

No. 08-31958

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 2008

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**RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,**

*Petitioner,*

v.

**WILLIAM R. TRACEY**

*Respondent.*

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**RECORD ON APPEAL**

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**WILLIAM R. TRACEY,  
Plaintiff,**

**v.**

**RUSHMORE COUNTY, CRAVEN,  
POLICE DEPARTMENT,  
Defendant.**

**No. 05-1947**

United States District Court  
for the District of Craven

February 19, 2006

MacGowan, District Judge.

### **I. Background**

The plaintiff brings his claim pursuant to 42 U.S.C. §1983 against the Rushmore County, Craven, Police Department for violations of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. The violation of the Due Process Clause is alleged to have occurred when the plaintiff was terminated by the Rushmore County Police Department for his participation in an extra marital affair. The Fourth Amendment violation is alleged to have occurred when Rushmore County Police officer Maxwell Calloway performed an illegal search, resulting in the discovery of a firearm. The defendant responded by filing a motion for summary judgment which contends that it is entitled to judgment as a matter of law because neither the plaintiff's Fourth Amendment rights nor the plaintiff's Due Process rights were violated. For the purpose of ruling on the motion for summary judgment, the parties have stipulated to the following facts.

On June 7, 2005, in Rushmore County, Craven, an officer with the Rushmore County Police Department, Maxwell Calloway, observed the plaintiff, William Tracey, seated on a park bench on the north side of McDonough Square. Officer Calloway had, for the last eight months, been part of an investigation into an illegal firearms distribution network tied to the private military company, Red Tide "R-T". The plaintiff, at the time of his arrest, was also a Rushmore County Police Officer of seven years who was involved in an undercover operation targeting the sale of illegal firearms in Rushmore County. However, the plaintiff was affiliated with a different precinct from Officer Calloway and had been operating undercover for the bulk of Officer Calloway's tenure. Therefore Officer Calloway was unaware that the plaintiff was an undercover officer.

Officer Calloway was pursuing a lead that an R-T official was meeting with prospective buyers in McDonough Square when he observed the plaintiff. Although the plaintiff did not match the description of the R-T official, Officer Calloway's suspicions were aroused by the plaintiff's closely cropped hair and black nylon bomber jacket, despite temperatures in the low seventies. As Officer Calloway observed the plaintiff over the next twenty minutes, he became increasingly concerned by the plaintiff's behavior. The plaintiff appeared agitated, and spent an inordinate amount of time surveying the layout of the square as well as scanning the rooftops of the surrounding buildings. Although Officer Calloway was hesitant to take any action that might compromise the investigation, he decided to approach the plaintiff.

Upon approaching the plaintiff, Officer Calloway identified himself and asked the plaintiff his name. The plaintiff became visibly angry and glanced to his left and right repeatedly. Finally, the plaintiff did respond that his name was "Bill." After this exchange with the plaintiff, Officer Calloway was not relieved of his suspicions that the plaintiff might be involved in criminal activity. As the plaintiff stood and began to turn away, Officer Calloway grabbed the defendant by the left wrist and turned the plaintiff so that he was facing him. Officer Calloway began to pat down the exterior surface of the plaintiff's clothing in order to determine whether the plaintiff was armed. Although the plaintiff did not physically resist, he began to curse and berate Officer Calloway. During the frisk Officer Calloway did not feel any object that was consistent with a weapon.

Shortly after the frisk was concluded, the plaintiff once again turned to leave. As the plaintiff turned away, Officer Calloway noticed what appeared to be a vertical leather strap underneath the plaintiff's unzipped jacket, located around the plaintiff's upper chest area. Officer Calloway was unsure of the strap's purpose and did not have the opportunity to get a close look at it. However, the strap was consistent with those used to carry a concealed firearm. Officer Calloway asked the plaintiff to stop and turn around. The plaintiff grudgingly complied. Officer Calloway reached towards the plaintiff to move aside the left exterior portion of the plaintiff's jacket, in order to get a better view of the strap. The plaintiff responded by brushing Officer Calloway's hand aside. Again, Officer Calloway reached out, this time more

forcefully, and moved the left exterior of the plaintiff's jacket aside, revealing a "Glock 21" .45 caliber pistol.

