35TH ANNUAL METROPOLITAN MENTOR MOOT COURT COMPETITION

2019
PROBLEM AND RULES

Justice Resource Center
122 Amsterdam Avenue
New York, NY 10023

Fordham University
School of Law
150 West 62nd Street
New York, NY 10023

I. INTRODUCTION

This packet contains all the materials necessary to participate in the Thirty-Fifth Annual New York Metropolitan MENTOR Moot Court Competition. Participants may not utilize any materials not contained in this packet or referenced in Appendix I in preparing for and presenting their arguments.

The MENTOR program focuses on the abilities of student advocates to organize and present their arguments persuasively. Judges will question advocates as they normally would in appellate court proceedings. Participants should refrain from memorizing prepared texts. Rather, they should focus on understanding the legal issues, structuring coherent arguments, effectively responding to judges' questions, thinking extemporaneously, and being persuasive. Some participants may be called upon to advance unpopular positions with which they disagree. This is often a characteristic of the legal process and should not diminish the student's enthusiasm or the quality of presentation.

This year's fictional lawsuit is entitled Frank Maddison v. King High School. The issues are: (1) whether King High School violated Frank Maddison's Fourth and Fourteenth Amendment right to be free from unreasonable seizures when a school resource officer detained him on school property for questioning regarding a crime committed on school grounds; and (2) whether King High School violated Frank Maddison's Fifth and Fourteenth Amendment privilege against self-incrimination when the school board drew an adverse inference from Frank Maddison's silence during a school board disciplinary hearing.

This packet contains: (1) the Statement of Facts; (2) the majority opinion of Judge Kohandel-Shirazi; (3) dissenting opinions from Judge Newman and Judge DeQuinzio; and (4) the Order granting the Petition for a Writ of Certiorari to the United States Supreme Court.

II. RULES OF THE COMPETITION

Preliminary rounds are scheduled for **Tuesday, November 12; Wednesday, November 13; Thursday, November 14; and Friday, November 15**. Each participating school will compete twice on one day of the preliminary rounds, which will be held at Fordham University School of Law, 150 West 62nd Street, New York, NY 10023. All teams must check-in by **8:30 a.m.** on the morning of their rounds. Rounds will begin promptly at **9:00 a.m.** and **11:00 a.m.** Failure to check-in on time may result in disqualification. After the 9:00 a.m. rounds, **teams should remain in the competition room and await instruction** from a clerk as to the location of their 11:00 a.m. round.

Upon completion of the preliminary rounds, the two top-scoring teams from each of the first four days will advance to the quarterfinals. The next eight overall top-scoring teams from all of the preliminary rounds will compete in the "wild card" round on **Thursday, November 21, 2019** at Fordham University School of Law. The four top-scoring teams from the wild card round will advance to the quarterfinal round.

The twelve quarterfinalist teams will compete on **Monday, November 25, 2019** at Fordham University School of Law. The four top-scoring teams from the quarterfinal rounds will then advance to the semifinal rounds on **Tuesday, November 26, 2019**, to be held at the Thurgood Marshall United States Courthouse. The two top-scoring teams will advance to the final round on **Tuesday, December 3, 2019**, also to be held at the Thurgood Marshall United States Courthouse. The winning team will qualify for a further round against the winning team from the Long Island MENTOR program, to be held on **Thursday, December 12, 2019**, at the Thurgood Marshall United States Courthouse. Scores will not be disclosed during the competition, but will be available for review after the competition ends. Schools will be notified

of advancement by telephone. Advancement results will be available at the end of each day after all rounds are completed.

Competition conflicts must be submitted in writing by **Wednesday, October 16, 2019**. The last day to withdraw from the competition is **Monday, October 21, 2019**. Untimely withdrawals may result in disqualification from the 2020 MENTOR Moot Court Competition.

III. TEAMS

Each school will field two teams, and each team will have two students. Team I will represent Appellant Frank Maddison on both issues. Team II will represent Appellee King High School on both issues.

The two finalist schools will be announced after the semifinal rounds at the closing luncheon to be held at **Thurgood Marshall United States Courthouse on November 26, 2019**. The two finalist teams will reach a mutual agreement as to which team will represent Appellant and Appellee, respectively. If no agreement can be reached, assignment of representation will be determined by a coin toss.

