



First Amendment: Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Can a school administrator punish a student for what the administrator believes are threats found on the student's phone?

JACOBS V. BELLS TOWER HIGH SCHOOL

Maxine Edwards, the eleventh-grade history teacher at Bells Tower Public High School noticed Tom Jacobs, age 16, using his cell phone after taking his exam in class. The school has a “zero tolerance” policy against using a cell phone in the school during classes. Ms. Edwards demanded the cell phone and Mr. Jacobs handed it over in accordance with the school’s policy.

Worried that her student was texting answers to the test to other students who would be taking the same exam the next class period, Ms. Edwards asked Principal Victoria Samuels to come to her class. Ms. Samuels instructed the student to open up the phone with his passcode, and she began searching the phone for back text messages, as well as searching the student’s GMAIL account for any messages that might have been sent to other students. Also worried that Mr. Jacobs may have taken pictures of the exam to send to others, the administrator searched through the student’s pictures and videos.

No exam information was uncovered but Samuels found what she believed to be threatening messages by Jacobs, in the form of a “rap song”, that were both written and filmed, and had been sent to other students in the school. Jacobs said that he intended to “do a Columbine” on a group of student athletes in the school. Jacobs explained that one of those star athletes, Billy White, had taken revealing photos of the female athletes in the school in their locker room and sent them to other members of the male sports teams.

When questioned by the administrator, Jacobs also shared concerns about the special treatment that he believed athletes received at the school. But, he said, he was only expressing his feelings through song, based on his artistic talent, and he intended to do no harm. He showed how the rap song was linked to YouTube videos of other songs on themes from school life created by him. However, Ms. Samuels and Ms. Edwards noted that among those comments on

the videos, and even in the words of the rap song, Mr. Jacobs had said “this was no threat but a hint of what might come if things did not change.”

The Principal suspended Jacobs and called the police who arrested Jacobs for making threats against fellow students. They took possession of the phone. The student’s lawyer sought to exclude the cell phone evidence under the Supreme Court’s precedents and also argued that even if the evidence was let in, it was a protected form of First Amendment expression, citing arguments from the *Elonis v. U.S.* case. The District Court allowed the evidence, finding no Fourth Amendment violation and the threats not protected under the First Amendment.

Mr. Jacobs has sued challenging his suspension and arrest, based on what he argues was an illegal search and seizure, and his protections under the First Amendment Freedom of Speech for artistic expression.

Background:

Cell Phone Search: *Riley v. California* (2014) The question in *Riley* was whether police could search the cell phone of a person arrested without a warrant. By a vote of 9-0, the Court said no.

Chief Justice John G. Roberts, Jr. wrote the opinion for the unanimous Court decision. Even though there had long been an exception that allowed warrantless searches incident to arrests, the Court determined that that exception exists for the purposes of protecting officer safety and preserving evidence, neither of which is at issue in the search of digital data. The digital data cannot be used as a weapon to harm an arresting officer, and police officers have the ability to preserve evidence while awaiting a warrant by disconnecting the phone from the network and placing the phone in a “Faraday bag.” The Court characterized cell phones as minicomputers filled with massive amounts of private information, which distinguished them from the traditional items that can be seized from an arrestee’s person, such as a wallet. The Court also held that information accessible via the phone, but stored using “cloud computing” is not even “on the arrestee’s person.” Nonetheless, the Court held that some warrantless searches of cell phones might be permitted in an emergency--perhaps in a terrorism situation when the government’s interests are so compelling that a search would be reasonable.

Justice Samuel A. Alito, Jr. wrote an opinion concurring in part and concurring in the judgment in which he expressed doubt that the warrantless search exception following an arrest exists for the sole or primary purposes of protecting officer safety and preserving evidence. In light of the privacy interests at stake, however, he agreed that the majority’s conclusion was the best solution. Justice Alito also suggested that the legislature enact laws that draw reasonable distinctions regarding when and what information within a phone can be reasonably searched following an arrest.

Threats Case: *Elonis v. United States* (2015) *Elonis* involved the question of whether the threats *Elonis* made concerning his wife, law enforcement officers and others violated a federal anti-threat statute, specifically whether there was proof that he meant what he said in a literal sense or whether it was enough that a “reasonable person” would see the statements he made as threats. The Court, by a vote of 8-1, found that proof of intent by *Elonis* was required by the statute.

Anthony Elonis was arrested on December 8, 2010 and charged with five counts of violating a federal anti-threat statute, 18 U.S.C. § 875(c). Specifically, he was charged with threatening his ex-wife, co-workers, a kindergarten class, the local police, and an FBI agent.

Elonis had posted statements on his Facebook page that appeared to threaten his ex-wife and other people in his life. Prior to the postings, his wife and family had left him and he had lost his job at an amusement park. Shortly after this chain of events, Elonis posted several statements on his Facebook page that were interpreted as threats.

At his trial, Elonis asked the court to dismiss the charges, stating that his Facebook comments were not true threats. He argued that he was an aspiring rap artist and that his comments were merely a form of artistic expression and a therapeutic release to help him deal with the events in his life. In an apparent attempt to underscore that his comments should not be taken seriously, he posted links to YouTube videos that he parodied, and noted that a popular rap artist often uses similar language in his lyrics. For several of his comments, he also posted a disclaimer stating: “This is not a threat.”

Despite the fact that his ex-wife, an FBI agent, and others viewing his comments might have perceived his statements as threats, Elonis argued that he could not be convicted of making a threat because he did not intend to threaten anyone with his postings. In other words, he claimed that he didn’t mean what he said in a literal sense. In legal terms, he said that he did not have a subjective intent to threaten anyone.

