

No. 08-31958

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT

Petitioner,

v.

WILLIAM R. TRACEY

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Team B

Counsel for the Respondent

QUESTIONS PRESENTED

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?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit is reported as Tracey v. Rushmore County, Craven, Police Dep't, No. 06-6436 (13th Cir. 2007). The opinion of the United States District Court for the District of Craven is reported as Tracey v. Rushmore County, Craven, Police Dep't, No. 05-1947 (D. Craven 2006).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fourth Amendment to the United States Constitution provides: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV.

The pertinent part of the Fourteenth Amendment to the United States Constitution provides that “no shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV §1.

STATUTORY PROVISION INVOLVED

Craven Statute 11-198.01 is said to prohibit adultery, though the record in this case does not provide the actual language from the statute.

STANDARD OF REVIEW

Because this present case involves issues concerning an improper search and seizure under the Fourth Amendment, this Court conducts a de novo standard of review. Ornelas v. United States, 517 U.S. 690, 699 (1996). Similarly, a claim for a due process violation under the Fourteenth Amendment is also subject to de novo review. E.g., Lawrence v. Texas, 539 U.S. 558, 564 (2003).

STATEMENT OF THE CASE

On June 7, 2005, in Rushmore County, Craven, Maxwell Calloway, an officer with the Rushmore County Police Department, observed the plaintiff-respondent, Officer William Tracey, seated on a park bench on the north side of McDonough Square. (R.2). At the time of the incident, Officer Tracey was a seven year veteran of the Rushmore County Police Department and was currently involved in an undercover operation targeting the sale of illegal firearms in Rushmore County. (R.2). During the time in which Officer Tracey was carrying out his undercover duties, Officer Calloway had been apart of an investigation into an illegal firearms distribution network tied to a private military company named Red Tide. (R.2). The officers worked in different precincts and so Officer Calloway was unaware Officer Tracey was in fact an undercover operative. (R.2).

On the day of the incident, Officer Calloway was pursuing a lead that a Red Tide official was meeting with prospective buyers in McDonough Square when he saw Officer Tracey. (R.2). Even though the plaintiff in no way resembled the description of the Red Tide official, Officer Calloway became suspicious of him and approached Officer Tracey who was dressed in

undercover clothing. (R.2). Upon approaching the plaintiff, Officer Calloway identified himself and asked the plaintiff his name. (R.3). Attempting to remain undercover, Officer Tracey became agitated and informed Officer Calloway that his name was Bill, and then began to turn away. (R.3). At this point, Officer Calloway forcibly grabbed the plaintiff by his left wrist. (R.3). Officer Calloway began to pat down the exterior surface of the plaintiff's clothing in search of a weapon. (R.3) The plaintiff did not resist Officer Calloway's frisk. (R.3). During the frisk, Officer Calloway did not feel any object that was consistent with a weapon which could be used against him or any other individual. (R.3).

After a fruitless frisk, Officer Tracey turned to leave. (R.3). As Officer Tracey turned away, Officer Calloway noticed a leather strap underneath the plaintiff's open jacket. (R.3). However, he still did not see a weapon of any kind. (R.3). Nevertheless, Officer Calloway asked the plaintiff to stop and turn around and Officer Tracey again complied. (R.3). This time, Officer Calloway conducted a more invasive search of the plaintiff by moving aside the left exterior portion of the plaintiff's jacket. (R.3). Officer Tracey then moved Officer Calloway's hand aside. (R.3). Despite Officer Tracey's attempts to remain undercover, Officer Calloway was zealous and forcibly reached into the plaintiff's jacket a second time and found the plaintiff's .45 caliber pistol. (R.3). The weapon had been issued by the department and the plaintiff was fully authorized to carry it. (R.4). Thereafter, Officer Calloway seized the firearm and placed the plaintiff under arrest. (R.3).

Officer Tracey immediately began to explain that he was a police officer working undercover and that Officer Calloway was putting his investigation in jeopardy as well as exposing the plaintiff to physical danger by forcing him to reveal his identity. (R.3). Officer Calloway asked the plaintiff for identification. (R.3). The plaintiff responded that he did not

carry identification while he was undercover so that he could not be tied to law enforcement.

(R.3). Despite the plaintiff's pleas, Officer Calloway decided the plaintiff should be held pending further investigation. (R.3).

The plaintiff was taken to Officer Calloway's precinct where a full search was performed. (R.3). A cell phone, with contact information belonging to Red Tide officials, was seized. (R.3). Officer Calloway searched further through the plaintiff's belongings and discovered contact information belonging to Jacqueline Malone, the daughter of Rushmore County Police Chief Patrick Malone. (R.3). Officer Calloway knew who this woman was due to her estrangement from her father as a result of her public accusations that the Rushmore County Police were corrupt. (R.3). Officer Calloway, fearing Ms. Malone may be a Red Tide target, subsequently contacted her. (R.4). Ms. Malone revealed that she was involved with the plaintiff who was married but had been separated from his wife for the past eighteen months and had recently served his wife with divorce papers. (R.4). Ms. Malone did also inform Officer Calloway that the plaintiff was indeed an undercover police officer. (R.4). Officer Tracey ultimately received an apology and was immediately released. (R.4). Officer Calloway, however, later disclosed that he had learned of a relationship between the plaintiff and Ms. Malone. (R.4).

The very next day after Officer Calloway disclosed the plaintiff's private relationship, Officer Tracey was terminated by the Rushmore County Police Department for "behavior unbecoming of an officer." (R.4). Police Chief Malone admitted that the reason behind the plaintiff's termination was due to Officer Tracey's involvement with his daughter, even though 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 an undercover officer when he was with Ms. Malone, who is unmarried. (R.4).

On February 19, 2006, the plaintiff, through counsel, brought constitutional claims pursuant to 42 U.S.C. § 1983 before the United States District Court for the District of Craven under case number 05-1947. (R.2). Specifically, the plaintiff brought claims against the Rushmore County, Craven, Police Department for violations of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. (R.2). Defendant Rushmore County, Craven, Police Department responded, through counsel, by filing a motion for summary judgment in which it was argued that the defendant was 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. (R.2). District Judge MacGowan granted defendant's summary judgment motion. (R.7).