IV. PREPARATION

Teachers and attorneys from sponsor law firms may coach the teams. Teams should arrange practice rounds alone, with teachers, and with attorneys from sponsor law firms. Visits to the appellate courts to observe the nature of appellate oral advocacy are also encouraged.

Teams **may not** utilize any legal precedent or research aids **not listed in Appendix I**. Moreover, participating attorneys may not use any outside materials in coaching student advocates. The facts contained in the record are inclusive; students may not invent facts or present data that conflict with these materials. However, in drawing inferences about the strength of given arguments, students may draw upon personal knowledge, as well as general knowledge

about crime and crime prevention.

A list of sources used in the problem is set forth in Appendix I. **PDF versions can be found on the JRC website, at http://jrcnyc.org/site/moot-court**. Many of the sources have been partially redacted for the students' convenience. Redacted sources are denoted with an asterisk in Appendix I. If a source has been redacted, students are **not permitted to use any complete, non-redacted versions of that source**. If a team has trouble accessing the cases, please contact the MENTOR Editor, Michael Dal Lago, at (908) 432-2926 or email mdallago@fordham.edu for assistance.

V. FORMAT OF THE COMPETITION

The order of arguments at each round will be as follows: (1) counsel for the Petitioner on Issue I; (2) counsel for the Petitioner on Issue II; (3) counsel for the Respondent on Issue I; and (4) counsel for the Respondent on Issue II. Each student advocate will have ten minutes to argue his or her client's position. Time periods will be strictly enforced. No rebuttal time will be permitted.

During the competition, only two team members may argue for each side—*i.e.*, one student advocate per issue. All four team members may, however, be seated at the counsel table in the courtroom. **Students may not pass notes once the oral arguments begin.**

All teams, coaches, teachers, and guests are invited to attend their school's rounds. Unfortunately, some rooms may not be large enough to accommodate all spectators. Therefore, coaches are expected to contact the MENTOR editor, Michael Dal Lago, if they plan to bring spectators. If we are unable to accommodate your school's request, the teacher-coach will be informed as such, and the number of spectators will be limited. **While MENTOR attorneys and teachers may be present during oral arguments, they may not coach the students while the**

round is in progress. Additionally, all persons affiliated with a school participating in the competition are prohibited from previewing the arguments of other participants.

VI. SCORING

All rounds will be scored by a panel of judges. No attorney may judge his or her MENTOR high school in any round. Judges will evaluate students on the following criteria: (1) overall persuasiveness; (2) ability to respond effectively to questions; (3) knowledge of the case law; (4) clarity of arguments; and (5) poise and appearance. Scoring in each category will range from one to ten, with ten being the highest score. After both teams have presented their arguments, the bench will give comments to the individual oralists. The bench will not announce a ruling on the merits of the case nor will the bench reveal the specific scores of the teams. The bench may, however, provide group or individual feedback to the oralists as time permits.

VII. AWARDS

All team members will receive a "Certificate of Participation." The finalists will receive a gift commemorating their participation in the competition. The name of the overall winner will be engraved on the MENTOR trophy.

VIII. CONTACT INFORMATION

Please address all inquiries regarding the New York Metropolitan MENTOR Moot Court Competition to:

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United States Court of Appeals for the Fourteenth Circuit

Argued December 7, 2018 Decided December 14, 2018

FRANK MADDISON
Appellant,

v.

KING HIGH SCHOOL
Appellee,

On appeal from the United States District Court
for the District of Fordhamville

Before KOHANDEL-SHIRAZI, NEWMAN, AND DEQUINZIO, Circuit Judges.

Opinion for the Court by *Chief Judge* KOHANDEL-SHIRAZI;
Dissent in part by *Circuit Judge* NEWMAN;
Dissent in part by *Circuit Judge* DEQUINZIO.

Kohandel-Shirazi, *Chief Judge*:

This case comes before this Court on appeal from the United States District Court for the District of Fordhamville's grant of Appellee's motion for summary judgment. Appellant Frank Maddison timely filed this appeal, asserting that the lower court incorrectly held that King High School ("King High") did not violate Maddison's Fourth and Fourteenth Amendment right to be free from unreasonable seizures, or his Fifth and Fourteenth Amendment privilege against self-incrimination.