Officer Calloway seized the firearm and placed the plaintiff under arrest. The plaintiff immediately began to explain that he was a police officer, and that Officer Calloway was putting his investigation in jeopardy, as well as exposing him to physical danger by forcing him to reveal his identity. Officer Calloway asked the plaintiff for identification. The plaintiff responded that he never carries any identification that would tie him to law enforcement when he is working undercover. Officer Calloway was very suspicious of the plaintiff's story and decided that the plaintiff should be held pending further investigation. Officer Calloway stated to the plaintiff that Craven does not have a concealed carry provision, and it is therefore in violation of Craven Statute 19-166.81 to be in possession of a concealed firearm.

The plaintiff was taken to Officer Calloway's precinct in nearby Charlestown, where a full search was performed. Among the items seized from the plaintiff was a cellular phone containing the contact information for several R-T officials. Officer Calloway was surprised to also find the contact information for Jacqueline Malone, daughter of Rushmore County Police Chief Patrick Malone. Officer Calloway was aware that Jacqueline was the daughter Patrick Malone due to her public estrangement from her father, which was widely reported when Jacqueline contacted the local newspapers claiming corruption within the Rushmore County Police

Department. These allegations ultimately proved to be false.

Officer Calloway was concerned that Ms. Malone was being targeted by the plaintiff due to her relationship with the County's Police Chief, so he immediately contacted Ms. Malone. Ms. Malone was alarmed to receive a phone call from local law enforcement. Before Officer Calloway could state the purpose of his call, Ms. Malone spontaneously disclosed that she had been having an affair with the plaintiff, who was in fact an undercover police officer. Officer Calloway immediately called the plaintiff's precinct to explain the situation and apologize that he had unwittingly arrested one of their undercover officers. Officer Calloway did, however, disclose that he had learned of a relationship between the plaintiff and Ms. Malone.

Now fully informed of the situation, Officer Calloway returned to consult with the plaintiff. The plaintiff explained that the firearm he was carrying was issued by the department, and that he was fully authorized to carry the weapon. Officer Calloway apologized to the plaintiff and immediately released him.

The following day, June 8, 2005, the plaintiff was terminated by the Rushmore County Police Department. The reason given was "behavior unbecoming of an officer." However, Police Chief Patrick Malone conceded that the reason behind the plaintiff's termination was his involvement in an extra marital affair in violation of the state's adultery statute. It was also disclosed that the plaintiff was not on duty when the encounters with Ms.

Malone occurred, nor was the plaintiff in the course of performing any of his duties as undercover officer when he was with Ms. Malone. Although the plaintiff is married, he has been separated from his wife for the past eighteen months and has recently been served with divorce papers. Ms. Malone is unmarried. Craven Statute 11-198.01 does prohibit adultery, although according to court records no prosecutions have been brought under that provision in over twenty years.

## **II. Analysis**

### **A. Fourth Amendment**

The text of the Fourth Amendment reads: "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 persons or things to be seized" U.S. CONST. amend. IV. As indicated by the text and confirmed by the Supreme Court, the Fourth Amendment does not proscribe all warrantless searches, but only *unreasonable* searches. See Florida v. Jimeno, 500 U.S. 248 (1991). In fact, the Supreme Court has maintained that the "touchstone of the Fourth Amendment is reasonableness." U.S. v. Knights, 534 U.S. 112 (2001).

Reasonableness is assessed objectively by "examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33 (1996). Therefore, the question is whether it was objectively reasonable for Officer Calloway to brush aside the plaintiff's jacket in an effort to

determine if the plaintiff was armed, for the purpose of ensuring his safety as a law enforcement officer. We hold that Officer Calloway acted reasonably.

