No. UC-SUP 2005

IN THE SUPREME COURT
OF THE UNITED STATES

_____

MATT BILLUPS,

Petitioner,

v.

DAVENPORT BOARD OF EDUCATION,

Respondent.

_____

On Writ of Certiorari to the
United States Court of Appeals for the Fifteenth Circuit

_____

BRIEF OF PETITIONER

_____

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QUESTIONS PRESENTED

I. Whether the Davenport Board of Education violated the Petitioner's First Amendment rights when the Board suspended the Petitioner after viewing surveillance footage of him shooting a pellet gun at a high school yearbook when his act did not constitute a true threat?

II. Whether, even if the Petitioner's expressions are not protected by the First Amendment, the suspension was inappropriate because the Petitioner had a reasonable expectation of privacy and the surveillance footage obtained by the Vernanda Police Department constituted an unreasonable search in violation of his Fourth Amendment rights?

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STATEMENT OF JURISDICTION

The judgment of the Fifteenth Circuit Court of Appeals in this case was entered on August 22, 2005. The petition for Writ of Certiorari was granted by this Court on September 1, 2005. The jurisdiction of this Court is found in 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The following United States Constitutional Provisions are relevant and set forth in the Appendix: U.S. CONST. amend. I and U.S. CONST. amend. IV.

STATEMENT OF THE CASE

Statement of Facts

The Petitioner in this matter is Matthew Billups, who is petitioning the Court by and through his natural father and legal guardian, David Billups. (R. at 2.) The Petitioner, a minor student attending Davenport Public High School, was suspended by the Principal of Davenport High School after the Principal viewed surveillance footage of him shooting a pellet gun at a high school yearbook within the premises of his home. *Id*. at 8. The Petitioner asserts his conduct was protected speech, which made the suspension a violation of his First Amendment rights. *Id*. at 2. In addition, the disciplinary action should be null and void because the school authorities' use of surveillance footage violated the Petitioner's Fourth Amendment right against unreasonable searches. *Id*.

The Respondent is the Davenport Board of Education. It contends the disciplinary actions did not intrude on Petitioner's First Amendment rights and no unreasonable search was conducted in violation of Petitioner's Fourth Amendment rights. *Id*. at 3.

On March 1 of this year, one of Vernanda's community surveillance cameras recorded Petitioner and his friend, Laura O'Reilly, while they rode on one of the City's public buses. *Id*.

at 5. The City posted no notices about the presence of the cameras, so the Petitioner and O'Reilly had no knowledge that they were being monitored by the City's police, who observe the recordings. *Id*. The surveillance camera zooms in on excessive noise, so it recorded the students as they conversed throughout their bus trip. *Id*. at 4, 5. The Petitioner carried the Davenport High School Yearbook with him, and on one page a circle had been drawn around the picture of a fellow classmate, Patrick Reeves. *Id*. at 5. The Petitioner pointed to the picture of Reeves repeatedly, but no part of the Petitioner's conversation was recorded. *Id*.

As the Petitioner and O'Reilly exited the bus, another camera affixed to a lamppost, fifty feet from the Petitioner's residential home, began recording them because of their loud conversation. *Id*. at 6. The lamppost was located near an empty lot, where trespassers were forbidden. *Id*. After O'Reilly left the Petitioner's home, he threw the yearbook on his garage floor unaware that the surveillance camera recorded him. *Id*. The camera recorded the cover of the yearbook, which had been altered. *Id*. The word "Yearbook" had been crossed out and had been replaced with the word "HITLIST." *Id*.

The Petitioner taped the yearbook to a ROTC target canvas with the book open to the picture of Reeves. *Id*. The canvas, which hung halfway inside the garage, had the phrase "Be All You Can Be" printed on the top, and at the bottom of the canvas the phrase "Thru Killing Bad People" had been spray painted on. *Id*. at 6,7. Then the Petitioner briefly fired a few shots with his pellet gun at the canvas, stopping every time neighbors were in the vicinity of his home. *Id*. at 7.

A police officer monitoring the surveillance camera in the Petitioner's neighborhood downloaded the images of the Petitioner shooting at the yearbook and provided them on compact disc to Davenport High School's Principal, Mr. Le Mark. *Id*. After a cursory investigation, Le

Mark found out that the Petitioner had a minor, unreported altercation with Reeves three weeks prior. *Id*. Both students have had no other conflicts after that day. *Id*. at 8.

