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Feature

The Safest Place To Hide: Life After Safford Unified School District #1 v. Savana Redding

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The Supreme Court recently reviewed the controversial issue of searches in public schools, especially addressing the narrow question of whether the strip search of a 13-year-old suspected of possessing prescription-strength drugs was unreasonable. In a highly anticipated decision, *Safford v. Redding*[1] answered this question in the affirmative. In a victory for the student who claimed her constitutional rights were violated, the decision addressed the broader question of how far is *too* far for a school official to go in order to recover contraband and maintain a safe school environment. The effects of *Redding* are likely to be felt by students, teachers, lawyers, judges, and school personnel. However, because of its factually sensitive and vague holding, those effects remain to be seen and will likely not be known for years to come. While *Redding* is a victory for individual liberty advocates, many wonder whether the decision will only further compound the problem of drugs in schools, arguably providing students with a safe way to sneak contraband into public schools.

Facts

The events leading up to *Redding* began nearly six years ago in October 2003, in southeast Arizona. At the time, Savana Redding was a 13-year-old eighth grade honors student at Safford Middle School. She was an honors student with no history of disciplinary problems.[2] A week before Savana was searched, another student told Assistant Principal Kerry Wilson that "certain students were bringing drugs and weapons on campus," and that he had been sick after taking some pills that "he got from a classmate."[3] On the morning of October 8, that same student gave Wilson a white pill, alerting Wilson that other students were planning to take the pills at lunch. This student stated he got the pill from Marissa Glines. Through speaking with the school nurse, Peggy Schwallier, Wilson confirmed that the pill was a 400-milligram Ibuprofen, available only by prescription.


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Acting on the student's tip, Wilson summoned Marissa to his office. Before Wilson spoke to Marissa, a teacher handed him a day planner found within Marissa's reach inside the classroom, containing contraband that included knives, lighters, and a cigarette. Inside Wilson's office, he asked Marissa to empty her pockets and wallet. Marissa produced a blue pill, four white pills, and a razor blade. Marissa stated that she got the blue pill from Savana Redding, adding "I guess it slipped in when she gave me the IBU 400s."[4] Wilson did not ask Marissa any follow-up questions, including whether Savana currently had any more pills or where Savana might be hiding such pills. Again with the help of nurse Schwallier, Wilson confirmed that the blue pill was an over-the-counter 200-milligram anti-inflammatory drug, generically known as naprox-

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en. Unauthorized possession of both kinds of pills was against school rules.

Wilson then called Savana into his office. Wilson showed her the day planner, and she admitted the planner was hers but said she had lent it to Marissa a few days prior. Savana denied ownership of the contraband found inside the planner. Wilson also showed Savana the four white pills and one blue pill. Savana denied knowing where the pills came from, even after Wilson told her that other students (including Marissa) had told him that Savana was distributing such pills throughout the school. To prove her defense, Savana then consented to a search of her backpack, but no pills were found.

Unsatisfied with the results, Wilson instructed school administrative assistant Helen Romero to take Savana into the nurse's office and search her clothes for pills. Romero and Schwallier directed Savana to remove her clothes so that Savana was down to her bra and underwear. At this point, Savana was told to "pull out" her bra and the elastic band on her underwear.[5] It is unclear to what degree, but it is undisputed that part of Savana's breasts and pelvic area were exposed. Again, no pills were found.

Procedural Posture

Claiming that this strip search violated her daughter's Fourth Amendment rights, Redding's mother filed suit against Safford Unified School District #1, Wilson, Romero, and Schwallier. All defendants moved for summary judgment, claiming that even if there were a Fourth Amendment violation, they were entitled to qualified immunity as a defense. The District Court for the District of Arizona granted the motion on the ground that there was no Fourth Amendment violation. A panel of the Ninth Circuit affirmed.[6] However, after *en banc* reconsideration, the court reversed in a closely divided panel,[7] holding that the search was unconstitutional under the test set forth in *New Jersey v. T.L.O.*[8] The Supreme Court of the United States granted certiorari and issued its decision on June 25, 2009, agreeing with the Ninth Circuit that the search did in fact violate Redding's Fourth Amendment rights.[9] Justice Clarence Thomas cast the sole dissenting vote.