On March 15, 2007 the plaintiff appealed the lower court's decision before the United States Court of Appeals for the Thirteenth Circuit under case number 06-6436. (R.8). The sitting three judge panel of Judge McGurk, together with Judge Fischer and Judge Blume, found that the district court erred in holding that the defendant violated neither plaintiff's Fourth Amendment nor Due Process rights and so reversed the court's grant of defendant's motion for summary judgment. (R.12). The appellate court made no determination as to the merits of the case. (R.12). Therefore, the case was remanded for further proceedings consistent with the Thirteenth Circuit's opinion. (R.12). The defendant then appealed to the Supreme Court under case number 08-31958. (R.13). The Supreme Court granted certiorari to review the decision of the United States Court of Appeals for the Thirteenth Circuit.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit properly concluded that Officer Maxwell Calloway violated the Fourth Amendment when he, acting under reasonable suspicion alone, moved aside the exterior garment of Officer William Tracey's jacket. While the Rushmore County, Craven, Police Department argues that it would have been unreasonable for Office Calloway to continue his investigative duties after merely spotting a strap inside Officer Tracey's jacket, case precedent establishes that an officer of the law must have probable cause before extending a search beyond the exterior of an individual's clothing. Without probable cause, an officer may only conduct a limited patting of the outer clothing of an individual for concealed weapons. Officer Calloway did not have probable cause prior to moving aside a portion of Officer Tracey's jacket. Instead, Officer Calloway previously testified that he was not even sure of the strap's purpose and only that it was consistent with one used for a firearm. His suspicion does not rise to the level of probable cause.

Lacking probable cause also excludes the petitioner from arguing that Officer Calloway's actions were justified under the plain view doctrine. This doctrine also requires an officer to have probable cause prior to searching items in plain view in areas where officers are legally allowed to be.

Not only does the petitioner lack requisite probable cause, but the record is void of facts which would even support a contention that Officer Calloway had reasonable suspicion to conduct the second subsequent search. While the state argues that because Officer Tracey was combative when approached, Officer Calloway was therefore reasonable in carrying out a more invasive search, case law does not support such a contention. This Court's precedent has

established that even when dealing with agitated suspects officers need to also rely on sound information gathered beforehand that an individual poses a potential threat. Officer Calloway lacked such information, and his decision to search again came after having already conducted one search and seeing an ambiguous leather strap on Officer Tracey's person. Thus, Officer Calloway's actions are wholly in violation of Officer Tracey's Fourth Amendment protection against unlawful searches.

Finally, if this Court allows for the type of search conducted by Officer Calloway, it will rewrite years of precedent that Terry and its progeny have established. Terry searches have always been carefully circumscribed so as to balance the privacy interest of the individual and the safety interest of law enforcement. Expanding it to include this type of search will tip the balance in favor of more intrusive searches in Terry-like situations, and will run counter to what the Fourth Amendment stands for.

The Thirteenth Circuit also properly concluded that Officer Tracey's Fourteenth Amendment right to due process had been violated when he was unlawfully terminated from his job for his extramarital affair. The court determined that private sexual conduct was a potential liberty interest that was protected under the due process clause of the Fourteenth Amendment, which provides that no state shall deprive any person of life, liberty or property without due process of law.

This Court's due process jurisprudence, culminating in its recent decision in Lawrence v. Texas, states that private sexual conduct between two consenting adults is a fundamental right under substantive due process protected by the Constitution. Because it is a fundamental right, this Court is required to use strict scrutiny analysis to evaluate whether or not the government's

action which deprives the respondent of this right is narrowly tailored to serve a compelling state interest. The police department cannot show that its interest in regulating immoral behavior is sufficiently compelling, and even so, they cannot show that their action was narrowly tailored.

In the alternative, even if private sexual conduct is not a fundamental right, then the Court's jurisprudence dictates that any intrusion into it is worthy of at least intermediate scrutiny. This form of review requires that the liberty interest of the individual be balanced against the state's interest, and the state must justify its intrusion in this liberty. This balance favors Officer Tracey, because the state's interest in regulating immoral behavior does not justify its intrusion into his personal, private sexual behavior.

Finally, even if the right to sexual privacy is not one worthy of any heightened scrutiny, Officer Tracey's termination was still improper. This Court's jurisprudence states that rational basis review only requires that the government action be rationally related to a legitimate government interest. The police department cannot even meet this bare minimum threshold. Punishing Tracey for private sexual conduct which occurs *off-duty* and with persons outside the department is not rationally related to the department's goal of regulating *on-duty* officer conduct. In addition, after Lawrence a state interest in enforcing morality is not a sufficiently legitimate to justify a government action.

For the reasons listed above, the Thirteenth Circuit's decision finding that Tracey's Fourth and Fourteenth Amendment rights had been violated should be upheld by this Court.

ARGUMENT

I. The Thirteenth Circuit Court of Appeals Properly Concluded That the Fourth Amendment Prohibited Officer Calloway, From Moving Aside Officer Tracey's Jacket to Search for a Weapon

The Fourth Amendment provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. Traditionally, evidence that has been gathered in violation of this amendment is later excluded from possible use against the accused at trial. Weeks v. United States, 232 U.S. 383, 398 (1914) (establishing exclusionary rule for federal actors for evidence obtained in violation of the Fourth Amendment, but not extending rule to state actors), Mapp v. Ohio, 367 U.S. 643, 658 (1961) (extending exclusionary rule to the states). However, in the context of a § 1983 civil rights action, the appropriate remedy for a Fourth Amendment constitutional violation is damages. See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971). Because the respondent’s termination came directly as a result of the intrusion on his Fourth Amendment rights, this Court should affirm the Thirteenth Circuit’s finding that his constitutional rights were violated by the illegal search.