The next morning, Principal Le Mark suspended the Petitioner immediately for five days. *Id*. At no time did the police or Le Mark contact Reeves or his family about the Petitioner's conduct. *Id*. The explanation for the suspension was that the Petitioner was threatening a fellow student in violation of the school's policy, which specifically prohibits "all true threats by students, faculty, and staff, against any and all students, faculty, staff, regardless of the threat's likelihood for causing disruption." *Id*.

Procedural Background

The Petitioner appears before this Court in Case No. UC-SUP 2005 on appeal of the decision rendered by the Fifteenth Circuit Court of Appeals on August 22, 2005, which held the District Court for the Eastern District of El Lago correctly determined the Respondent's disciplinary actions did not violate the Petitioner's First Amendment right to free speech. The Fifteenth Circuit Court of Appeals also held the District Court correctly determined that the Vernanda surveillance camera system did not allow city officials to unreasonably search Petitioner in violation of his Fourth Amendment rights.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fifteenth Circuit Court of Appeals' decision that held the Respondent's disciplinary actions did not violate the Petitioner's First Amendment right to free speech. In the alternative, this Court should reverse the Court of Appeals' decision that the Vernanda surveillance camera system did not allow city officials to unreasonably search the Petitioner in violation of his Fourth Amendment rights. The acts of the Petitioner are protected by the First Amendment to the U.S. Constitution because they did not constitute a true threat

against his fellow classmate. Even if the Court finds the Petitioner's acts do not deserve First Amendment protection, the Respondent should have been excluded from viewing the footage because the surveillance camera conducted an unreasonable search that violated the Petitioner's legitimate privacy expectations under the Fourth Amendment.

The Petitioner's First Amendment right to symbolic speech was violated because he never intended to communicate his conduct. Without intentionally or knowingly communicating his conduct, it was never removed from the protection of the First Amendment. First, there were no notices about the presence of surveillance cameras, so he did not knowingly expose his conduct the police. Second, the Petitioner concealed that he had altered the yearbook by writing "HITLIST" on the cover from any possible viewers, including O'Reilly. Third, he stopped shooting when neighbors were in the vicinity. Finally, he did not have to worry about someone watching across the street because trespassers were forbidden in the lot across from his house. The Petitioner did not mean to communicate his conduct, and his speech remained protected the entire time he was within his garage.

Even if the Court finds the Petitioner intended to communicate his conduct, the Petitioner's acts did not constitute a true threat as required by the school policy. Lower courts use two different objective tests when determining if speech is a true threat. The first is the objective speaker-based test, which requires a court to look at both the allegedly threatening behavior as well as the context surrounding the communication. The Petitioner's behavior of shooting a pellet gun at a high school yearbook is ambiguous. His acts could represent political hyperbole or crude humor. Also, the Petitioner's acts were carried out in his home and there was no direct communication with Reeves. A reasonable person would not interpret the Petitioner's

conduct as a true threat given the ambiguous nature of the communication and the context of his acts.

The alternative objective standard is based on the reasonable recipient, which is a fact intensive inquiry that takes into account whether the recipient of the alleged threat would reasonably conclude that it is an expression to cause harm. Even though the reaction of the police officer and Principal Le Mark, who first watched the Petitioner's conduct, was one of concern, they did not warn Reeves about the Petitioner's acts. In addition, the conduct was not communicated directly to Reeves, there is no history of the Petitioner making threats to Reeves, and no evidence the Petitioner has any violent propensities. A reasonable recipient in these circumstances would not believe the Petitioner communicated a true threat.

Even the Petitioner's acts do not deserve First Amendment protection, the Court should find that the Respondent should have been excluded from viewing the surveillance footage because it constituted an unreasonable search in violation of the Petitioner's Fourth Amendment rights. The Petitioner had a subjective expectation of privacy when shooting the pellet gun for a number of reasons: he was well within his garage; no one could watch from across the street; and he made sure neighbors walking by did not see him. These factors can lead one only to believe he was trying to keep his actions private.

The average person would also believe the Petitioner's expectation of privacy was reasonable since he was in his home and video cameras are one of the most intrusive methods of surveillance. Society is willing to recognize the right to be free from such surveillance when within your home. Furthermore, none of the delineated exceptions that allow evidence collected without a search warrant to be used in disciplinary hearings in the State of El Lago apply in this case.