This appeal involves two distinct questions, both of which involve fundamental constitutional rights. This Court must first determine whether King High violated Maddison's right to be free from unreasonable seizures during an extended detention and interrogation. This Court must then determine whether King High violated Maddison's Fifth Amendment privilege against self-incrimination when it drew an adverse inference from her silence during a disciplinary hearing.

I.

Standard of Review

On appeal of a district court's grant of summary judgment, an appellate court reviews the district court's conclusions of law *de novo*. See Dal Lago v. MCB, 150 U.S. 62, 64 (1995).

II.

Factual Background

The material facts on summary judgment are undisputed and are set forth by this Court herein.

King High is a public school in Fordhamville, Fordham with 597 students and 160 faculty members. In 2017, Frank Maddison was a sixteen-year-old junior at King High and the star wide receiver on the varsity football team. Maddison's longtime girlfriend, Hannah Bernard, was also a junior at King High and the captain of the cheerleading squad.

In March 2017, Maddison and Bernard were eagerly preparing for King High's annual prom, which was hosted for junior and senior class members in good academic standing. A rumor was circulating that Lil Knapp X would make a surprise guest appearance at prom to perform his hit single, *Old Greg Road*. Although the dance was not until June 3, 2017, Maddison and Bernard had already picked out their outfits and practiced their choreographed dance to *Old Greg Road* in an effort to secure the titles of prom king and queen.

In early April 2017, Maddison and Bernard were preparing for Salvatore Sanzotta's Advanced Chemistry midterm exam. Mr. Sanzotta was a well-liked teacher, but he had a reputation for giving his students especially difficult midterm exams. While Maddison studied for the exam, Bernard spent most of her time making Pik Pok videos. Mr. Sanzotta informed Bernard that if she received less than a B- on the upcoming exam, she would fail the course and be placed on academic probation. This would preclude her from attending prom and winning the coveted title of prom queen. The exam took place on April 14 during the last period of the academic school day, from 2:45 p.m. to 3:30 p.m. Bernard received a C- on the exam.

Mr. Sanzotta informed King High's principal, Kyle Favetta, of Bernard's failing grade. Accordingly, Favetta placed Bernard on academic probation, precluding her from attending the upcoming prom. Maddison was especially disheartened by this news because he would no longer have a partner for the *Old Greg Road* routine. And despite being the favored

candidate that year, he felt it would be unlikely that he would win prom king without Bernard and their choreographed performance.

On June 3, the day of prom, the entire school attended an assembly on the dangers of smoking KUUL, a newly popularized e-cigarette that was plaguing high school teenagers. While the student body and faculty were in the gymnasium, Maddison snuck outside to the parking lot where he found Mr. Sanzotta's lime-green Maserati. Maddison used his house keys to scratch the phrase "KUUL kid wuz here" into the driver's side door, causing significant damage to the car. Maddison then snuck back into the assembly before anyone noticed he was gone. That night at prom, Maddison performed the *Old Greg Road* routine alone in front of Lil Knapp X. The titles of prom king and queen were given out after Maddison's performance to Stephen Solomon-Indelicato and Milana Diaz.

Once Mr. Sanzotta discovered the damage to his car, he informed Izzy Gartland, King High's vice principal and disciplinarian. Gartland promptly checked the security footage and conducted interviews with the campus security guards. However, no security guard had witnessed the vandalism and Maddison managed to evade all of the security cameras. Gartland made a school-wide announcement, offering a reward for any information regarding the vandalism. No one came forward. After an entire summer of investigating, Gartland and Sanzotta lost hope of finding the person or persons responsible.

On September 5, 2017, the first day of Maddison and Bernard's senior year at King High, the couple was hanging Lil Knapp X posters in Maddison's locker. As Mr. Sanzotta walked by, he noticed a white board inside Maddison's locker with, "King High Kool Kid" written in marker. Mr. Sanzotta then asked about their summers. Bernard's response was friendly, but Maddison turned around and walked away, mumbling under his breath. As Maddison walked

away, Bernard said, "ok Cool Kid, see you later." After Maddison walked away, Mr. Sanzotta went straight to Gartland's office and told her that he had a strong suspicion that Maddison was responsible for the vandalism to his car. Gartland was skeptical, but decided to call Maddison in for questioning.