A. Officer Calloway’s actions went beyond what the Fourth Amendment allows under Terry v. Ohio

The Court’s landmark case of Terry v. Ohio, 392 U.S. 1 (1968), stood for the proposition that law enforcement officers, absent probable cause, could under certain circumstances momentarily seize persons and pat down the exterior of their clothing in search of instruments which could be used in an assault. In Terry, the plaintiff had motioned for evidence of a firearm found in his possession suppressed. Id. at 4. The plaintiff argued that the arresting officer

conducted an unlawful search by removing his firearm from underneath his jacket. Id. The officer testified that he only patted the man down to see whether he had a weapon, and that he did not put his hands beneath the outer garments of the plaintiff's clothes until he felt one. Id. at 7. Thereafter, the plaintiff was charged with carrying a concealed firearm. Id.

The Court found that the search of the exterior portion of the plaintiff's garments was properly limited. Id. at 29. While acknowledging that a frisk "constitute[d] a brief, though far from inconsiderable, intrusion upon the sanctity of the person" the Court declared that it would be "unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." Id. at 24-25. Terry made clear that an officer could conduct a reasonable search for weapons, "where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." Id. at 27. Unlike other searches, which are used for purposes of gathering evidence against the accused, "the sole justification of the search in the present situation is the protection of the police officer and others nearby." Id. at 28. If a frisk gives rise to probable cause that a person has indeed committed a crime only then should a police officer be allowed to carry out a full search. Id. Thus, because the arresting officer in Terry, did not conduct a more intrusive search of the interior of the plaintiff's jacket until after the officer felt what appeared to be a gun during a legal frisk, the Court affirmed the plaintiff's conviction. Id. at 30.

In addition to Terry, the Court solidified what constitutes a proper frisk in Sibron v. New York, 392 U.S. 40 (1968). In defining the scope of the rule set out in Terry, the Court stated that "the search for weapons approved in Terry consisted solely of a limited patting of the outer clothing of the suspect for concealed weapons." Id. at 65. (emphasis added). Thus, the officer's

search in Sibron where he thrust his hand into the defendant's pocket in order to remove some narcotics was deemed in violation of the Fourth Amendment because it "was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception-the protection of the officer by disarming a potentially dangerous man." Id. The Court would subsequently extend its rule in Minnesota v. Dickerson, 508 U.S. 366, 375 (1993), which allowed for an officer to conduct a more thorough search if he felt readily identifiable contraband during a Terry frisk. Id. (holding that if a police officer "feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons" but also indicating that if the search goes beyond the scope laid out in Terry, then any contraband found would be inadmissible).

The bright line rule in Terry has consistently been applied in lower court cases as well. For example, in United States v. Rivers, 121 F.3d 1043 (7th Cir. 1997), the court affirmed a lower court's decision denying suppression of drugs found on a defendant. In this case police officers stopped and subsequently frisked an individual believed to be engaged in illegal drug activity. Id. at 1044. The arresting officer patted down the defendant and felt a lump in the suspect's jacket. Id. Only after feeling the lump did the officer reach inside the suspect's jacket and find a bag of cocaine. Id. The court found that the search was lawful and reasoned that under Terry and Dickerson an officer may conduct a non invasive pat-down search of a suspect to ensure the officer's safety and that any contraband that was uncovered through a search in these confines was properly obtained. Id. at 1045.

The case at hand involving Officer Calloway and the plaintiff is distinguishable from Terry, because it went beyond the scope of the type of limited search the case allows for. As

brought out in Sibron, the search in Terry consisted solely of a limited pat down of outer clothing belonging to the suspect. After patting the plaintiff down once and feeling no contraband, Officer Calloway decided to do a more invasive search based on suspicion rather than probable cause as required by Terry. Officer Calloway's reason for conducting a more intrusive search inside the plaintiff's jacket was apparently due to seeing a leather strap underneath consistent with a holster. By peeling back the plaintiff's jacket, the officer went beyond the limited pat down authorized in a Terry frisk. In this regard, the actions taken by Officer Calloway are further distinguishable from those taken by the officer in Rivers who did not reach inside the suspect's coat pocket until *after* he had felt what he believed to be cocaine. At no time did Officer Calloway state that he felt a weapon inside the plaintiff's jacket during the initial pat-down, and the fact that one was eventually discovered cannot justify the search. See Sibron, 392 U.S. at 62-63 ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.")

Therefore, Officer Calloway's actions run counter to the line of Court cases which allow an officer to pat-down a suspect when the officer has only reasonable suspicion to believe an individual poses a threat to the officer's safety.

- B. Officer Calloway's subsequent search was invalid because he did not have information to support reasonable suspicion that the plaintiff was carrying a firearm.

In concluding that the search was proper, the district court stated that Officer Tracey's actions towards Calloway gave rise to a 'more intrusive' Terry search. In rationalizing this, the court relied on State v. Heitzmann, 632 N.W. 2d 1, 9 (N.D. 2001), a state case out of North Dakota. However, this reliance is misplaced because the defendant in that case tried to prevent

the Terry search from *occurring in the first place*. In Heitzmann, the defendant engaged in “nervous, evasive behavior” that threatened the officer, and under those circumstances, the officer was allowed to take “reasonable actions to protect [himself], which may involve an immediate intrusive search of the suspect.” Id. at 9-10. Other cases which have held that searches that go beyond the scope of Terry are constitutionally permissible have involved similar situations where a suspect initially prevented the officer from conducting the search. See, e.g., Adams v. Williams, 407 U.S. 143, 148 (1972) (finding that officer’s seizure of a gun from suspect’s waistband without a prior frisk reasonable because the suspect failed to comply with officer’s request to step out of vehicle); State v. Kearney, 443 A.2d 214, 216 (1981) (allowing an immediate search of a suspect’s pockets when he prevented an officer from conducting a frisk by grabbing the officer’s hands and backing away from him when the officer attempted to touch a bulge in suspect’s clothing).