The Majority Opinion

In the majority opinion, the Court held that the limited search of Savana's backpack and outer garments was reasonable, but that the more intrusive strip search violated Savana's Fourth Amendment rights. In authoring the majority opinion, Justice Souter relied heavily on *T.L.O.* The student in *T.L.O.* was a 14-year-old girl accused of smoking in the girls' bathroom of her high school. A principal at the school questioned her and searched her purse, recovering a bag of marijuana and other drug paraphernalia. The Court held that this search was reasonable under the Fourth Amendment and thus did not violate the student's constitutional rights against unreasonable searches and seizures. *T.L.O.* was a seminal case because it recognized that the school setting requires a different analysis than other Fourth Amendment cases. The *T.L.O.* Court stated that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search" and that "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause."[10] The Court in *T.L.O.* went on to say that a search of a student is permissible in 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.[11]

The *Redding* Court affirmed the general holding of *T.L.O.*, including the application of the reasonable suspicion standard to school search cases, articulated as "a moderate chance of finding evidence of wrongdoing."[12] However, the search at issue in *Redding* was far more intrusive than the minimal search considered in T.L.O. In applying T.L.O.'s standard of reasonableness, the *Redding* court held that the search in *Redding* violated Savana's Fourth Amendment rights. The Court cited two glaringly absent factors in its holding that the search was unreasonable: (1) the lack of danger to the students from the power of the pills or their quantity; and (2) the lack of any reason to suspect that Savana was carrying the pills specifically in her undergarments.[13]

With respect to the first factor, the court stated that Wilson had "no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills."[14] The Court also cited Wilson's awareness of the non-narcotic composition of the pills as a reason supporting its holding that the search was unreasonable. Regarding the second factor, the Court acknowledged the possibility that students may hide contraband under clothing, but firmly instructed that "a reasonable search that extensive calls for suspicion that it will pay off."[15] The court held that Wilson's suspicion was not specific enough to search Savana's undergarments for a variety of reasons, including the lack of knowledge as to *when* Savana gave Marissa the pills, the lack of any evidence that the pills were specifically concealed in Savana's intimate areas, and the lack of evidence in the record of any practice among Safford Middle School students of hiding contraband in undergarments. Justice Souter concluded that "the combination of these deficiencies was fatal to finding the search reasonable."

The Aftermath Of *Redding*: Importance Of The Holding And Unresolved Questions

The *Redding* decision is significant for various reasons. The case attracted national attention and amplified the growing national debate over how much flexibility schools should have when enforcing anti-drug policies. Many parents were furious

with the strip search,[17] but some realized the necessity of such measures to keep their children safe."[18] In the end, the enraged parents felt vindicated by the Court's holding of a constitutional violation. In an interview after the decision came down, Savana Redding herself stated that the decision made her feel "good" because "they recognized that it was against my rights and it most likely won't happen to anyone else."[19]

More significantly, the *Redding* decision confirms that the standard of "reasonableness" so often cited by Fourth Amendment jurisprudence is not toothless, but can actually safeguard constitutional rights, including those of students in public schools.[20] It is proof from the highest court in the nation that students do have a right to privacy in school. It reminds teachers and other school personnel that they are not free from restrictions placed on them by the U.S. Constitution. Constitutional law scholars believe the decision may even provide a "bargaining chip" for future students confronted with similarly intrusive searches.[21]

The finding of a constitutional violation is also significant because had *Redding* come out the other way, "it would have made a great deal of law, essentially shutting the door on all student claims under the Fourth Amendment."[22] If the strip search in *Redding* were endorsed as reasonable by the U.S. Supreme Court, then there is an argument to be made that *unreasonable* searches in public schools would be few and far between. An opposite holding by the Court would give school personnel the green light to conduct searches without individualized suspicion or an imminent risk of danger to students.

Despite the significance of the *Redding* decision, countless unresolved questions and problems remain. First, *Redding* was arguably an easy case to decide because of the set of facts involved. This is reflected by court's 8-1 vote on the constitutional violation issue. The facts involved an extremely intrusive search with very little evidence against Savana. The contraband sought in the search was not heroin or a gun, but rather prescription-strength Ibuprofen. The school had few credible arguments on its side. And as constitutional scholar and legal blogger Vikram David Amar said in his piece on *Redding,* "hard cases make bad law, and easy cases make very little law."[23] However, the decision may not have been so cut and dry if the balance between the school's interests and the student's rights were closer.