When Maddison got to Gartland's office at 1:30 p.m. he was immediately confronted by Jack Cordara, King High's school resource officer. Cordara was dressed in his standard uniform and did not have any weapons on his person. Gartland informed Maddison that Cordara would be questioning him regarding "an incident that happened last spring." Cordara then handcuffed Maddison, took him by the bicep, and guided him to a separate detention room that was commonly used for disciplinary purposes. On the way to the detention room Maddison said "let go of me. I won't run," and Cordara did not respond. When they got to the detention room, Cordara uncuffed Maddison and put his hand on Maddison's shoulder to place him in a seat.

While questioning Maddison, Cordara employed tactics that he learned during his previous career as a narcotics detective with the Fordhamville Police Department. The questioning lasted three hours. Cordara took three breaks over the course of the questioning, telling Maddison that he would be back shortly. Cordara never offered Maddison a chance to use the restroom, take a break, or call his parents. Though the door remained partially open throughout the questioning, Cordara never explicitly told Maddison that he could leave the room. Over the course of the questioning Maddison kept repeating, "I didn't do anything to Sanzotta or his car. Just let me out of here, my girlfriend needs a ride home."

After Cordara concluded the interview and Maddison left, Cordara said to Gartland, "I think he's guilty, but we need more information. I bet if you suspend him he'll start talking." That afternoon, Gartland called Maddison's home and told his mother, Soraya Maddison, that

her son was suspended from King High for eleven days for the suspected vandalism of Mr. Sanzotta's car. Gartland also told her that her son had the right to appear before Superintendent Kat Paparo and the Fordhamville District School Board (the "school board") on September 7 if he wished to appeal the suspension.

Maddison attended the school board hearing to testify and appeal his suspension. There, Superintendent Paparo explained that if the school board determined that Maddison was guilty of the vandalism, the school board would uphold his suspension and could expel him from King High. This made Maddison visibly nervous. Then, Superintendent Paparo questioned Maddison for fifteen minutes, but he refused to answer any questions; he remained silent throughout the entire hearing. After a brief deliberation, the school board informed Maddison of their decision to expel him. Superintendent Paparo explained that Maddison's silence, in the face of a serious accusation, was inexplicable and supported the school board's suspicion that Maddison was responsible for the vandalism of Mr. Sanzotta's car.

III.

Procedural History

Frank Maddison filed a complaint in the United States District Court for the District of Fordhamville through his mother, Soraya Maddison, pursuant to 42 U.S.C. § 1983 (1996). The complaint requested injunctive relief and damages. Maddison argued that his Fourth and Fourteenth Amendment rights were violated when Cordara questioned him in the detention room. Maddison further argued that his Fifth and Fourteenth Amendment rights were violated when Paparo drew a negative inference based on his silence in the school board hearing.

King High filed a motion for summary judgment, asserting that Maddison was not seized under the Fourth Amendment when Cordara questioned him in a detention room. King High

further argued that Maddison, a public school student, did not hold the Fifth Amendment privilege against self-incrimination in an administrative school board hearing.

The District Court granted King High's motion for summary judgment, finding that the school did not violate Frank's constitutional rights. The court found that Maddison was not seized under the Fourth Amendment, and did not analyze the reasonableness of the detention. The court further found that students do not have a Fifth Amendment privilege against self-incrimination during administrative disciplinary hearings.

Maddison appealed to this Court. We find that King High School did not violate Maddison's constitutional rights and we hereby AFFIRM the District Court's decision.

IV.

Fourth Amendment

This Court must first address whether public school students' Fourth and Fourteenth Amendment rights are violated when they are detained in school by the school's resource officer regarding a crime that occurred on school grounds. The District Court held that Maddison was not seized because a reasonable person in his position would have felt free to leave the detention room at any time. We disagree and find that there was a seizure. However, applying the reasonableness standard established in New Jersey v. T.L.O., we find that the seizure was reasonable. 469 U.S. 325 (1985).

For the reasons set forth below, we AFFIRM the judgment of the District Court and hold that King High did not violate Maddison's Fourth and Fourteenth Amendment rights.

A.

Background

The Fourth Amendment to the United States Constitution dictates that the federal government shall not violate "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. CONST. AMEND. IV. The Fourteenth Amendment extends the Fourth Amendment's protections against unreasonable seizures to the conduct of state officers. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995). Because public school officials are considered state actors, the Fourteenth Amendment also protects against unreasonable seizures in public schools. See id. Indeed, public school education is a constitutionally protected property interest. See Goss v. Lopez, 419 U.S. 565, 574 (1975).