Here, Calloway had already had one opportunity to conduct a frisk on the respondent, which led to no weapons being uncovered. While Tracey was verbally abusive towards Calloway, which was certainly understandable because months of investigative work and his cover as an undercover agent were potentially being squandered away in a matter of seconds, he did not “physically resist” Calloway’s initial search. His attempt to depart afterwards was also not indicative of guilt, especially after he had already been searched once. Cf. Ohio v. Robinette, 519 U.S. 33, 35 (1996) (recognizing that a person detained in a traffic stop is free to leave once the stop has been completed); Florida v. Royer, 460 U.S. 491, 498 (1983) (A person stopped by law enforcement “need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way...[and] his refusal to listen or answer does not, without more, furnish those grounds [for further detainment]”). Tracey left because the search

had led to nothing being found and he needed to continue carrying out his surveillance duties. His subsequent attempt to brush Calloway's hand away only came *after* Calloway stepped beyond the bounds of Terry by attempting to search him again, further delaying the encounter and putting Tracey at grave risk of his identity being exposed.

Even in situations where potential suspects are combative and carrying a weapon, many courts have validated Terry stops in conjunction with police officers receiving specific information beforehand concerning the possibility of the suspect carrying a weapon. The Court in Adams held that where an informant, who had previously given information to an officer, advised the officer that an individual was carrying narcotics and had a gun in his waist, the officer acted justifiably in removing the loaded gun from" the suspect's clothing. Adams, 407 U.S. at 148. Similarly, in United States v. Romain, 393 F.3d. 63 (1st Cir. 2004), the appellate court upheld a Terry frisk where the frisking officer spoke with a 911 caller prior to detaining the suspect. The 911 caller described the suspect, informed the police that the suspect was carrying a weapon and even informed them that the weapon was located in the suspect's waistband. Id. at 72. The police officers knew the 911 caller was a reliable source because the caller mentioned that she was in an apartment with the suspect and the court trusted that she likely had even seen the gun. Id. While the suspect was clearly agitated when the police arrived, the court reasoned that the behavior of the suspect, only coupled with the reliable information received by the 911 caller, "formed the basis for a reasonable belief that a frisk was necessary to protect the safety of both civilians and officers." Id.

The case at hand is greatly distinguishable from Adams and Romain where officers in both situations relied on information gathered beforehand in support of reasonable suspicion of criminal activity. In both cases, police officers were not only informed that suspects were

carrying weapons, but were also told the exact locations where the weapons could be found. Here, Officer Calloway received no such information prior to carrying out his initial search. After his initial search yielded no contraband, this should have dispelled the officer's belief that he was a potential threat. The officer in Romain spoke to a reliable witness on the scene who actually saw a weapon. Similarly, the officer in Adams had received reliable info as to the location of a weapon on the suspect. Here, Calloway had after conducting his first search no sufficient reason to believe Officer Tracey was carrying a weapon. Officer Calloway never saw or felt a gun or a holster. While the state argues it was reasonable for Officer Calloway to do a more thorough search after merely seeing a strap inside the plaintiff's jacket, Terry and its progeny require more reliable information prior to searching an individual.

- C. The plain view doctrine does not support Officer Calloway's actions because they were not supported by probable cause.

The petitioner may not use the plain view doctrine in order to support Officer Calloway's illegal search. It has been established by the Court that an officer of the law may seize evidence in plain view without a warrant. Coolidge v. New Hampshire, 403 U.S.443, 465 (1971). Plain view is implicated when law enforcement already has "a prior justification for an intrusion in the course of which [they] c[ome] inadvertently across a piece of evidence incriminating the accused." Id. at 466. However, this doctrine does not apply where an officer lacks probable cause to believe the item in question is indeed contraband. Arizona v Hicks, 480 U.S. 321, 326 (1987). In Hicks, the state admitted that they did not have probable cause to search stereo equipment for serial numbers not in plain view which later proved the equipment was stolen. Id. at 324. Instead, they acknowledged that they had only reasonable suspicion that items were stolen. Id. The court therefore affirmed a lower court's decision granting the defendant's motion

to suppress evidence of the stereo equipment due to an unlawful search. Id. at 321. The court held that probable cause is required for the plain view doctrine and reasoned that not requiring probable cause would undercut the practical security of the doctrine. Id. at 326.

The case at hand is analogous to Hicks where an officer lacked probable cause to make a search and so could not use the plain view doctrine to support his actions. First, the weapon found on the plaintiff was not in plain view, just like the serial numbers located on the stereo equipment in Hicks. All that was in Calloway's sight was a vertical leather strap which was purportedly consistent with one used to carry a concealed firearm. Calloway, however, "was unsure of [its] purpose." Tracey v. Rushmore County, Craven, Police Dep't., No. 05-1947, 3 (D. Craven 2006). Officer Calloway had at most, a reasonable suspicion that Tracey might be carrying a gun, which came to light after the Terry search had already been conducted and revealed no weapon. Therefore, Officer Calloway needed to have probable cause to search inside the plaintiff's coat for a weapon like the officers in Hicks needed before they could maneuver the stereo equipment to look at its serial numbers. The petitioner in this case cannot show that Officer Calloway proceeded to search the plaintiff's jacket upon sound probable cause. On the contrary, the petitioner lists several reasons why Officer Calloway should have been suspicious of the plaintiff. However, the requirement for use of the plain view doctrine is not mere suspicion but rather probable cause which Officer Calloway did not have.

Because Officer Calloway lacked probable cause to search the inside of the plaintiff's jacket his actions do not fall within the protection of the plain view doctrine.

D. Allowing for this search would stretch Terry beyond recognition and obfuscate the purposes of the Fourth Amendment

If this Court were to rule that Calloway's subsequent search of Officer Tracey was proper, it would remove its decision in Terry from the Fourth Amendment moorings of reasonableness on which it stood. While this Court has acknowledged that the test for reasonableness "balances the nature and quality of the intrusion on personal security against the importance of the governmental interest alleged to justify the intrusion," United States v. Hensley, 469 U.S. 221, 228 (1985), it has also stated that "the scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate th[at] reasonableness of a particular search or seizure in light of the particular circumstances." Terry, 392 U.S. at 21. The Court has made clear that requiring less "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." Id. at 22. The situations where the Court has been willing to allow for a standard less than probable cause have always been where without a lesser burden, law enforcement would have great difficulty in performing their duties effectively. See Hicks, 480 U.S. at 328 ("We do not say, of course, that a seizure can never be justified on less than probable cause...where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime" can the traditional probable cause requirement be dispensed with); see also, e.g., Terry, 392 U.S. at 25 (allowing for limited pat-down frisk for weapons based on reasonable suspicion); United States v. Cortez, 449 U.S. 411 (1981) (allowing for a limited investigative detention of vehicle suspected to be transporting illegal aliens based on reasonable suspicion); United States v. Sharpe, 470 U.S. 675 (1985)

(allowing for a temporary detention of persons suspected of being involved in criminal activity based on reasonable suspicion).