For these reasons, the Petitioner respectfully requests that this Court reverse the Fifteenth Circuit Court of Appeals' decision that the Petitioner's First and Fourth Amendment rights were not violated when the Respondent suspended him after observing surveillance footage of him shooting a pellet gun at a high school yearbook because his actions were not a true threat and the surveillance footage constituted an unreasonable search.

ARGUMENT

I. THE DAVENPORT BOARD OF EDUCATION VIOLATED THE PETITIONER'S FIRST AMENDMENT RIGHTS WHEN THE BOARD SUSPENDED HIM AFTER VIEWING SURVEILLANCE FOOTAGE OF HIM SHOOTING A PELLET GUN AT A HIGH SCHOOL YEARBOOK BECAUSE THE ACTS DID NOT CONSTITUTE A TRUE THREAT.

The First Amendment to the United States Constitution prohibits the government from making any law "abridging the freedom of speech." U.S. Const. amend. I. In general, threats are not protected by the First Amendment to the U.S. Constitution. *Watts v. United States*, 394 U.S. 705, 707 (1969). However, to be considered a true threat the speaker must have intended to communicate a serious expression to commit harm against the object of the threat. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

Since Davenport Public High School's policy prohibits "all true threats...regardless of the threat's likelihood for causing disruption," it implies all true threats inherently create the material interference necessary to validly prohibit such speech. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). The policy's validity is not at issue, so a substantial interference analysis is irrelevant. The only First Amendment issue the Petitioner is addressing is whether his conduct constituted a true threat.

A. THE PETITIONER'S CONDUCT WAS NEVER REMOVED FROM THE PROTECTION OF THE FIRST AMENDMENT BECAUSE HE DID NOT INTENTIONALLY OR KNOWINGLY COMMUNICATE HIS ACTS TO REEVES OR A THIRD PARTY.

In striking down a Virginia statute that outlawed cross burning carried with an intent to intimidate, the Supreme Court defined true threats as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359.

If a speaker does not intend to communicate a potential threat, there is not a need to find if the speech would be classified as a true threat. *Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 617 (5th Cir. 2004). In *Porter*, a student was expelled from his high school when his younger brother accidentally brought his violent drawings into school. *Id.* at 611, 612. The pictures, drawn by the student at home, were stored in a closet for two years before the student's younger brother brought them into school. *Id*. at 611. The Fifth Circuit Court of Appeals held the student in no way intended to communicate his speech because he "took no action that would increase the chances that his drawing would find its way to school." *Id*. at 615. The fact that the student's pictures were confined to his own home for two years and the drawing's introduction into the school environment was wholly accidental was evidence that he "did not intentionally or knowingly communicate his drawings in a way sufficient to remove them from the protection of the First Amendment." *Id*. 617.

Also, *Doe v. Pulaski County Special School District*, 306 F.3d 616, 619 (8th Cir. 2002), involved expression that was produced in a student's home that was later carried into school. The student was suspended after a violent poem he had composed at home about his ex-girlfriend was taken to school by a third party. *Id*. at 619. Prior to the poem being brought into school, the student had given permission for his friend to read the poem. *Id*. In analyzing true threats the Court stated that "[r]equiring less than an intent to communicate the purported threat would run afoul of the notion that an individual's most protected right is to be free from

governmental interference in the sanctity of his home and in the sanctity of his own personal thoughts." *Id*. at 624. The Court held that the student intended to communicate because he permitted his friend to read the poem knowing that his friend may tell others about it. *Id*.

Thus, in order to intentionally or knowingly communicate an alleged threat, the speaker must have conveyed the threat to the recipient or a third party. A finding that the speaker had no intent to communicate obviates the need to determine whether the speech constitutes a true threat because it never fell outside First Amendment protection.

Like the student in *Porter*, the Petitioner did not intentionally or knowingly communicate his conduct to the alleged recipient, Patrick Reeves, or to a third party. In *Porter*, the student's drawings were brought into a school environment without his knowledge or any notice beforehand. Similarly, the Petitioner was never put on notice that he was being recorded because the City did not post signs informing the public that cameras were located on City buses. There were also no signs about the surveillance system in the Petitioner's neighborhood. At no time was he put on notice to the fact that cameras may be recording his actions. This is evidence he did intentionally or knowingly communicate his conduct to the police or school principal.