Under the Fourth Amendment, a seizure occurs when an officer terminates or restrains an individual's freedom of movement such that a reasonable person would not feel free to leave. See United States v. Mendenhall, 446 U.S. 544, 554 (1980). When determining whether a reasonable person would feel free to leave, courts look to factors including: the presence of multiple officers, the display of a weapon, physical contact, and the use of language or tone indicating that compliance might be necessary. See id. Additionally, a reviewing court must view the encounter through the eyes of a reasonable person of similar age and experience because those characteristics are relevant to whether an individual would feel free to leave. See Jones v. Hunt, 410 F.3d 1221, 1226 (10th Cir. 2005).

When a court finds that a seizure occurred, it must then determine whether the seizure was reasonable. See Shuman ex rel. Shertzer v. Penn Manor Sch. Dist., 422 F.3d 141, 147 (3d Cir. 2005). In assessing the reasonableness of a law enforcement seizure in a public school when force is involved, like here, circuit courts are divided as to whether to apply the reasonableness

standard in T.L.O. or the objective reasonableness standard in Graham v. Connor, 490 U.S. 386 (1989). See K.W.P. v. Kansas City Public Schools, 931 F.3d 813, 822 (8th Cir. 2019). Under T.L.O., courts evaluate reasonableness considering the unique pedagogical interests of a school, whereas under Graham, courts assess reasonableness objectively and independent of the school setting. See Graham, 490 U.S. at 397; T.L.O., 469 U.S. at 338. The Eleventh Circuit has applied the T.L.O. standard. See Gray ex rel. Alexander v. Bostic, 458 F.3d 1295, 1304 (11th Cir. 2006). In contrast, the Fourth and Tenth Circuits have applied the Graham standard. See E.W. by & through T.W. v. Dolgos, 884 F.3d 172, 185 (4th Cir. 2018); Hawker v. Sandy City Corp., 591 F. App'x 669, 674 (10th Cir. 2014). The Ninth Circuit has applied both standards. See C.B. v. City of Sonora, 769 F.3d 1005, 1031 (9th Cir. 2014) (finding that an officer who handcuffs a compliant eleven-year-old acted unreasonably under either standard of reasonableness).

B.

Discussion

Given the use of physical contact and the prolonged detention, we find that Officer Cordara's conduct constitutes a seizure. We find that the seizure was reasonable and therefore did not violate Maddison's Fourth and Fourteenth Amendment rights.

1. T.L.O. reasonableness is the appropriate standard in this case.

We align ourselves with the Eleventh Circuit and find that the T.L.O. standard applies when assessing the reasonableness of a law enforcement seizure in a public school. In T.L.O., the Supreme Court held that the public school setting requires a modification to the level of suspicion otherwise required by administrators to conduct *searches* of students on school

grounds. See 469 U.S. at 340. We fail to see why that logic should not be extended to *seizures* conducted by law enforcement officials on school grounds.

Public schools advance unique pedagogical interests that are not limited to the four walls of the classroom. See Gray, 458 F.3d at 1304. For example, the Supreme Court has recognized that public schools have an interest in maintaining order, preventing crime, and preserving flexibility in disciplinary methods to promote the informal teacher-student relationship. See T.L.O., 469 U.S. at 339. The same pedagogical interests that are advanced through searching students on school grounds apply equally to seizing students on school grounds. Under T.L.O., these interests must be balanced against students' reduced privacy interests. See id. It is therefore prudent to apply the same standard of reasonableness to both searches and seizures to allow public school officials to effectively advance these unique needs.

Additionally, we find it immaterial that the seizure was conducted by a school resource officer rather than a teacher or administrator in determining which standard should apply. Because the officer was acting in concert with school officials to investigate a crime that occurred on school grounds during the school day, we do not believe that the standard of reasonableness should change simply because the seizure was conducted by law enforcement rather than a school official.

Finally, the use of force in performing the seizure should not be used as a factor to determine *whether* T.L.O. controls in this case. Rather, force is merely a factor that should be used to determine the existence of a seizure and its reasonableness *under* T.L.O.

2. The seizure was reasonable.

Turning to its application, the T.L.O. reasonableness analysis is twofold. First, we must determine whether Cordara's conduct was justified at its inception. See Gray, 458 F.3d at 1305. Second, we must determine whether the seizure was reasonably related in scope to the circumstances which justified the interference at the outset. See id.