For instance, suppose that instead of prescription pills, a narcotic drug such as cocaine was sought in a strip search of a student. This factor would likely weigh heavily in the school's favor, because the *Redding* court cited the danger of item sought, in "power or quantity" as one of the two most crucial factors in determining reasonableness.[24] According to Souter's majority opinion, it was this factor *combined* with the lack of suspicion that the pills were specifically hidden in Savana's underwear that invalidated the search. This seems to suggest that if a future search has one but not both of these factors present, the search may be upheld. For example, if the drugs sought were dangerous enough (i.e. heroin, cocaine, etc.), but the school officials still did not have any evidence that the drugs were hidden in undergarments, the search may be upheld as reasonable post-*Redding*.[25]

The same arguments present if the item sought were a dangerous weapon, such as a gun or a knife. This would likely present sufficient danger, providing strong support for the school's argument for conducting a strip search. Like a narcotic drug, a strip search looking for a gun may also deemed reasonable even without individualized suspicion regarding the gun's exact hiding sport on the student searched. Pre-*Redding* case law regarding school strip searches has hinted at this problematic issue, but the *Redding* decision still leaves the question unanswered.[26]

This problematic issue of the nature of the contraband sought is illustrated clearly in at least four pre-*Redding* cases that remain good law. *Williams v. Ellington*[27] validated the strip search of a student when school personnel had suspicion that the student possessed cocaine. Three other cases deemed strip searches of students reasonable, when school personnel had evidence the student possessed marijuana.[28] In its reasoning, the *Williams* court stated that even though the search was "so personally intrusive in nature," the school personnel were not unreasonable in strip searching the student "in light of the item sought" (a small vial containing suspected narcotics).[29] The Court in *Tarter* upheld the strip search looking for marijuana, stating that the school officials had "reasonable cause to believe the search is necessary in the furtherance of maintaining school discipline and order, or his duty to maintain a safe environment conducive to education."[30] The *Redding* decision does not make it clear what substances or contraband will provide enough "danger" in its "power or quantity" to predict whether these cases would be upheld in a post-*Redding* world.

In his lengthy dissenting opinion, Justice Thomas addresses this problem. Thomas hypothesizes that the majority opinion implied that if the item sought after in *Redding* was a street drug, the Court would have deemed the strip search reasonable. To support this theory, he argues the pills were carefully described by the majority opinion as having a "limited threat" and "limited power."[31] Justice Thomas argues that these words were chosen with careful deliberation, as to permit lower courts to deem strip searches for street drugs or other dangerous contraband reasonable. Lower courts are now faced with the difficult task of determining what type of contraband presents enough of a threat to justify an intrusive strip search. With such subjective interpretations, it is likely for the various circuits to interpret this differently, particularly varying geographically throughout the nation.

The *Redding* decision is also problematic because it does not provide clear guidance to school personnel, but rather imposes unclear standards and factually sensitive guidelines to which schools are now required to adhere. Matthew W. Wright, the attorney for the Safford school district who made

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the oral arguments to the Supreme Court, said that the decision "offers little clarification" on when school officials may conduct a strip search of a student, or even search a student in any capacity.[32] School administrators were basically told only to consider the danger of the contraband sought and whether there is any evidence or reason to think it is hidden in an intimate place.[33] This is undoubtedly an overwhelming task for school personnel, particularly when considering the difficulty they already face when balancing the privacy rights of students with the practicality of keeping schools safe.

There is an argument to be made that *Redding* does nothing more than affirm the already vague "reasonable suspicion" standard for school searches that has already been in place for 25 years, and announce that although school strip searches are seriously frowned upon, they are still not completely forbidden by the Constitution.[34] The "reasonable suspicion" standard is already unclear, particularly for school personnel lacking legal sophistication. Unless faced with a factually identical situation as in *Redding,* school officials will likely remain without clear guidance. Justice Thomas also addresses this issue in his dissent, chastising the majority for imposing a "vague and amorphous standard on school administrators."[35]

In addition to the problems illustrated above, the *Redding* decision is also widely problematic because it limits what school officials can do to protect students from the harmful effects of drugs and weapons and maintain discipline in schools. Justice Thomas criticizes the *Redding* decision as a "deep intrusion into the administration of public schools" that "second-guesses the measures that these officials take to maintain discipline in their schools and ensure the health and safety of the students in their charge."[36] *Redding* suggests that an intrusive search is warranted when the drug in question is serious enough, but now school officials are now left with the daunting task of determining which drugs may be serious enough to warrant such an intrusive search. But teachers are not pharmacologists. They are not trained or qualified to make this determination. Justice Thomas persuasively argues that such a task is "unworkable and unsound."[37] School officials may now be forced to halt searches because of the possibility that a court might later find the particular drug not dangerous enough.