The rationale behind the Court's holding in Terry v. Ohio, 392 U.S. 1 (1968), was to allow law enforcement to perform their duties without undue risks to their personal safety. The primary concern was not the advancement of crime prevention generally, but the "more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." Terry, 392 U.S. at 23. Further, the Court in Terry maintained that "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." Id. After Officer Calloway spotted what was consistent with a holster for an illegally concealed firearm, it would be unreasonable to require him to continue with his investigative duties in light of the potential risk that he had become aware of. In fact, Officer Calloway acted exactly in the fashion that the citizens of Craven, whom he has sworn to protect, would expect a law enforcement official to act under the circumstances. The justification for Officer Calloway's slightly extended search was consistent with the rationale for the court's holding in Terry: officer safety and the safety of those in the immediate area. This was not an example of an officer becoming overzealous in his crime-solving pursuit and using his suspicions as an excuse to seize potential contraband as is prohibited by Terry. See Sibron v. New York 392 U.S. 40 (1968).

The Supreme Court has further specified that the test for determining reasonableness "balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." U.S. v. Hensley, 469 U.S. 221, 228 (1985). Clearly, the government has a very strong interest in the present case. In fact, it is difficult to imagine an interest stronger than ensuring the safety of law enforcement officers in the pursuit of potentially armed and dangerous individuals. On the other hand, it is difficult to fathom how the slight displacement of an outer garment would be significantly more intrusive than patting down the entire exterior of an individual's clothing. As it stands, law enforcement is entitled to frisk an individual from head to toe, a procedure described by the court in Terry as an "intrusion upon cherished personal security" as well as "an annoying, frightening, and perhaps humiliating experience." Terry, 392 U.S. at 24-25. In light of this assessment, it seems implausible that moving aside a piece of clothing would be the tipping point between proper conduct and a constitutional violation.

Furthermore, the plaintiff resisted Officer Calloway's attempt to investigate, and "[c]ourts have recognized that a more intrusive Terry search may be constitutionally permissible when the detainee attempts to prevent an officer from performing an effective pat-down. State v. Heitzmann, 632 N.W.2d 1, 9 (N.D. 2001). The plaintiff was fairly combative and uncooperative from the moment he was approached. First, the plaintiff was slow to respond when asked to identify himself. Second, the

plaintiff cursed and berated Officer Calloway during the pat-down. Third, the plaintiff pushed aside Officer Calloway's hand when he reached toward the plaintiff. Under these circumstances it is difficult to imagine that Officer Calloway was able to perform an effective pat-down. Officer Calloway's extended search could be justified on this corollary to the Terry frisk doctrine alone. Therefore the plaintiff's Fourth Amendment rights were not violated.

### **B. Substantive Due Process**

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. 14, § 1. The Supreme Court has clarified that "[t]he Due Process Clause guarantees more than fair process." Washington v. Glucksberg, 521 U.S. 702, 719 (1997). In fact, "the Fourteenth Amendment forbids the government to infringe fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Glucksberg, 521 U.S. at 721 (internal quotations and punctuation omitted). However, "[o]nly fundamental rights and liberties which are deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty qualify for such protection." Chavez v. Martinez, 538 U.S. 760, 775 (2003).

The conduct at issue in the instant case is private sexual activity. Although the Supreme Court has recognized fundamental rights related to this area of conduct, it has never recognized a fundamental right to

private sexual activity generally. This is certainly not due to a lack of opportunity, for "[t]he Court has been presented with repeated opportunities to identify a fundamental right to sexual privacy – and has invariably declined." Williams v. Attorney General of Ala., 378 F.3d 1232, 1235 (11<sup>th</sup> Cir. 2004). Notably, the Court's most recent opportunity occurred in Lawrence v. Texas, 539 U.S. 558 (2003). However, once again the Court declined to do so. As the Eleventh Circuit has concluded, "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right." Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804, 817 (11<sup>th</sup> Cir. 2004).

Not only does no such fundamental right exist, but this Court is unwilling to recognize a new right as broad as "sexual privacy." Such reluctance is appropriate under the circumstances. The Supreme Court has grappled with similar concerns, explaining that the creation of new fundamental rights "to a great extent, place[s] the matter outside the arena of public debate and legislative action." Glucksberg, 521 U.S. at 720. The Court went on to explain that caution is warranted regarding the establishment of new rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." Id. Accordingly, I decline the invitation to expand the list of fundamental rights recognized under the Due Process Clause.

