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"on its face" an interpretation of federal law. This failure to conform to the dictates of *Michigan v. Long* vests this Court with jurisdiction. Since the state court did not indicate that its opinion rested on independent state grounds, this Court has properly exercised its jurisdiction in this matter.

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POINT II

APPLICATION OF THE EXCLUSIONARY RULE WILL NOT SERVE TO DETER ANY IMPROPER SEARCHES BY SCHOOL OFFICIALS.

Respondent's brief repeatedly implies that the position taken by petitioner condones searches which are violative of the United States Constitution. This is obviously not the case. We agree that unconstitutional searches should not occur; the issue between the parties is simply whether suppression of probative evidence of criminality in a subsequent court proceeding can have any measurable deterrent effect upon the decision of educators to search their charges. We submit that the exclusionary rule is inappropriate precisely because, at least in the school search situation, it cannot achieve the deterrent ends which justified its creation.[5]

Respondent asserts that exclusion of evidence is constitutionally mandated when the state would use illegally seized evidence on its case-in-chief. This argument requires an identity between a violation of the Fourth Amendment and the decision to suppress, a position which has been rejected by the decisions of this Court.[6] This

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5 In fact, as respondent fails to recognize, there are two competing values. The suppression of evidence of criminality also must teach these same young persons the lesson that wrongdoers are not appropriately punished. While, of course, unconstitutional searches are unjust, justice is not served when, in Cardozo's famous words, "[t]he criminal is to go free because the constable has blundered." *People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).* This latter value has been deemed subordinate to that of preventing unconstitutional searches; where, however, the deterrent value of the rule is not served, the injustice of permitting the criminal to go free is paramount.

6 Respondent posits a relationship between a lowered standard of reasonableness governing a search and invocation of the exclusionary rule, arguing that "the difference in the nature of the search has already been balanced and accommodated by the use of a standard less than probable cause." (Respondent's brief at 33). Application of the exclusionary rule in fact consists of two independent evaluations: (1) whether the search itself was "unreasonable" and (2) whether application of the rule is of any deterrent utility. These two evaluations are wholly unrelated. It is, of course, clear that, inversely, this Court has never even implied that the existence of the exclusionary rule would justify lowering standards to the extent that constitutional violations are permitted. Thus, respondent's argument regarding a balance between invocation of the exclusionary rule and lowered constitutional standards is fallacious.

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Court has recognized that exclusion is not commanded in every case of illegality; rather, the Court must weigh the illegality against "the considerable harm that would flow from indiscriminate application of an exclusionary rule." *United States v. Payner, 447 U.S. 727, 734 (1980).* Indeed, it is established that "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *Id.*

If deterrence of unlawful searches will not be achieved by application of the rule, then to suppress evidence will only serve to benefit those students guilty of criminal acts, while according no protection to innocent students who are victims of illegal but fruitless searches. *See Irvine v. California, 347 U.S. 128, 136 (1954).* This anomalous result can be corrected only by utilization of effective methods of deterrence. In the school search situation not only is the exclusionary rule unworkable to achieve compliance with the Constitution, but there are other, non-judicial factors inherent in the system which can themselves generate deterrence of improper searches. As this Court recognized in *Ingraham v. Wright, 430 U.S. 651, 670 (1977),* the "openness of the public school and its supervision by the community afford significant safeguards" against official abuse. Most citizens are products of the public schools; many have children attending these schools. Hence, while unlawful police acts directed at those accused of crime may fail to evoke outrage in honest citizens who cannot identify with such a victim, the community-at-large has a substantial interest in halting any abuses by school officials. Some parent-teacher cooperation is a recognized fact in public school regulation, with parents having impact on the policies and behavior of school officials. Thus, school officials, being directly responsible and answerable to parents, cannot and will not be overly protective of "an overzealous subordinate." (Respondent's brief at 47).

Where it can serve no deterrent purpose, there is no reason to apply the exclusionary rule. This Court has established that suppression is not a personal constitutional right of one aggrieved by an unlawful search. *United States v. Calandra, 414 U.S. 338, 348 (1974).* The exclusion of evidence is not intended to remedy the particular wrong done by an unconstitutional search. *Id.* Thus, no student who has been unlawfully searched is "entitled" to have evidence of his criminality suppressed. Only if, by sacrificing the justice of conviction, future official overstepping can be avoided, is the exclusionary rule justified. It is clear that "a rigid and unthinking application of

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the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Terry v. Ohio, 392 U.S. 1, 15 (1968).*

As discussed in petitioner's brief previously filed with this Court, a school official's primary concern is education and he has no professional interest in the criminal justice process.[7] Such an official may be faced with school exigencies, such as a risk of harm to the general student population, where "prompt action" is required and decisions must be "made in reliance on factual information supplied by others."[8] *Wood v. Strickland, 420 U.S. 308, 319 (1975).* Regardless of whether any "evidence" may be inadmissible in a subsequent criminal trial, that official may properly be expected to perform his duty as he sees it, including undertaking a disciplinary search. In such circumstances, the deterrent goal of the exclusionary