The Petitioner did not communicate his expressions to his friend Laura O'Reilly either. First, he hid the cover of the yearbook, which he altered by writing "HITLIST," from O'Reilly the entire time the two were together. Second, the Petitioner deliberately waited until she left his home before taping up the yearbook to the practice target and shooting it. Unlike this situation, the student's poem in *Doe* was communicated to a third party. The student in that case knew that there was a risk his friend would tell others about the violent poem, but he willingly gave permission for his friend to read it.

Although there is recorded footage of the Petitioner pointing at Reeves' picture in the yearbook while riding the bus with O'Reilly, the camera did not record what was actually spoken in the conversation between the students. The Petitioner could be making threats or he could be commenting on Reeves' hairstyle. Since the topic of their communication was unknown, any attempt to interpret its subject matter would be speculative. The protections of the First Amendment should not be cast away based on such speculation.

The Petitioner was not put on notice about the presence of the surveillance cameras and had no way to know the footage would be brought into school by a police officer. Furthermore, there was no communication about the alleged threat between him and O'Reilly. Any discussions the two students had on the bus are subject to speculation because the surveillance cameras do not record sound. Therefore, the Petitioner's speech was never removed from the protection of the First Amendment because he did not intentionally or knowingly communicate his acts.

B. EVEN IF THE PETITIONER INTENTIONALLY OR KNOWINGLY COMMUNICATED HIS SPEECH, THE ACTS DID NOT CONSTITUTE A TRUE THREAT BECAUSE NEITHER AN OBJECTIVE SPEAKER NOR AN OBJECTIVE RECIPIENT OF THE SPEECH WOULD INTERPRET THE SPEECH AS A SERIOUS EXPRESSION OF AN INTENT TO CAUSE A PRESENT OR FUTURE HARM.

The lowers courts have applied two different objective tests for determining whether speech is considered a true threat. One standard is based on the reasonable speaker. *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997); *see also United States v. Saunders,* 166 F.3d 907, 914 (7th Cir. 1999); *Lovell v. Poway Unified Sch. Dist.,* 90 F.3d 367, 372 (9th Cir. 1996). A defendant's expression is scrutinized as to "whether he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made." *Id*. The alternate objective test takes into account the viewpoint of the reasonable recipient.

Doe, 306 F.3d at 624; *see also United States v. Alkhabaz*, 104 F.3d 1592, 1504 (6th Cir. 1997). The test involves a fact intensive inquiry to "determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." *Id*. at 622.

1. An objective person could not have reasonably foreseen that the Petitioner's acts would be taken as a threat to Patrick Reeves because the act of shooting a pellet gun at a high school yearbook was ambiguous speech and the conduct was not directly communicated at Reeves.

In order to ascertain that a true threat has been made, one must establish that the statement was made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon another." *Saunders*, 166 F.3d at 912.

The reasonable speaker standard avoids the danger of a uniquely sensitive recipient. *Fulmer*, 108 F.3d at 1491. In *Fulmer*, the Defendant contested the evidence supporting his conviction of threatening a federal agent because his statement, "The silver bullets are coming," was ambiguous and could not be considered a true threat. *Id*. at 1490. The Court found the appropriate standard is to focus on what the defendant reasonably should have foreseen from his speech in order to prevent him from being "convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant." *Id.* at 1491.

In response to uttering a threatening statement directly to a school guidance counselor, the student in *Lovell* was suspended. 90 F.3d at 369. The Court held that a reasonable person in Lovell's position could have foreseen one of her statements to be threatening because the phrase was "unequivocal and specific enough" to convey a threat of violence. *Id*. at 372. The Court

stated it is necessary to take into account the entire factual context of the threat and considered Lovell's utterance against the prevalence of violence among students in school. *Id*.

In order to punish a person for a true threat, the reasonable person must have believed the intended object of the threat would have perceived the expression as an intent to cause serious harm. Courts can consider whether the speech was ambiguous or "unequivocal and specific," and whether the speech was directly communicated the object of the alleged threat. Courts should not consider events outside the speaker's knowledge that may render the expression more threatening than the objective speaker would find.

The Defendant in *Fulmer* left an ambiguous message on an FBI agent's voicemail, which the agent interpreted as a threat. Likewise, the Petitioner's act of shooting a pellet gun at a yearbook taped to an altered ROTC target canvas was ambiguous. The conduct could have been interpreted as a political statement, as a way to vent frustrations, or as crude humor. The student in *Lovell* was found to have made an "unequivocal and specific" statement. The student's outburst is very different than the Petitioner's conduct shooting a pellet gun at a high school yearbook since it is not certain what he intended to communicate.