Under the first prong, we examine whether Gartland and Cordara's decision to question Maddison had a reasonable basis. See id. Under T.L.O., this basis does not need to meet the requirements of probable cause; rather, it must only be reasonable given the circumstances and the school's pedagogical interests. See id. Here, Gartland and Cordara had a reasonable basis to suspect Maddison was guilty. Because Sanzotta failed Bernard in Advanced Chemistry and cost Maddison the prom king title, Maddison had a motive to cause damage to Sanzotta's car. Then, Mr. Sanzotta noticed the white board in Maddison's locker which had the moniker "Kool Kid," phonetically the very same words that were keyed into Mr. Sanzotta's car. Further, as Maddison walked away, Bernard referred to him as "Cool Kid" once again. A reasonable person with the information that Gartland and Cordara possessed would have suspected that Maddison was guilty.

Under the second prong, we must analyze whether the nature of the seizure was reasonably related to the circumstances that justified the seizure at the outset. T.L.O., 469 U.S. at 342. A seizure is permissible when the officer's method is reasonably related to the seizure's objectives and not excessively intrusive in light of the student's age. See id. Here, King High was investigating the vandalism of a teacher's car on school grounds that happened in the middle of a school day. That crime is a serious affront to the school's pedagogical interests. Maddison was sixteen years old, just two years shy of being considered an adult in the criminal justice

system. From Cordara's perspective as a trained detective, even if Maddison was innocent, he posed a risk of fleeing from the police; a nervous teenager may not understand the long-term consequences of fleeing from police and is instead more likely to respond to immediate apprehension with a rash decision. Cordara's decision to seize Maddison with handcuffs was appropriately proportional to the nature of the offense given Maddison's age and experience. We therefore hold that Cordara acted reasonably, and King High did not violate Maddison's Fourth and Fourteenth Amendment rights.

V.

Fifth Amendment

This Court must next address whether a public school student is entitled to the Fifth and Fourteenth Amendment privilege against self-incrimination in a school board disciplinary hearing. The District Court held that Maddison was not entitled to the privilege against self-incrimination during his suspension hearing. We agree.

For the reasons set forth below, we AFFIRM the District Court's judgment, and find that public school students are not entitled to the privilege against self-incrimination in school board disciplinary hearings.

A.

Background

The Fifth Amendment to the United States Constitution provides in relevant part, "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. AMEND. V. This right is referred to as the privilege against self-incrimination. The Fourteenth Amendment extends that privilege to states and state actors. Malloy v. Hogan, 378 U.S. 1, 6 (1964). The Fifth Amendment privilege against self-incrimination is a fundamental right of

criminal defendants at trial. See Chavez v. Martinez, 538 U.S. 760, 767 (2003). The privilege may be invoked when the government attempts to use compelled statements against a criminal defendant at trial. See id.

Not only does the privilege protect individuals in criminal prosecutions, but it also "may be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States, 406 U.S. 441, 444–45 (1972); see also Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). The privilege has also been extended to coerced statements that were used in non-criminal disciplinary proceedings, when the statements may eventually implicate the criminal justice system. See Miss. State Bar v. Attorney-Respondent in Disciplinary Proceedings, 367 So. 2d 179, 185 (Miss. 1979) (holding that attorney disciplinary hearings may warrant privileges against self-incrimination on a question by question basis but not as a blanket privilege); but see McKune v. Lile, 536 U.S. 24, 39 (2002) (holding that a prisoner did not have a privilege against self-incrimination when the prison punished his refusal to speak by transferring him to a less desirable prison).

In criminal prosecutions, this privilege bars courts from drawing adverse inferences from defendants' silence. See Mitchell v. United States, 526 U.S. 314, 328 (1999); see also Garrity v. State of N.J., 385 U.S. 493, 500 (1967). In civil cases and certain disciplinary hearings, however, drawing adverse inferences from a defendant's silence may be permissible. See Baxter v. Palmigiano, 425 U.S. 308, 318–19 (1976) (holding that it is not a *per se* Fifth Amendment violation to draw an adverse inference from an inmate's silence at a disciplinary hearing); see also United States ex. Rel Bilokumsky v. Tod, 263 U.S. 149, 154 (1923) (holding that the state may draw an adverse inference from silence during administrative deportation proceedings).