Since no fundamental right is at stake, rational basis is the appropriate standard of review. Rational basis

requires only that the governmental act be rationally related to a legitimate state interest. Heller v. Doe by Doe, 509 U.S. 312, 320, (1993). This form of review is highly deferential and has been described as “a paradigm of judicial restraint.” F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 314 (1993). Regulating officer conduct is a legitimate state interest, and a policy of terminating officers who fail to conform to department regulations is rationally related to this interest. This Court is not the first court to come to this conclusion See Shawgo v. Spradlin, 701 F.2d 470 (5<sup>th</sup> Cir. 1983) (holding

under rational basis review that a police department’s policy of prohibiting off-duty dating and cohabitation was not in violation of the police officer’s rights). Therefore, terminating the plaintiff for participating in an extramarital affair did not violate his rights under the Due Process Clause of the Fourteenth Amendment. For the reasons stated above, the Court concludes that there is no genuine issue of material fact and that defendant is entitled to judgment as a matter of law on both of the plaintiff’s claims. Accordingly, the defendant’s motion for summary judgment is GRANTED.

**WILLIAM R. TRACEY,  
Plaintiff – Appellant,**

**v.**

**RUSHMORE COUNTY, CRAVEN,  
POLICE DEPARTMENT  
Defendant – Appellee.**

**No. 06-6436**

**United States Court of Appeals for the  
Thirteenth Circuit**

**Argued March 15, 2007  
Decided April 29, 2007**

McGurk, Circuit Judge.

The plaintiff brought his claim in District Court pursuant to 42 U.S.C. §1983 against the Rushmore County, Craven, Police Department for violations of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. The violation of the Due Process Clause is alleged to have occurred when the plaintiff was terminated by the Rushmore County Police Department for his participation in an extra marital affair. The Fourth Amendment violation is alleged to have occurred when Rushmore County Police officer Maxwell Calloway performed an illegal search, resulting in the discovery of a firearm. The defendant responded by filing a motion for summary judgment which contended that it is entitled to judgment as a matter of law because neither the plaintiff's Fourth Amendment rights nor the his Due Process rights were violated. The District Court granted the defendant's motion for summary judgment. The

plaintiff now appeals the District Court's grant of summary judgment.

**I. Analysis  
A. Fourth Amendment**

Terry v. Ohio, 392 U.S. 1 (1968), and its sister case Sibron v. New York, 392 U.S. 40 (1968), stand for the proposition that when a member of law enforcement has a reasonable suspicion that criminal activity is underway and that the individual may be armed and pose a threat to the officer's safety, the officer may approach the individual. If the initial contact does not dispel the officer's suspicions, the officer may frisk the exterior of the individual's clothing in order to determine whether he or she is armed. In the case at hand, Officer Calloway had a reasonable suspicion that the plaintiff was involved in criminal activity. Officer Calloway's suspicion was based, in part, on information that he had acquired concerning criminal operations that were allegedly taking place in McDonough Square. Further, Officer Calloway stated that based on his experience as a law enforcement officer the plaintiff's behavior was consistent with that of an individual who was waiting to conduct a purchase or sale of illegal firearms or narcotics. Officer Calloway also testified that in his experience wearing a jacket, such as the plaintiff's, despite warm temperatures is consistent with an attempt to conceal a weapon.

Furthermore, upon making initial contact with the plaintiff, none of the plaintiff's actions served to dispel Officer Calloway's suspicions. In fact, the opposite was true. The plaintiff continued to act in a suspicious manner that was consistent with criminal

activity. Therefore, it was entirely proper for Officer Calloway to pat-down the outside of the plaintiff's clothing in order to determine whether he was carrying a weapon. However, having frisked the plaintiff and having failed to locate a weapon, Officer Calloway was not permitted to extend his search beyond the exterior of the plaintiff's clothing.