The Petitioner did not communicate directly to Reeves either. The student in *Lovell* uttered a threatening phrase directly to her guidance counselor, which an objective speaker could reasonably find as a threat to cause harm to the recipient. The Petitioner made no attempt to direct his expression towards Reeves since he was within his garage the entire time and Reeves was nowhere within the vicinity of the Petitioner's home.

In addition, the Petitioner had no knowledge police were monitoring his acts through a surveillance camera. The fact that the police officer reacted strongly to the Petitioner's conduct does not matter. Under the objective speaker standard, events outside the Petitioner's knowledge

to do factors into the analysis. Therefore, an objective person could not have reasonably foreseen that the Petitioner's acts would be taken as a threat to harm Patrick Reeves because a the act of shooting a pellet gun at a high school yearbook was ambiguous speech and the conduct was not directly communicated at Reeves.

2. Under the alternative reasonable recipient standard, the Petitioner's conduct would still not constitute a true threat because the Petitioner did not communicate directly at Reeves, he has no history of making threats against Reeves, and there is no evidence that the Petitioner is a violent person.

The five factors that are relevant to how a reasonable recipient would view a threat include: "1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence. *Doe*, 306 F.3d at 623. Using the reasonable recipient standard, the Court concluded that the student's ex-girlfriend was reasonably threatened by the poem, and therefore the school district did not violate the student's First Amendment rights by suspending the student. *Id*. at 626, 627.

The reasonable recipient standard is a fact intensive inquiry, which requires this Court to look at several factors when determining if a student's speech is a true threat. The standard examines not only the recipient's reaction, but also the context of the speech, the reaction of those who heard the speech, past incidents between the speaker and recipient, and if the speech was conditional.

It is not foreseeable Patrick Reeves would have interpreted the Petitioner's conduct as a serious intent to cause harm. No one witnessed the Petitioner while he was firing pellets at the yearbook except for the Vernanda police officer who was monitoring the surveillance camera.

The police officer was alarmed and brought the Petitioner's actions to the attention of the Principal Le Mark, but neither the officer nor Le Mark brought the footage to the attention of Reeves. If the officials were worried about the safety of Reeves, they would have contacted him and his family after viewing the recording.

The Petitioner did not communicate his threat directly towards Reeves. The poem in controversy in *Doe* was written directly to the student's ex-girlfriend, and she became frightened and cried after reading it in school. In this matter, Reeves was not in the vicinity of the Petitioner's home and had no knowledge about the alleged threat. The Petitioner carried out his acts alone and did not communicate directly to anyone, including the alleged recipient.

There is no history of the Petitioner making threats against Reeves. There was a shouting incident between the two students three weeks prior to when the Petitioner's conduct was recorded on the surveillance camera. However, they were not disciplined, and both students have gone to school without incident since then. This single episode does not amount to a "history of making threats." Also, this is the first time the Petitioner has been reported for doing anything of a violent nature. He had no disciplinary record prior to this conduct that was caught on the surveillance camera.

Although the alleged threat was not conditional, the Petitioner did not communicate directly to Reeves, the Petitioner does not have a history of threatening Reeves, and there is no evidence that the Petitioner has a propensity towards violence acts. The police officer and principle appeared to take his conduct seriously, but they did not inform Reeves about the Petitioner's conduct. If they were truly afraid for a student's safety, contacting Reeves should have been a priority. For these reasons, under the objective recipient standard, the Petitioner's conduct does not constitute a true threat.

II. EVEN IF THE PETITIONER'S EXPRESSIONS ARE NOT PROTECTED BY THE FIRST AMENDMENT, HIS SUSPENSION IS INAPPORPRIATE BECAUSE HE HAD A REASONABLE EXPECTATION OF PRIVACY AND THE SURVEILLANCE FOOTAGE OBTAINED BY THE VERNANDA POLICE DEPARTMENT CONSTITUTED AN UNREASONABLE SEARCH IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS.