Thus, the district court's conclusion that it would be implausible to state that "moving aside a piece of clothing would be the tipping point between proper conduct and a constitutional violation" trivializes the issue at stake. Tracey, No. 05-1947 at 5. Were the Court to adopt that type of reasoning, many search and seizure cases would undoubtedly have been resolved in favor of law enforcement because their intrusive impact would be minimal compared to more gross constitutional violations. For instance, the Court's decision in Hicks should have then come out in favor of the government because surely the slight movement of stereo equipment in order to obtain a better look at its serial numbers would not have been the "tipping point" either. See Hicks, 480 U.S. at 328 (rejecting notion that manipulating the equipment was a mere cursory inspection that would require less than probable cause). In short, certain searches under the Fourth Amendment do not somehow become less illegal solely because they pose less of an inconvenience to the target of the search. Cf. Kyllo v. United States, 533 U.S. 27, 38 (2001) (rejecting notion that use of thermal imaging equipment to obtain information from interior of a home was not a search despite lack of physical trespass)

In evaluating virtually every Fourth Amendment claim, this Court has always considered the two pronged test for determining whether a search implicates its protection: whether the person exhibited a subjective expectation of privacy and whether society considers that expectation to be reasonable. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This Court has always made clear to limit the scope of the search rules they proscribe so as to protect those expectations and prevent law enforcement from using these rules as a basis for committing greater unwarranted intrusions. See, e.g., Coolidge, 403 U.S. at 466

(“Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the ‘plain view’ [sic] doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.”); Dickerson, 508 U.S. at 378 (“[T]his Court rightly “has been sensitive to the danger ... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.”) (quoting Texas v. Brown, 460 U.S. 730, 748 (1983) (Stevens, J., concurring)). Allowing searches to go beyond the parameters set out in Terry, even if they do not seem to be significantly more intrusive, will lead to a slippery slope that could eventually result in these types of stops becoming even more invasive. The Fourth Amendment simply does not allow for such a result.

II. The Thirteenth Circuit Court of Appeals Properly Concluded That the Due Process Clause of the Fourteenth Amendment Prohibits Officer Tracey’s Termination From Employment Based On His Participation In An Extramarital Affair

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. XIV § 1. It “forbids the government [from] infring[ing] fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” Washington v. Glucksberg, 521 U.S. 702, 719 (1997). This method of evaluating a government action is known as strict scrutiny. Id. This Court has recently emphasized 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) (emphasis added). If a fundamental

right is not at stake however, rational basis is the appropriate standard of review. E.g., Heller v. Doe by Doe, 509 U.S. 312, 320 (1993). This standard only requires that the government act be rationally related to a legitimate government interest. Id. Because the respondent was terminated for exercising a liberty interest worthy of at least heightened scrutiny, the appellate court correctly concluded that the respondent’s termination was improper. In the alternative, the respondent’s termination fails even rational basis review and thus was still improper because it has no relation to a legitimate state interest.

A. Private sexual conduct between two consenting adults is a fundamental right that requires strict scrutiny analysis

For a right to be considered fundamental, the Court has traditionally required that it must be one that is so “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist if [it] were sacrificed.” Glucksberg, 521 U.S. at 721. This Court has also stated that this right should be one with a “careful description of the asserted fundamental liberty interest.” Id. That being said, the Court has also recognized that had the founding fathers “who drew and ratified the Due Process Clause...known the components of liberty in its manifold possibilities, they might have been more specific” as to what rights were worthy of this protection, and that instead, “they did not presume to have this insight.” Lawrence, 539 U.S. at 578-579. Applying this rationale, the Court has recognized many fundamental rights associated with substantive due process that are not explicitly written within the Constitution, such as the right to marry, Loving v. Virginia, 388 U.S. 1 (1967), the right to have children, Skinner v. Okla. ex rel. Williamson, 316 U.S. 535 (1942), the right to use contraception, Eisenstadt v. Baird, 405 U.S. 438 (1972), and the right to an abortion, Roe v. Wade, 410 U.S. 833 (1972), Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

The right to privacy as a liberty interest in the context of private sexual conduct was first recognized by the Court in Griswold v. Connecticut, 381 U.S. 479 (1965), noting that this right was based not on any specific guarantee in the U.S. Constitution or Bill of Rights, but rather through “penumbras, formed by emanations from those guarantees [within those documents] that help give them life and substance.” Id. at 484 (holding that an all-encompassing ban on the use of contraceptives was unconstitutional because of its intrusion on marital privacy). Future cases showed that this right was also not limited to the marital relationship, but existed individually as well. See Eisenstadt, 405 U.S. at 438 (1972) (striking down a ban on the distribution of contraceptives to unmarried persons on equal protection grounds); Carey v. Population Services Int’l, 431 U.S. 678 (1977) (striking down a similar ban against minors under the age of sixteen). Because the Court’s language in Lawrence implies that it viewed private sexual conduct as part of this penumbral fundamental right of privacy, Rushmore County’s termination action is subject to strict scrutiny analysis because it punished the type of conduct Lawrence was protecting. Because the department cannot show that its action serves a compelling state interest, the respondent’s termination was improper.