Courts are divided as to whether a public school may draw an adverse inference from a student's silence during a school board disciplinary hearing. See Caldwell v. Cannady, 340 F. Supp. 835, 841 (N.D. Tex. 1972) (holding, before Baxter, that drawing an adverse inference from a student's silence violated that student's Fifth Amendment privilege); Gonzales v. McEuen, 435 F. Supp. 460, 471 (C.D. Cal. 1977) (holding, after Baxter, that schools may not draw adverse inferences from a student's silence because expulsion could implicate harsher consequences than criminal convictions); but see Morale v. Grigel, 422 F. Supp. 988, 1003 (D.N.H. 1976) (holding that drawing adverse inferences based on silence is permissible when it is not the only evidence of guilt).

B.

Discussion

We hold that public school students cannot invoke the Fifth Amendment privilege against self-incrimination in a school board disciplinary hearing. We therefore find that King High did not violate Maddison's Fifth and Fourteenth Amendment rights when Superintendent Paparo drew an adverse inference from Maddison's silence and subsequently expelled him.

Because public school board disciplinary hearings are administrative rather than criminal, the Fifth Amendment privilege against self-incrimination does not apply. The Fifth Amendment privilege against self-incrimination is a right principally held by criminal defendants at trial, where defendants risk criminal consequences. Chavez, 538 U.S. at 767. School board disciplinary hearings, while containing some penal elements, are not criminal trials because they simply do not impose the same degree of consequential risk on the defendant. See Miss. State Bar, 367 So. 2d at 185; see also Baxter, 425 U.S. at 319 (holding that disciplinary hearings in state prisons involve interests other than criminal interests). Here, Maddison was not a defendant

in a criminal trial. While vandalism is a misdemeanor in Fordhamville, a school board disciplinary hearing is not a criminal trial, and therefore Maddison was not a criminal defendant entitled to the Fifth Amendment privilege.

Further, the mere possibility that Maddison could become a criminal defendant in the future does not entitle him to Fifth Amendment privileges now. If Maddison were to be prosecuted for the vandalism, then and only then would the privilege against self-incrimination attach. Once this privilege attaches, the lack thereof in the previous school board disciplinary hearing would be irrelevant for Fifth Amendment purposes.

Even if public school students are entitled to *some* form of the Fifth Amendment privilege in disciplinary hearings, King High's negative inference was drawn permissibly. Silence in a disciplinary hearing can be used to draw a negative inference, when it is one of several factors that support a finding of guilt. See Grigel, 422 F. Supp. at 1003. Here, Paparo's decision to expel Maddison was based in part on Maddison's silence in the school board hearing. However, that decision also rested on probative evidence independent of the silence. Therefore, Paparo's adverse inference did not violate Maddison's Fifth and Fourteenth Amendment rights.

VI.

Conclusion

Accordingly, we hereby AFFIRM the judgment of the District Court.

Newman, Circuit Judge, dissenting in part:

I write to vehemently dissent from Part IV of the majority's opinion regarding Maddison's Fourth and Fourteenth Amendment claim. The majority reached the correct decision that Maddison was seized. My agreement with the majority ends there. The majority erroneously applied T.L.O. reasonableness to a seizure, when in fact the Supreme Court limited its holding in T.L.O. to circumstances where school administrators perform searches of students. See 469 U.S. at 337. Unlike in T.L.O., the seizure here was conducted by a police officer who used force to perform a seizure.

The appropriate standard to assess the reasonableness of Cordara's conduct is the standard established in Graham. I would follow the Fourth and Tenth Circuits which have applied the Graham standard to law enforcement seizures of students conducted on school grounds. See Dolgos, 884 F.3d at 184; Hawker, 591 F. App'x at 675. Those courts applied the Graham standard because, like here, the law enforcement officials used excessive force during the seizure. The majority inexplicably ignored the fact that officer Cordara handcuffed a child. Cordara used a degree of force that was wholly unnecessary and inappropriate in the school setting. I would find that handcuffing a child *per se* warrants a Graham analysis. Therefore, I would find that Graham, rather than T.L.O., controls here.