Chief Justice John Roberts wrote the Opinion of the Court. He did not rule on First Amendment matters, nor on the question of whether recklessness was sufficient *mens rea* to show intent. It did rule that *mens rea* was required to prove the commission of a crime under §875(c). Justice Clarence Thomas dissented holding that a “reasonable person” would perceive Elonis’s languages as threats to do bodily harm.

Look over these arguments below that were used at the initial hearing and which can be used at the Supreme Court. Note whether they help the student (S) or the Principal (P). You can also decide the arguments help both sides (B) or neither side (N).

Search Questions

1. _____ **The *Riley* Supreme Court decision stated that a warrant is needed before a phone may be searched. There was no warrant requested in this case.**
2. _____ **The *Riley* case did not take place at a school. At schools, students have less protection from searches and seizures as there only needs to be reasonable suspicion, not probable cause, for a search to take place. The standard for a school search is that the search needs to be justified at its inception if there is reasonable suspicion that a search will uncover evidence of further**

wrongdoing and the scope of the search must be tailored to the nature of the infraction and must be related to the objectives of the search.

3. _____ Nothing contained in the digital record of a smartphone is capable of threatening the safety of anyone at school and once the phone is taken away from the individual, authorities can take steps to make sure that any evidence it contained would not be destroyed, altered or lost. Authorities can stop the device from receiving any more calls — thus making the contents more secure — by putting it into “a Faraday bag” (a container that allows the device to remain on but electronically blocked from receiving any signals that might alter its digital contents).
4. _____ The contents of a smartphone are no different from book bags, wallets, address books, personal papers, or other items that have long been subject to examination by school officials who have reasonable suspicion a rule or law has been violated.
5. _____ If you want to protect your privacy, do not do bad things in school. But if you do things that get you in trouble, know the authorities may search your cell phone.
6. _____ Justice Antonio Scalia believed the Fourth Amendment right against unreasonable searches has been infringed upon by the current Court. In *Maryland v. King*, a case decided in 2013, Scalia disagreed with the Court's conclusion that the police may lawfully take a cheek swab of someone's DNA after he or she has been arrested for a serious offense. Scalia expressed "doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”
7. _____ Smartphones can carry great amounts of information about a person. Before smartphones, the kinds of information they contain was kept private by people in the security of their homes. Police generally need a warrant to search the home of someone who has been arrested; all authorities should need a warrant to search that person’s cellphone.
8. _____ The search in our case was reasonable given the concern over cheating on an exam. The search was reasonable at its start—there was concern about cheating—and reasonable in its scope—the administrator was looking for evidence of cheating and accidentally came upon the threat made against the athletes. That the search uncovered criminal behavior is on the student, both for using the phone in class and for making threats.
9. _____ The slippery slope in this case is trying to figure out where are the limits on the government’s invasion of privacy? Currently, I can access many things, even cameras in my home, from my smartphone. As technology progresses, my smartphone may tell even more about me. Is everything fair game for warrantless search by school officials with reasonable suspicion?

10. _____ The Pennsylvania ACLU tells students that a school can search a cell phone only if it has *reasonable, individualized suspicion* that you personally broke a specific school rule. The search must be reasonable and must be limited to content that is reasonably necessary to confirm or dispel the suspicion of wrongdoing. The search must stop once the suspicion has been dispelled.

Speech Questions

1. _____ The *Elonis* Supreme Court decision stated that intent was needed before a person could be punished under a federal law. The student here says there was no intent to harm, just an intent to express, creatively, differences among students.
2. _____ The *Elonis* case did not take place at a school. At schools, students have less protection for speech. The 1969 *Tinker v. Des Moines* case said student speech could not disrupt schools. Speech that would be allowed outside of school has been lawfully punished in schools.
3. _____ Nothing contained in the digital record of the rap song is capable of threatening the safety of anyone at school. Anyone listening to the song, especially people who know the singer, understand that the rap song is making a point about school life and not making a threat.
4. _____ The rap song on the phone disrupted the school. Police were called to the school; classes were interrupted and students spent a lot of class time over the next few days talking about the disruption.
5. _____ If there was a disruption at school, it was because of the administrator's actions, not the actions of the student.
6. _____ Some people believe the First Amendment means that all speech is protected and allowed—the words are “make no law...abridging freedom of speech”. But even if some speech can be limited, speech with a political purpose like the student's rap song deserves special protection under the Constitution.
7. _____ The student is a very talented student, both musically and academically. Schools are places where talented young people learn the boundaries for their behavior. What might be acceptable behavior outside of school is not allowed in school and can be punished.
8. _____ The world we live in means we must weigh the right of one student to speak against the safety of others. In that balance, the school must always come down on the side of safety. Keeping people safe is worth limiting rights.
9. _____ The slippery slope in this case is trying to figure out where are the limits on the school—and thereby, the government—on the First Amendment. Does

concern about school safety and anti-bullying policies mean that students have no right to free speech left in schools?

10. _____ In *D.J.M. v. Hannibal Public School District #60* (8th Cir. Aug. 2011), a high school student challenged his school district alleging that his suspension, which was based on alleged threats the student made to shoot other students, violated his First Amendment freedom of speech rights. The Eighth Circuit found that the student's statements were not protected speech under either "true threat" or substantial disruption analysis. A "true threat" is a statement that a reasonable recipient would interpret as a serious expression of intent to harm or cause injury to another and is intended to be communicated to another by the speaker.