The Fourth Amendment grants people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In order to receive this protection a person must first exhibit "an actual (subjective) expectation of privacy" and this expectation must be one "that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring). Evidence that is collected without a warrant is prevented from being used in criminal proceedings, *U.S. v. Leon*, 468 U.S. 879 (1984), and in the State of El Lago, in public school disciplinary proceedings, *State of El Lago v. Bas de Gaay Fortman*, 222 El L. 4 (1985), unless one of the "specifically established and well-delineated exceptions" apply. *Katz*, 389 U.S. at 357.

A. THE PETIONER HAD A SUBJECTIVE PRIVACY EXPECTATION BECAUSE HE TOOK NORMAL PRECAUTIONS TO MAINTAIN HIS PRIVACY BY NOT SHOWING ANY PERSON THE COVER OF HIS YEARBOOK AND STOPPING HIS CONDUCT WHILE NEIGHBORS WALKED PAST HIS HOME.

The U.S. Supreme Court has found that a person has a subjective privacy expectation when he takes "normal precautions to maintain his privacy." *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980). Whether a person manifests a subjective expectation of privacy can depend on a number of factors, like whether fences were erected around where the activity was carried out, whether the person screened their acts from "views of casual observers," and whether the area monitored was within the curtilage of a home. *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987).

The Petitioner did have a subjective privacy expectation and took normal precautions to maintain this privacy. First, at no time did he show O'Reilly the cover of his yearbook, which he had ample opportunity to do while riding the bus and after arriving at his home. The Petitioner tried to keep the altered cover private and out of sight of others. Secondly, he placed the target canvas well-within the garage, which was attached to his home in a residential subdivision. The Petitioner did not begin shoot the yearbook till he was at home and intentionally did not go to a public location.

Thirdly, the Petitioner stopped his activities for passer-bys in the neighborhood. He was very cautious not to let neighbors observe him shooting at the yearbook in his garage. If he was not concerned for his privacy, he would have continued his conduct while people passed, but he made a deliberate effort to conceal his acts from the public. Lastly, there was no one across the street who could have possibly observed the Petitioner's activity. The lot across from the Petitioner's home was under construction and trespassers were forbidden. He did not have to close the garage door because he did not have to worry about neighbors across the street witnessing his behavior. All these facts clearly support that the Petitioner had a subjective privacy interest.

B. THE PETIONER HAD A PRIVACY EXPECTATION SOCIETY WOULD HONOR AS REASONABLE BECAUSE HE WAS WITHIN HIS HOME AND THE CAMERA SURVEILLANCE WAS A SEVERE INTRUSION ON THE PETITIONER'S PRIVACY INTEREST.

If the "Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is…presumptively unreasonable without a warrant." *Kyllo v. United States*, 533 U.S. 27, 40 (2001). Thus, both the type of structure being monitored and the type of search

device being used determine whether a person has a legitimate privacy interest society would honor as reasonable. *Id*.

1. The garage where the Petitioner carried out his acts is attached to the Petitioner's home and is recognized as curtilage.

United States v. Dunn, 480 U.S. 294, 300 (1987) recognized that the curtilage of a house is protected by the Fourth Amendment. The Court listed four factors to determine whether an area can be curtilage to a home. *Id*. at 301. Those factors include: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation." *Id*.

The Ninth Circuit Court of Appeals dealt with the issue of whether the expectation of privacy extended could be extended to a garage. *Los Angeles Police Protective League v. Gibson*, 907 F.2d 879, 884 (9th Cir. 1990). The garage in question was attached to the Plaintiff's home, and the Court noted garages can be used to store household items besides automobiles. *Id.* at 885. The garage was found to be curtilage of the house and was entitled to the same Fourth Amendment protection that a home would receive. *Id*. The District Court for the Southern District of Ohio also came to the conclusion that an attached garage was part of the curtilage and receives the same Fourth Amendment protection as a residence. *Bell v. City of Miamisburg*, No. C-3-90-258, 1992 U.S. Dist. LEXIS 22764 at *24 (S.D. Ohio Jan. 17, 1992).

The Petitioner's garage deserves the same Fourth Amendment protection that his home receives. The garage, similar to both *Gibson* and *Bell*, is attached to the family home. In addition to having extremely close proximity to the home, garages are often used to store household items. This purpose is evidence that garages are sometimes considered an extension to the home. The Petitioner remained in his garage the whole time he shot his pellet gun at the

yearbook. Thus, the surveillance camera followed the Petitioner into an area where he is protected by unreasonable searches, and society would recognize the garage as a location where a person legitimately expects privacy.