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7 This Court has only extended the suppression sanction to other than police agents when the government searchers were primarily engaged in a law enforcement function, albeit not necessarily enforcement of criminal laws. *See Michigan v. Clifford, ___ U.S. ___, 104 S.Ct. 641 (1984)* (arson investigators); *Michigan v. Tyler, 436 U.S. 499 (1978)* (fire and police officials jointly investigating cause of fire); *Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)* (inspection for safety hazards and violations of OSHA regulations); *United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976)* (interdicting flow of illegal entrants into the United States recognized as "formidable law enforcement problem" for border patrol); *See v. City of Seattle, 387 U.S. 541, 543 (1967)* (official inspection "to aid enforcement of laws" prescribing minimum physical standards for commercial premises); *Camara v. Municipal Court, 387 U.S. 523 (1967)* (municipal health inspector searching for possible violations of city's housing code; Court noted that "[l]ike most regulatory laws, fire, health and housing codes are enforced by criminal process"); *Jones v. United States, 357 U.S. 493 (1958)* (search by federal alcohol agents investigating information that defendant was operating an illicit distillery).

8 School officials confront an exceedingly difficult task in discharging their educational duties in today's school system. The risks of violence for young adolescents in cities are greater while attending school than elsewhere; nearly 7,000 schools in this country are seriously affected by crime. Wyne, "The National Safe School Study: Overview and Implications," 2 (1979), ERIC #ED-175-112. Indeed, there is a clear relationship between declining standardized test scores for public school children and the fact that schools are not now safe environments in which to learn. Clark, "Violence in the Public Schools: The Problem and Its Solutions," 4 (1978), ERIC #ED-151-990. School administrators must have broad supervisory and disciplinary powers in order to protect their students so that the educational function may be fulfilled.

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rule cannot be achieved.[9]

Indeed, it is precisely this necessity for school officials to exercise their judgment "independently, forcefully, and in a manner best serving the long-term interest of the school and students," which has led this Court to hold that such officials have a qualified immunity from civil liability. *Wood v. Strickland, 420 U.S. at 320.* If this Court, as indicated in *Wood v. Strickland,* has refrained from imposing liability on school officials in order that their honest judgment not be affected by considerations of personal liability, it is clear that a determination has been made that school officials are not to be dissuaded from such discretionary actions, including searches. Hence, even if application of the exclusionary rule could deter school officials from exercising similar honest judgment in a decision to search a student, it would be undesirable to so interfere with decision-making by those officials. Indeed, it would be anomalous to forego direct deterrence by providing personal immunity while at the same time attempt, by use of the exclusionary rule, to indirectly deter school officials from those same exercises of judgment inherent in carrying out their proper function.

The state court noted the propriety of the exercise of official judgment in this case when it stated:

> We do not disparage the school officials' actions in these cases. They must often, as here, act on short notice based on the information they possess....

State in the Interest of T.L.O., 94 N.J. 331, 349, 463 A.2d 934, 943 (1983). That court, however, went on to view the exclusionary rule as mandated because the search was not, viewed retrospectively, proper. In this, the state court erred; it incorrectly deemed suppression to be a personal remedy for a student aggrieved by an unlawful search. This Court has declared otherwise and, hence, the state court judgment, suppressing evidence seized in a proper exercise of the school official's discretion, cannot stand.

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9 Respondent and *amicus curiae* the American Civil Liberties Union both observe that several states have statutes requiring school officials to report school crimes to the police. (Respondent's brief at 20; ACLU brief at 32-33). The fact that teachers may be required by school regulation or even statute to report to police any crime occurring on school grounds, or evidence of a crime which is discovered, does not alter the analysis that the exclusionary rule cannot serve to deter searches by school officials. The function of school officials is not to investigate or prosecute crimes but, as is the proper obligation of any citizen, to report crimes if encountered. School officials do not undertake student searches in order to further prosecutions for criminal violations; that this may be the result is immaterial to a particular decision to search made in furtherance of school disciplinary objectives.

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CONCLUSION

For the foregoing reasons, as well as the reasons expressed in petitioner's brief previously filed with this Court, the State of New Jersey urges this Court to rule that the exclusionary rule is inapplicable to school searches performed by school administrators and teachers and to reverse the decision of the New Jersey Supreme Court suppressing evidence.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF N.J.
ATTORNEY FOR PETITIONER

By: s/A.J.N.
Allan J. Nodes
Deputy Attorney General
Attorney of Record

ALLAN J. NODES
VICTORIA CURTIS BRAMSON
DEPUTY ATTORNEYS GENERAL

OF COUNSEL AND ON THE BRIEF

DATED: MARCH 20, 1984.

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