a. Lawrence implicitly recognized this right as being fundamental. In Lawrence, the Court struck down a Texas statute which criminalized private sexual relations between two persons of the same sex. In trying to describe the issue that was at stake, the Court began by recounting its previous “statements of the substantive reach of liberty under the Due Process Clause” in Griswold, Eisenstadt, Roe, and Carey. Lawrence, 539 U.S. at 564. All of the cases the Court mentioned revolved around fundamental rights inherent in the sphere of private sexual conduct. See id. at 565. See also Cook v. Gates, 528 F. 3d 42, 52 (1st Cir. 2008) (stating that “it would be strange indeed to interpret Lawrence as not recognizing a

protected liberty interest when virtually every case it relied upon for support recognized such an interest,” though ultimately choosing to forego strict scrutiny analysis in favor of an intermediate scrutiny balancing test); Dale Carpenter, Is Lawrence Libertarian?, 88 Minn L. Rev. 1140, 1156 (2004) (arguing that these line of decisions “were, broadly speaking, about a form of sexual autonomy” and were described “in a way that lines them up very well with what it believe[d was] at stake in Lawrence.”) In describing this history, the Court stated that the “protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person” and as a general rule the State should not “define the meaning of [such a personal] relationship or...set its boundaries absent injury to a person or abuse of an institution the law protects.” Lawrence, 539 U.S. at 565, 567.

The Court’s implicit recognition of private sexual conduct as a fundamental right in Lawrence was also revealed in its use of Justice Stevens’ dissent in Bowers v. Hardwick, 478 U.S. 186 (1986), the case it overruled, in its opinion. In Bowers, Stevens argued that prior Court cases had made two propositions “abundantly clear.” Bowers, 478 U.S. at 216 (Stevens, J., dissenting). First, “the fact the governing majority has traditionally viewed a particular practice as immoral [wa]s not a sufficient reason for upholding a law prohibiting the practice.” Id. “Second, individual decisions...concerning the intimacies of their physical relationship are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth.” Id. The cases that Stevens referred to were the Court’s prior jurisprudence on fundamental rights, and were further evidence that the Court was viewing the issue in Lawrence within this framework. See Carpenter, supra, at 1158 (“Lawrence is an application of the old rule that morals justifications for regulation do not count as a state interest sufficient to trump a fundamental right.”).

Additional language suggests the Court’s intent to treat private sexual relations as a fundamental right. Lawrence stated that “if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into *matters so fundamentally affecting a person.*” Lawrence, 539 U.S. at 567. (emphasis added)

The Court concluded that the statutes in question for both Lawrence and Bowers, with “their penalties and purposes...ha[d] more far reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.” Id. Lawrence intimated that the question is not one of whether persons have a constitutionally-protected right to engage in extramarital sex, but rather whether they have the right to be free from an infringement on their privacy. Id. Bowers and other lower court cases which have refused to recognize such a right have instead narrowly expressed the issue in terms whether the Constitution gives persons a fundamental right to engage in the practice in question. See, e.g., Bowers, 478 U.S. at 190 (“The issue presented is whether the Federal Constitution confers *a fundamental right upon homosexuals to engage in sodomy...*”) (emphasis added); Williams v. Att’y Gen. of Ala. 378 F.3d 1232, 1242 (11th Cir. 2004) (“Because a prohibition on the distribution of sexual devices would burden an individual's ability to use the devices, our analysis must be framed not simply in terms of whether the Constitution protects *a right to sell and buy sexual devices*, but whether it protects *a right to use such devices.*”) (emphasis added); City of Sherman v. Henry, 928 S.W.2d 464, 471 (Tex.,1996) (“We conclude that the right to privacy under the United States Constitution does not include *the right to maintain a sexual relationship with the spouse of someone.*”) (emphasis added). This Court’s repudiation of framing the issue at hand in that manner means that it was dealing with a broader right that was deserving of a significant level of protection, and it always treated this right to privacy in that

manner. See Carey, 431 U.S. at 687 (stating that “Griswold may no longer be read as holding only that a State may prohibit a married couple’s use of contraceptives. Read in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”)

Finally, the fact that Lawrence may not have explicitly described this right as fundamental is not dispositive of the issue. See Cook, 528 F.3d at 53 (noting that “while it is true that Lawrence nowhere used the word “fundamental” to describe the interest at stake, there are several Supreme Court cases that have recognized protected liberty interests without using this word” and listing cases to that effect); see also Laurence H. Tribe, Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1917 (2004) (“to search for the magic words proclaiming the right protected in Lawrence to be ‘fundamental,’ and to assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice.”) The First Circuit in Cook pointed out that in Washington v. Harper, 494 U.S. 210, 223 (1990) and Parham v. J.R. 442 U.S. 584, 600 (1979), the Court described substantial liberty interests in a prisoner avoiding the unwanted administration of certain drugs and a child not being confined unnecessarily for medical treatment, respectively, without ever mentioning the word fundamental. Cook, 528 F.3d at 53. In addition, the fact that the Lawrence Court may not have gone through a traditional Glucksberg-like approach to ascertaining a fundamental right by looking at whether this right was deeply rooted in the nation’s history does not mean it was not treating the interest as such. “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” Lawrence, 539 U.S. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). The Court’s language and rationale

as a whole in the case can only lead to the conclusion that it regarded consensual sexual privacy as a fundamental right. See Tribe, supra, at 1917 (arguing that Lawrence did not recognize a fundamental right would require “overlooking passage after passage in which the Court’s opinion indeed invoked the talismanic verbal formula of substantive due process.”) This reading of Lawrence as recognizing this fundamental right and applying strict scrutiny has not been limited to academic discussion. Several jurisdictions have read it as requiring this level of review. See Raich v. Gonzales, 500 F.3d 850, 864 (9th Cir. 2007) (reading Lawrence as “recognizing narrowly defined fundamental right to engage in consensual sexual activity, including homosexual sodomy, in the home without government intrusion”), Fields v. Palmdale Sch. Dist., 271 F. Supp.2d 1217, 1221 (C.D.Cal. 2003) (listing Lawrence in citations of precedent announcing fundamental rights); Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 548 (S.D.N.Y. 2004) (same), Doe v. Miller, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004), rev’d on other grounds, 405 F.3d 700 (8th Cir. 2005) (same).