2. The sense-enhancing nature of the surveillance camera technology allowed the police to see what normally would not have been captured by the naked eye.

A court can consider the totality of circumstances that exist in a case, including the nature of the governmental invasion. *Bond v. United States*, 526 U.S. 334, 337 (2000). A purely visual observation is not as invasive as other types of inspection, *Id*., but video surveillance is one on the most intrusive mechanisms law enforcement officers use. *United States v. Nerber*, 222 F.3d 597, 600. (9th Cir. 2000); *see also United States v. Takata*, 923 F.2d 665 (9th Cir. 1991) (holding a warrantless video surveillance of an office violated the Defendant's Fourth Amendment rights).

When law enforcement agents placed a surveillance camera on top of a power pole to observe the Defendant's fenced-in backyard, the Fifth Circuit Court of Appeals held it was a violation of his Fourth Amendment rights. *Cuevas-Sanchez*, 821 F.2d at 251. The government argued that casual observers could see into the Defendant's backyard, so if a person of average height or a power company lineman could peer in, a warrant was not necessary to place the camera on the pole. *Id*. at 249. Unlike naked-eye observations, surveillance cameras are indiscriminate and "the most intrusive method of surveillance." *Id*. at 250. The Defendant ultimately had a legitimate expectation to be free from video surveillance that society was prepared to recognize as reasonable. *Id*. at 251.

The fact that an individual takes measures to shield their acts from the public does not "preclude an officer's observations from a public vantage point where he has a right to be and which renders activities clearly visible." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). In

Ciraolo, two law enforcement officers flew over the Respondent's backyard and observed marijuana plants with no visual assistance. *Id*. The air space was navigable to the public, so any member of the public would have been able to see what the officers saw. *Id*. Therefore, the Respondent did not have a privacy expectation society was prepared to honor as reasonable. *Id*. at 214.

Society will recognize a reasonable right to privacy when the surveillance is of an extremely intrusive nature. If a person can casually observe activity from a public vantage point, the surveillance will not be a violation of the Fourth Amendment. However, if the surveillance is indiscriminate and an intrusive mechanism, then society will recognize a right to be free from such surveillance because it violates privacy interests.

The highly intrusive nature of the surveillance camera that recorded the Petitioner violated a privacy expectation that society would honor as reasonable. Similar to the Defendant in *Cuevas-Sanchez*, the surveillance camera that recorded the Petitioner was placed on top of a pole and went undetected. The entire time the Petitioner was within his garage, the camera indiscriminately focused on him. In addition, the camera had sense-enhancing technology, which enabled it to zoom towards excessive noise. It recorded the altered cover of the Petitioner's yearbook and that he taped the page with Patrick Reeves photo to the target canvas. These are details that could not have been seen by a person standing fifty feet away.

This is not the same surveillance that took place in *Ciraolo*. The officers in that case did not use any sense enhancing technology to determine the Defendant was breaking the law. A momentary, naked-eye observance is substantively different than a surveillance camera, which not only will film a person if by chance they speak loud, but also will zoom towards that person and remain focused on them for a substantial length of time. An aerial observation or a glance

by a passer-by would not have necessarily intruded upon the acts of the Petitioner. However, a camera that recorded all activity the Petitioner carried out in his garage is extremely intrusive and society, like in *Cuevas-Sanchez*, is willing to recognize that the Petitioner has a right to be free from this type of video surveillance.

Also, the surveillance camera was positioned across the street, where a construction lot was located. Trespassers were forbidden from entering the lot and would be arrested. It is true that a construction worker or law enforcement officer could have legally witnesses some of the Petitioner's acts from the same position the camera was located. However, it would have been impossible for them to read the cover of the yearbook or know the exact page of the yearbook that was posted up to the target canvas. Therefore, the sense-enhancing nature of the surveillance camera technology allowed the police to see what normally would not have been captured by the naked-eye.

C. THE SPECIFIC EXCEPTIONS THAT WOULD JUSTIFY THE USE OF THE SURVEILLANCE FOOTAGE IN THE SCHOOL DISCIPLINARY HEARING WITHOUT A WARRANT DO NOT APPLY TO THE RESPONDENT.