While Terry v. Ohio spawned the rule, Sibron v. New York defined its scope: “[t]he search for weapons approved in Terry consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault.” Sibron, 392 U.S. at 65. Therefore, when Officer Calloway moved aside the left exterior portion of the plaintiff's jacket, he had moved beyond the bounds of what is permissible under Terry. Having moved beyond what was permissible on the basis of reasonable suspicion, Officer Calloway required probable cause to perform a more intrusive search. Since Officer Calloway lacked probable cause, the search that uncovered the gun was illegal.

Additionally, the defendant cannot rely on the “plain-view doctrine” as permissible grounds for the seizure of the plaintiff's weapon. The Supreme Court in Coolidge v. New Hampshire established the doctrine, articulating that “[i]t is well established that under certain circumstances the police may seize evidence in plain view without a warrant.” 403 U.S. 443, 465 (1971). However, subsequent cases have clarified that this exception to the warrant requirement, like most, is a narrow one.

The Supreme Court subsequently clarified that the plain-view doctrine does not apply if an officer lacks probable cause to believe that the item in question is evidence or contraband. Arizona v. Hicks, 480 U.S. 321 (1987). In Arizona v. Hicks, officers had permissibly entered the respondent's apartment to investigate a shooting. Upon entering, officers permissibly seized weapons in connection with their shooting investigation. The officers also noticed expensive stereo equipment that they suspected was stolen. Officers then moved some of the equipment in order to view the serial number on the unit. Having obtained the serial number, the officers were able to determine that the equipment was, in fact, stolen. The Court in Hicks suppressed the evidence, holding that moving the equipment was a search requiring probable cause, whereas the officers only had a reasonable suspicion. Since the officers were lawfully in the respondent's apartment, had the serial number been in plain view the officers could have used the serial number to gain probable cause and permissibly seized the equipment as evidence. However, this was not the case.

Hicks is analogous to the present case. There is no question that Officer Calloway viewed the leather strap, located inside the plaintiff's jacket, from a lawful vantage point. The encounter took place in a public location for an appropriate purpose. However, Officer Calloway had, at most, a reasonable suspicion with respect to the strap. In fact, Officer Calloway testified at trial that he was unsure of the strap's purpose. While Officer Calloway also testified that the strap was consistent with a device used to conceal a firearm,

this does not rise to the level of probable cause. Therefore, the plain view doctrine does not apply, and by moving the exterior of the plaintiff's jacket aside without probable cause, Officer Calloway conducted an illegal search in violation of the Fourth Amendment.

## **B. Substantive Due Process**

Plaintiff's affair with Ms. Malone took place in private between two consenting adults. There is nothing to suggest that either party was coerced or in a position where consent could not be freely given. Although adultery is prohibited by statute in Craven, the statute has not been enforced in over two decades. Further, at the time of the encounters the plaintiff was not acting in his capacity as a police officer. He and Ms. Malone were engaging in private sexual conduct.

Private sexual conduct between consenting adults is a potential liberty interest, the protection of which must be resolved under the Due Process Clause of the Fourteenth Amendment of the Constitution. The Supreme Court has previously noted that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Lawrence v. Texas, 539 U.S. 558 (2003). The liberty interest in private sexual conduct, described as the "right to privacy," was first recognized within the scope of the marital relationship. Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a state law prohibiting the use of contraceptives was unconstitutional due to its intrusion on marital privacy). However, subsequent cases made it clear that the right to privacy is an individual right that exists

apart from the marital relationship. See Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that to allow married persons to obtain contraceptives while prohibiting the distribution of contraceptives to unmarried persons was a violation of equal protection); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (holding that a state law prohibiting the distribution of contraceptives to individuals under the age of sixteen was invalid).

Relying in part on the above cited cases, the Court in Lawrence overturned a Texas law prohibiting homosexual sodomy, claiming that the "statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." Lawrence, 539 U.S. at 578. Although, the Court in Lawrence did not specify what level of scrutiny it was applying, there is authority to suggest that at the very least intermediate scrutiny was applied.