The *Redding* decision implies that prescription-strength Ibuprofen pills do not pose a serious enough risk of danger to students to impose a strip search (at least without individualized suspicion that the student is hiding pills under his or her clothing). This is troubling for several reasons. First, schools today have valid reasons for punishing unauthorized possession of such prescription-strength pills because abuse of prescription drugs among teenagers is on the rise in America. According to the National Center on Addiction and Substance Abuse at Columbia University, abuse of prescription opiods among children 12 to 17 years old increased by 542 percent between 1992 and 2002, and in 2004, 2.3 million of that same age group abused at least one controlled prescription.[38] Second, it is a crime to use or possess prescription-strength Ibuprofen without a prescription in Arizona, where *Redding* took place.[39] So in essence, Safford Middle School enforced a rule consistent with the criminal code of Arizona. This is difficult to reconcile with the *Redding* decision. If the legislature of Arizona considers abuse of prescription-strength Ibuprofen serious enough to criminalize its possession, then it is troubling that the U.S. Supreme Court does not also acknowledge the danger it increasingly presents. This paradox begs the obvious question: How would the public react if a student overdoses on prescription-strength medication when school officials had reason to suspect the possession, but could not search the student under the limitations placed by *Redding*? The dilemma of *Redding* will be felt first-hand by the parent of that student, and public outrage may result.[40]

Foster v. Raspberry

Since the *Redding* decision came down, only one court has had the opportunity to apply the *Redding* reasoning to its own set of facts regarding a school strip search. In the trial-level Georgia district court case of *Foster v. Raspberry,*[41] the item sought in the strip search was not illegal drugs, but rather a stolen iPod. In *Foster,* one student named King violated school policy by bringing an iPod to her classroom. Classmate Tiara took this iPod from King and began dancing around the classroom. The teacher, Raspberry, confiscated the iPod and placed it in his desk drawer. Later during class, another student named Thomas removed the iPod from the desk drawer while Raspberry was in the restroom. Despite various attempts to speak to his students about who had the iPod, no one was willing to identify the possessor. After the students' book bags were searched without success, a student named Tish gave up Thomas to Assistant Principal Kellogg. Reluctant to reveal the identity of his tipster, Kellogg instructed female school employee Perryman to "take the five girls in the class individually into a storage closet to the side of the classroom and have them shake out their blouses and roll down their waste [sic] bands in an effort to locate the missing iPod."[42] King also claimed she was told to her remove her pants and underwear.

Applying the *Redding* decision, the court found that "if a jury determines that King was subjected to a strip search as she claims, then that jury would be authorized to find that the search violated King's Fourth Amendment right to be free from unreasonable searches by school officials."[43] Like the court in *Redding,* the *Foster* court stressed the importance of the nature of the item sought and the lack of danger presented. The *Foster* opinion stated that "no evidence has been submitted that the iPod was dangerous…it was simply not permitted on school grounds…but it clearly was not 'dangerous' contraband."[44] The second factor supporting its holding was that there was no individualized suspicion that King had the iPod.[45] The court also relied on an 11th Circuit opinion, holding that with a "very limited exception," for a school search to

be reasonable, a school official must have reasonable grounds that the particular student searched possesses contraband.[46] Interestingly, the court went on to say that even if the school officials did have individualized suspicion that King had the iPod, the scope of the search was still unreasonable under *Redding* because there was no reason to suppose that King was carrying the iPod specifically in her underwear.[47] Like *Redding*, *Foster* is also a somewhat easy set of facts to work with. The nature of the item sought was not drugs or a weapon and there was no individualized suspicion towards King. However, much more nuanced questions inevitably remain on the near horizon.

Conclusion

The *Redding* decision was clear—it is a violation of a student's Fourth Amendment rights to be strip searched when (1) the item sought is not particularly dangerous; *and* (2) there is no reason to suspect that item is hidden specifically under the student's undergarments. Other than on these extremely narrow set of facts, however, the effects of *Redding* remain to be seen. New case law will undoubtedly unveil when a factual scenario arises where one of the two factors cited by *Redding* is present, but not the other. Until then, it is difficult to argue with dissenting Justice Thomas's point: "*Redding* would not have been the first person to conceal pills in her undergarments…Nor will she be the last after today's decision, which announces the safest place to secrete contraband in school."[48]

Endnotes

1 129 S. Ct. 2633 (decided June 25, 2009).

2 Adam Liptak, *Supreme Court Says Child's Rights Violated by Strip Search,* N.Y. Times, June 26, 2009.

3 *Redding,* 129 S. Ct. at 2640.

4 *Id*.

5 *Id*. at 2641.

6 504 F. 3d 828 (2007).

7 531 F. 3d 1071, 1081-1087 (2008).

8 469 U.S. 325 (1985).

9 *Redding.* The Supreme Court also addressed the issue of qualified immunity for the defendants, denying the parties this defense. This article will not address the issue of qualified immunity, but rather focus solely on the Fourth Amendment violation issue.