Under Graham, determining the reasonableness of a particular seizure requires a court to balance the nature and quality of the intrusion against the countervailing government interests. 490 U.S. at 396. An officer may be justified in the application of a certain degree of force, but the reasonableness of that degree of force is subject to a careful review of the facts and circumstances of each case. See Dolgos, 884 F.3d at 184 (holding that handcuffing a calm and compliant ten-year-old was objectively unreasonable especially since the alleged crime took place days before the seizure); but see Hawker, 591 F. App'x at 675 (holding that an officer

acted reasonably when restraining a nine-year-old who posed a threat to the safety of the officer and others). In assessing the facts and circumstances, courts must pay particular attention to three non-exclusive factors: (1) the severity of the crime; (2) whether the suspect poses an immediate threat to the safety of the officer or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. See id. at 674.

Here, all three factors weigh heavily in Maddison's favor. While I do not deny that vandalism of a teacher's property is a serious matter that a school is well within its rights to discipline, it is a non-violent misdemeanor in Fordhamville. Maddison posed no immediate threat to the safety of any person at King High and he willingly complied with all school and law enforcement requests. The majority took the position that Maddison was likely to run based on Cordara's unsubstantiated bias given Maddison's age and experience. The record, however, does not reflect the majority's characterization of Cordara's beliefs. Even if it did, an officer's subjective opinion is irrelevant to the reasonableness of a seizure under Graham. 490 U.S. at 398. The majority erred by resting its holding on the inference that Cordara believed teenagers are likely to run from police. Regardless of whether that inference was accurate, Cordara's subjective belief is completely irrelevant to reasonableness under Graham.

DeQuinzio, Circuit Judge, dissenting in part:

I write to dissent from Part V of the majority's opinion regarding Frank's Fifth Amendment claim.

A public school student should be entitled to the Fifth Amendment privilege against self-incrimination in school board disciplinary hearings, when that student faces a punishment that could substantially affect his or her access to an education. Education has long been recognized as a substantial property right that must be protected. See Goss, 419 U.S. at 574. Losing your opportunity to receive an education through expulsion may bring worse consequences than a criminal conviction for the same offense. See Gonzales, 435 F. Supp. at 471. Here, Maddison was suspected of vandalism, merely a misdemeanor in the state of Fordham. It is therefore likely that Maddison's expulsion will have a longer lasting and more dire consequence than would a relatively minor misdemeanor conviction.

Despite the majority's mischaracterization of the Fifth Amendment, the privilege against self-incrimination is not limited to criminal defendants at trial. See Lefkowitz, 414 U.S. at 77. The privilege has been extended to circumstances where an individual is compelled to make a statement in non-criminal settings, where that statement may eventually implicate the criminal justice system if that individual is prosecuted in the future. See Kastigar, 406 U.S. at 444–45. I would find no difference between compelling testimony, as was done in Kastigar, and punishing silence, as Superintendent Paparo did here.

Additionally, courts have held that when an individual is faced with the choice between job termination and the privilege against self-incrimination, that individual has effectively been deprived of their Fifth Amendment right. See Garrity, 385 U.S. at 500. Here, giving Maddison

the choice between making an incriminating statement that may result in expulsion and remaining silent effectively deprives him of his Fifth Amendment privilege.

Finally, the only evidence that the school board used to justify Maddison's expulsion was his silence. Although silence *could* imply guilt, guilt is by no means the *only* conclusion to be drawn from silence. Maddison was clearly in an emotional state during the hearing where he was warned of the school board's power to expel him. The school board gave him no chance to calm down and collect himself before attempting to elicit his testimony. Here, stress is just as likely an explanation for Maddison's silence as guilt is, given the nature of the circumstances. Therefore, the school board made an impermissible inference of guilt, in violation of Maddison's Fifth and Fourteenth Amendment rights.

(U.S. SUPREME COURT ORDER LIST: 614 U.S.)

Monday, October 7, 2019

CERTIORARI GRANTED

No. 16-1420

FRANK MADDISON

V.

KING HIGH SCHOOL

The petition for a writ of certiorari is granted. This Court may consider the following questions raised by the parties:

1. Whether King High School violated Frank Maddison's Fourth and Fourteenth Amendment right to be free from unreasonable seizures when a school resource officer detained him on school property for questioning regarding a crime committed on school grounds.

2. Whether King High School violated Frank Maddison's Fifth and Fourteenth Amendment privilege against self-incrimination when the school board drew an adverse inference from Frank Maddison's silence during a school board disciplinary hearing.

Appendix I – Table of Authorities

Cases

Statutes