Therefore, Lawrence stated that private sexual conduct between two consenting adults was a fundamental right. Here, Officer Tracey’s behavior with Jacqueline Malone was no different from the behavior that was protected in Lawrence. Both were in a consensual relationship. The police department was not required to officially recognize or give approval to the manner in which it manifested itself, but it cannot “demean their existence or control their destiny” by punishing one party for the affair. Lawrence, 539 U.S. at 578. Since the right described in that case covers the behavior that the respondent was punished for here, strict scrutiny is the appropriate analysis required.

b. The petitioner cannot show a compelling state interest

With strict scrutiny analysis the appropriate test to apply, it is clear that the department action cannot withstand constitutional muster. First, the police department cannot make out a compelling state interest. The state may claim its interest in “regulating officer conduct” is compelling, Tracey, No. 05-1947 at 7, but as the Thirteenth Circuit correctly suggests, their real interest is far narrower. The state wishes to regulate officer conduct by limiting “what is in its view, immoral conduct.” Tracey v. Rushmore County, Craven, Police Dep’t., No. 06-6536, 11 (13th Cir. 2007). Such an interest cannot be considered a compelling one, not in comparison to the other concerns which this Court has been willing to declare as such. Compare Roe, 410 U.S. at 162-163 (compelling state interest in health of a pregnant woman and potentiality of human life as she approaches term) and Grutter v. Bollinger, 539 U.S. 306 (2003) (compelling state interest in state higher educational institution maintaining a diverse student body) and Cutter v. Wilkinson, 544 U.S. 709 (2005) (compelling state interest in ensuring prison security) with Eu v. San Francisco County Democratic Cent. Committee, 489 U.S. 214 (1989) (preserving political party unity not a compelling state interest) and Shaw v. Hunt, 517 U.S. 899, 909-910 (1996) (alleviating effects of societal discrimination not a compelling state interest) and Sherbert v. Verner, 374 U.S. 398, 407 (1963) (denying unemployment benefits to Seventh Day Adventists not a compelling state interest).

Second, even if the government’s characterization of what is at stake is accepted and the interest in fact compelling, the department action is not narrowly tailored nor uses the least restrictive means possible. They cannot show that the action is critically necessary to regulating officer conduct. This Court has made clear that “when a [s]tate...burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment

of some significant state policy requires more than a bare assertion...that the burden is connected to such a policy.” Eisenstadt, 431 U.S. at 696. The police department has numerous, alternative measures of regulating officer conduct without infringing on this fundamental right. They cannot show that employing this policy is the least restrictive means by which it can achieve its goal. And even if the state’s desire to regulate morality were truly a compelling interest, the state’s action which punished the respondent’s adulterous behavior only partially serves that goal because based on that rationale, they should have also previously disciplined him or dismissed him for his other ‘immoral’ conduct, such as being separated from his wife and filing for a divorce.. See Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 806 (1996) (Kennedy, J., concurring and dissenting in part) (“[P]artial service of a compelling interest is not narrow tailoring.”) Thus, the reason for firing him manages to become both overly broad and narrow simultaneously. It is facially overbroad in that it covers sexual behavior that occurs outside the scope of duty for a police officer, and at the same time it is overly narrow as applied to the respondent because it did not punish all of his ‘immoral’ conduct. Such a state action cannot survive strict scrutiny analysis.

- c. A recognition of private sexual conduct as a fundamental right does not open the door to other sexual acts of questionable morality

The Court in Lawrence took care in describing what right they were recognizing, and made clear that this was not an absolute, unassailable right to *any* form of sexual privacy. The decision made sure to state that they were defining something that was narrow in scope. They articulated clearly that “[Lawrence] does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the

government must give formal recognition to any relationship that homosexual persons seek to enter.” Lawrence, 539 U.S. at 578.

By making this statement, the Court was making clear that other crimes traditionally associated with sexual moral turpitude fell outside of this fundamental right. For instance, prostitution is unprotected because it involves solicitation of sexual services in the public sphere. See, e.g., J.B.K., Inc. v. Caron, 600 F.2d 710, 711 (8th Cir. 1979) (rejecting claim that prostitution implicates a fundamental right). Polygamy raises problems with religious concerns suddenly being allowed to trump government actions and often involves issues of consent. See Reynolds v. United States, 98 U.S. 145, 166-167 (1878) (“To permit [polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”); State v. Holm, 137 P.3d 726, 744 (Utah 2006) (noting that polygamy often involves the targeting of women and children). The prohibition against incest, health issues notwithstanding, involves important state interests of promoting large societies and protecting younger family members from exploitation. See Benton v. State, 461 S.E.2d 202, 205 (Ga.,1995) (Sears, J., concurring) (“The incest taboo is one of the most important human cultural developments.”) By recognizing the narrow right that Lawrence circumscribed, the Court is not opening the door to other sexual activity that society has traditionally frowned upon and criminalized.

B. If strict scrutiny analysis is not the appropriate standard of review, at the very least Lawrence now requires a level of intermediate scrutiny in evaluating a departmental ban on adulterous relations with another

If Lawrence did not make private sexual activity a fundamental right subject to strict scrutiny analysis, it at the very least gave it a heightened level of review. This is a view that

many legal experts and commentators have concluded Lawrence stands for, e.g., Paul M. Secunda, The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs, 40 U.C. Davis L. Rev. 85 (2006) (“Lawrence attaches some form of heightened review when the government seeks to interfere with the private and personal lives of individuals”), and it is one that has been adopted by several lower circuits. See Witt v. Dep’t. of Air Force, 527 F. 3d 806, 817 (9th Cir. 2008) (holding that “Lawrence requires something more than traditional rational basis review” and applying intermediate scrutiny to evaluate policy of ‘Don’t Ask, Don’t Tell’ regarding homosexuals in the military); Cook, 528 F. 3d at 52 (“Lawrence is...Supreme Court authority that identifies a protected liberty interest and then applies a standard of review that lies between strict scrutiny and rational basis.”); see also Briggs v. North Muskegon Police Dept., 563 F. Supp. 585, 590 (D.C. Mich. 1983) (“[T]he privacy and associational interests implicated here are sufficiently fundamental to warrant scrutiny of the defendants' acts on more than a minimal rationality basis.”); Thorne v. City of El Segundo, 726 F.2d 459, 469 (9th Cir. 1983) (city government required to show that “its inquiry into appellant's sex life was justified by the legitimate interests of the police department”).