10 *T.L.O,* 469 U.S. at 340.

11 *T.L.O.* 469 U.S. at 342.

12 *Redding,* 129 S. Ct. at 2639.

13 *Id*. at 2642-43.

14 *Id*. at 2644

15 *Id*. at 2642.

16 *Id*. at 2643.

17 Adam Liptak, *Strip-Search of Girl Tests Limit of School Policy,* N.Y. Times, March 24, 2009. Adam B. Wolf, a lawyer for the American Civil Liberties Union, which represented Savana Redding, stated that Savana's experience was "the worst nightmare for any parent." He further stated that "When you send your child off to school every day, you expect them to be in math class or in the choice. You never imagine their being forced to strip naked and expose their genitalia and breasts to school officials."

18 Liptak, *supra* note 2.

19 *Id*.

20 Vikram David Amar, *Common Sense Wins in Redding, the School Strip-Search Case,* July 6, 2009. Available at http://writ.lp.findlaw.com/amar/20090706.html. Amar argues that the *Redding* decision "breaks the streak of school victories at the high Court in this area, reminding everyone at least in a symbolic way, that schools do not always have cart blanche to do as they wish when it comes to student searches."

21 *Id*.

22 *Id*.

23 *Id*.

24 *Redding,* 129 S. Ct. at 2643.

25 Lyle Denniston, *Analysis: Some Expansion of Student Privacy,* June 25, 2009. Available at: http://www.scotusblog.com/wp/analysis-some-expansion-of-student-privacy/.

26 *Oliver v. McLung,* 919 F. Supp. 1206, 1218 (U.S. Dist. Court for the Northern District of Indiana, Fort Wayne Division 1995) (finding that a school strip search for stolen money was not reasonable, but noting that the same search may have been reasonable if undertaken to find drugs or weapons). Cited by *Beard v. Whitmore,* 402 F.3d 598, 605 (6th Cir. 2005) (finding that a school strip search of 20 male high school students conducted by male teacher was not reasonable because among many factors, the school's interest in recovering the stolen money was "not weighty").

27 936 F.2d 881 (6th Cir. 1991).

28 *Cornfield v. Consolidated High School District No. 230,* 991 F.2d 1316 (7th Cir. 1993); *Widener v. Frye,* 809 F. Supp. 35 (S.D. Ohio, West. Div. 1992); *Tarter v. Raybuck,* 742 F.2d 977 (6th Cir.1984).

29 *Williams,* 936 F.2d at 887. The Court also stated that the scope of the search was reasonable because taking into account the size of the clear glass vial, it would be reasonable to suspect that the girl might conceal it on her person.

30 *Tarter,* 742 F.2d at 982.

31 *Redding,* 129 S. Ct. at 2651 (Thomas, J., dissenting).

32 Liptak, *supra* note 2.

33 *Id*.

34 Denniston, *supra* note 25.

35 *Redding,* 129 S. Ct. at 2646 (Thomas, J., dissenting).

36 *Id*. at 2646. *See also* Liptak, *supra* note 17. Quoting attorney for Safford School District Matthew W. Wright as saying that the decision "unduly limits the ability of school officials to protect students from the harmful effects of drugs and weapons on school campuses."

37 *Id*.

38 Ken Schroeder, *Get Teens Off Drugs,* The Education Digest 75 (Dec. 2006).

39 See Arizona Rev. Stat. Ann § 13-3406(A)(1)

40 According to Justice Thomas in his dissenting opinion, that public outrage "would likely be directed at the school for failing to take steps to prevent the unmonitored use of the drug." *Redding,* 129. U.S. at 2654.

41 2009 U.S. Distr. LEXIS 65419 (U.S. Dist. Court for the Midd. Dist. of Georgia, Columbus Division) (decided July 29, 2009).

42 *Foster,* at 9.

43 *Id*. at 16.

44 *Id*. at 16.

45 In fact, Kellogg's tipster told him that Thomas, not King, had the iPod.

46 *Foster,* at 15. *Citing Thomas ex. rel. Thomas v. Roberts,* 261 F.3d 1160, 1167 (11th Cir. 2001), vacated, 536 U.S. 953, 122 S. Ct. 2653, 153 L. Ed. 2d 829 (2002), reinstated, 323 F.3d 950 (11th Cir. 2003)

47 *Foster,* at 17-18. Citing *Redding,* 129 S. Ct. at 2639-43.

48 *Redding,* 129 S. Ct. at 2650 (Thomas, J., dissenting).