The Supreme Court of the State of El Lago created the "student protection precept to the exclusionary rule" doctrine, which ensures school safety without diminishing students' Fourth Amendment right against unreasonable searches. *Bas de Gaay Fortman*, 222 El L. at 4. The doctrine: 1) requires state agents to obtain valid warrants to conduct searches, unless an exception to the warrant requirement applies; 2) prohibits Courts from applying the "exigent circumstances exception to the warrant requirement" to searches yielding evidence of potential threats to school safety; 3) allows evidence collected from a warrantless search to be used as necessary to ensure student safety; and 4) excludes the evidence collected from a warrantless

search from being used as evidence against students in a) criminal proceedings; and b) public school disciplinary proceedings. *Id*.

Evidence obtained by a search without a warrant must be excluded from criminal trials unless the search was performed incident to a lawful arrest, *United States v. Robinson*, 414 U.S. 218, 225 (1973); the search was performed at a border crossing, *United States v.* Ramsey, 431 U.S. 606, 618 (1977); the search was authorized by consent, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); exigent circumstances existed, *Mincey v. Arizona*, 437 U.S. 386, 394 (1978); or the "plain view" doctrine applies. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). The "plain view" exception is used when police officers have a prior justification for an intrusion and come across an incriminating piece of evidence inadvertently. *Id*. at 466.

The search of the Petitioner conducted by the surveillance camera was not incident to a lawful arrest, it did not take place at a border crossing, and at no time did the Petitioner give his consent to be searched by the surveillance camera. Even if exigent circumstances existed, which would permit the surveillance camera search without a warrant, the State of El Lago specifically prohibits applying the exception to searches yielding potential threats to school safety.

Furthermore, the "plain view" doctrine does not apply because law enforcement officials in Vernanda had no prior justification for recording the Petitioner's conduct. The camera initially focused on him because of his loud conversation with O'Reilly, which is not a justification to carry out a warrantless search. The evidence of the Petitioner shooting at his high school yearbook with a pellet gun may have been discovered inadvertently by the police officer on duty, but since no prior justification existed for monitoring the Petitioner, the evidence should have been forbidden from use in the disciplinary hearing. Therefore, the specific exceptions that

would justify the use of the surveillance camera footage in the school disciplinary hearings do not apply the Respondent.

CONCLUSION

The Petitioner's First Amendment rights were violated when the Respondent suspended him because his conduct did not constitute a true threat. The Petitioner did not intentionally or knowingly communicate his conduct because he tried to conceal his yearbook from the public and shielded his acts from those around him. Even if this Court finds he did intend to communicate his conduct, an objective person could not have foreseen his acts would be taken as a threat to Patrick Reeves because the conduct was ambiguous and not directly communicated. Under the alternate reasonable recipient standard, the Petitioner's conduct would not constitute a true threat because the expression was not directly communicated, he has no history of making threats against Reeves, and he has no record of any violent acts.

Even if the Petitioner's speech does not deserve First Amendment Protection, his suspension was inappropriate because he had a reasonable expectation of privacy, so the surveillance footage obtained by the Vernanda Police Department constituted an unreasonable search in violation of his Fourth Amendment rights. The Petitioner had both a subjective privacy expectation and a privacy expectation society would honor as reasonable because his acts were carried out in the curtilage of his home and the sense-enhancing nature of the surveillance camera technology allowed the police to see what normally would not have been seen by the naked-eye. Furthermore, the delineated exceptions that would justify the use of the surveillance footage in the school disciplinary hearing without a warrant do not apply in this case.

For the reasons stated above, the Petitioner, Matt Billups, respectfully requests that this Court reverse the Fifteenth Circuit Court of Appeals' decision that held the Respondent did not

violate the Petitioner's First Amendment right to free speech because his expression was not a true threat. In the alternative, this Court should reverse the Fifteenth Circuit Court of Appeals' decision that held the Respondent did not violate the Petitioner's Fourth Amendment rights from unreasonable searches because the surveillance camera recordings violated the Petitioner's legitimate privacy expectations.

Respectfully Submitted,

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DATED: _____ _____
Applicant ID #

CERTIFICATE OF SERVICE

The foregoing brief was served upon attorney for the Respondent at the following address, on this 10th day of October, 2005:

Respondent's Attorney, Esq.
5000 Main Street, Suite 1200
Cincinnati, Ohio 45220

DATED: _____ _____

Applicant ID # 68

APPENDIX

CONSTITUTIONAL PROVISIONS:

U.S. CONST amend. I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right to the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. CONST amend. IV

"The right of the people to be secure in their person, 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 persons or things to be seized."