The Ninth Circuit recently grappled with this issue in Witt v. Department of Air Force, 527 F.3d 806 (9<sup>th</sup> Cir. 2008). In Witt, the plaintiff-appellant challenged 10 U.S.C. § 654, known as the "Don't Ask, Don't Tell" policy ("DADT"), as unconstitutional on the basis of substantive due process, among other claims. Major Witt was involved in a homosexual relationship that took place in private off the grounds of the Air Force base and while Major Witt was off duty. As a result of this relationship, Major Witt received an honorable discharge. The court in Witt determined that after Lawrence DADT must satisfy intermediate scrutiny, not rational basis.

Furthermore, the First Circuit recently addressed the issue in Cook v. Gates, 528 F.3d 42 (1<sup>st</sup> Cir. 2008). In Cook, like Witt, DADT was challenged as unconstitutional on the basis of substantive due process, among other grounds. After evaluating the Court's decision in Lawrence, the court in Cook was "persuaded that Lawrence did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label." Cook, 528 F.3d at 52. Rather than applying the standard type of review that corresponds with the level of scrutiny assigned, the court in Cook maintained that Lawrence applied a balancing test, "balanc[ing] the strength of the state's asserted interest in prohibiting immoral conduct against the degree of intrusion into the petitioners' private sexual life caused by the statute in order to determine whether the law was unconstitutionally applied." Cook, 528 F.3d at 56.

The plaintiff's claim in Cook ultimately did not succeed. However, this was due in large part to the court's deference to Congress. The legislative record made it clear that Congress believed DADT was necessary "to preserve the military's effectiveness as a fighting force" and therefore "ensure national security." Cook, 528 F.3d at 60. In light of such substantial governmental interests, the court was unable to find for the plaintiff. However, the court noted that the military interest implicated in the context of DADT far surpassed the government's interest in Lawrence.

We agree with the court in Cook that Lawrence applied a level of

intermediate scrutiny that balanced the state's interests against that of the individual. Such an approach should be applied in the instant case. Like Lawrence, the case at hand involves private sexual conduct that is prohibited by law. Adultery, like sodomy, is prohibited by law based on the state's desire to prohibit immoral conduct. We can discern no legally significant difference between the conduct at issue in Lawrence and the conduct in the present case. Since the Texas statute prohibiting homosexual sodomy could not withstand the court's balancing test applied in Lawrence, we do not believe that a prohibition on adultery can withstand such scrutiny either.

The only possible state interest that could be implicated is the desire to enforce regulations condoning, what is in its view, immoral conduct. Moral concerns are not insignificant. However, after Lawrence, prohibiting private sexual conduct between consenting adults on moral grounds is not permissible. Lawrence identified a liberty interest under the Due Process Clause to conduct the very types of acts at issue in this case without government interference. A private citizen's liberty interest trumps any prohibition based on moral considerations.

Finally, the interest of the Rushmore County Police Department in regulating officer conduct does not rise to the level of the military's interest in DADT cases and does not control here. There is no act of Congress prohibiting police officers from participating in certain types of sexual conduct which take place in private. Further, there is no legislative history documenting a belief that prohibiting certain types of conduct

is necessary to prevent the degradation of law enforcement's effectiveness. We therefore hold that terminating the plaintiff due to his participation in an extramarital affair conducted off duty and in private is unconstitutional under the Due Process Clause of the Fourteenth Amendment.

## **II. Conclusion**

Because we conclude that the district court erred in holding that defendant violated neither plaintiff's

Fourth Amendment nor Due Process rights, we reverse the court's grant of defendant's motion for summary judgment. Our conclusion that plaintiff's constitutional rights were violated, however, does not necessarily mean that he is entitled to judgment in his favor. Defendant's answer raises a number of defenses that have yet to be addressed. Accordingly, we remand for further proceedings consistent with this opinion.

Judge Fischer and Judge Blume join.

No. 08-31958

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 2008

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**RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,**

*Petitioner,*

v.

**WILLIAM R. TRACEY**

*Respondent.*

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**ORDER**

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The petition for certiorari is granted as to the following questions:

1. Does the Fourth Amendment prohibit a police officer, acting under a reasonable suspicion, from moving aside an exterior garment of a suspect?
2. Does the Due Process Clause of the Fourteenth Amendment prohibit the termination of a police officer for his participation in an extramarital affair?