In Witt, the Ninth Circuit concluded that Lawrence applied a heightened level of scrutiny. The court held that “when the government attempts to intrude [into this privacy right], in a manner that implicates the rights identified in Lawrence, the government must advance an important governmental interest, the intrusion must be necessary to further that interest.” Witt, 527 F.3d at 819. In further explaining the third factor, the court indicated that “a less intrusive means must be unlikely to achieve substantially the government’s interest.” Id. The court based its reading of Lawrence on Sell v. United States, 539 U.S. 166, 179 (2003), which used a four

factor balancing test to determine whether the Constitution allowed the government to forcibly administer anti-psychotic drugs to a defendant in order to make him competent to stand trial. Id. at 818. Because Sell had identified both a significant liberty interest in refusing the unwanted administration of these drugs, and a legitimate state interest in providing medical treatment to reduce “the danger that an inmate suffering from a serious mental disorder represents to himself or others,” the court required the state to justify its intrusion into this liberty interest in order to balance both of these concerns. Sell, 539 U.S. at 178. The Ninth Circuit concluded that just as Sell required the State to justify its intrusion into this interest, Lawrence required a similar justification which would balance the interests at stake. Witt, 527 F.3d at 818.

The First Circuit has also adopted a similar balancing test. In Cook, the court in evaluating the constitutionality of the U.S. military’s “Don’t Ask, Don’t Tell” statute requiring separation of openly homosexual members concluded that Lawrence “identified a protected liberty interest and then applie[d] a standard of review that lie[d] between strict scrutiny and rational basis.” Cook, 528 F.3d at 56. The case “balanced 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.” Id.

Both of these circuits, in rejecting rational basis review as the standard to employ, pointed out that Lawrence was inconsistent with traditional rational-basis review jurisprudence. As the First Circuit indicates, in Lawrence the Court stated that the Texas statute in question “further[ed] no legitimate state interest *which c[ould] justify its intrusion into the personal and private life of the individual.*” Witt, 527 F.3d at 817 (quoting Lawrence, 539 U.S. at 578) (emphasis added). Had the Court chosen to apply rational basis review, “it would not [have

needed to] identify a legitimate state interest to “justify” the particular intrusion of liberty at issue in Lawrence because “regardless of the liberty involved, any hypothetical rationale for the law would do.” Id. See also Heller, 509 U.S. at 314 (holding that a statute under rational basis review fails only when it “rests on grounds wholly irrelevant to the achievement of the State’s objectives”) FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (“[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data”). Furthermore, “rational basis review does not permit consideration of the strength of the individual’s interest or the extent of the intrusion on that interest caused by law; the focus is entirely on the rationality of the state’s reason for enacting the law.” Cook, 528 F.3d at 55. The Ninth Circuit also concluded that had Lawrence applied traditional rational basis review, then the statute in the case would have been upheld, because upholding morality would be a sufficiently legitimate state interest when a protected liberty interest is not at stake. Id. at 52-53 (“[A] legislature can legitimately act...to protect the societal interest in order and morality.”) (quoting Barnes v. Glen Theater, Inc., 501 U.S. 560, 569 (1991)). In short, it is impossible to “reconcile what the Supreme Court did in Lawrence with the minimal protections afforded by traditional rational basis review.” Witt, 527 F.3d at 816.

Applying either of these balancing tests, the department’s firing cannot survive this intermediate level of scrutiny. As stated previously, the department’s interest in regulating officer conduct is certainly an important one. However, its interest in regulating outside officer conduct it considers to be ‘immoral’ is much more questionable. This state interest is not like the one in Witt, which involved the “management of the military” in regulating sexual conduct. Witt, 527 F.3d at 821. Nor is it one that involves a need to preserve “high morale, good order and discipline, and unit cohesion” in light of special conditions. See Cook, 528 F.3d at 61.

(“Every member of the armed forces has one fact in common- at a moment’s notice he or she may be deployed to a combat area. The conditions of service in such an area bring into play the animating concerns behind the Act.”). The police department punished the respondent for outside sexual behavior that has no bearing on that ability for the respondent or the department as a whole to do its job. The appellate court indicated that “[the respondent] was not acting in his capacity as a police officer” and there is nothing to indicate that the conduct affected his ability to perform his duties. Tracey, No. 06-6536 at 10. In balancing the police department interest in regulating this type of conduct versus the gross intrusion into the respondent’s interest to liberty, the latter clearly outweighs the former. Therefore, the government’s interest is insufficient to justify its intrusion into the respondent’s liberty interest and cannot satisfy intermediate scrutiny.

C. Even under rational basis review the policy fails because terminating officer employment for adulterous relationships conducted while off duty is not rationally related to the state interest of regulating officer conduct

If a fundamental right is not at stake, then rational basis review is the appropriate standard to apply. Heller, 509 U.S. at 319. Rational basis review only requires that there be a rational connection between the government action and a legitimate state interest. Id. This standard of review acknowledges that “it is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” Beach Communications, 508 U.S. at 313. It recognizes that the legislative action or regulation in question “is accorded a strong presumption of validity.” Heller, 509 U.S. at 319. A law or regulation will be upheld under this test “even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.” Romer v. Evans, 517 U.S. 620, 632 (1996). Because the department’s action has *no* relationship to any state legitimate interest, the respondent’s termination was improper.

- a. A ban on adulterous relations bears no rational relationship to regulating officer conduct

Even if private sexual conduct is not a fundamental right and only requires a court to evaluate it using rational basis review, the department's action still fails to pass constitutional muster. While this standard of review has been described as "a paradigm of judicial restraint," it is not a blank check for the State to employ any policy that it wishes. Beach Communications, 508 U.S. at 314. If the relationship between the policy and the state interest is employed is "so attenuated as to render [it] arbitrary or irrational" then it will fail rational basis review. City of Cleburne, Tex. v. Cleburne Living Center 473 U.S. 432, 446 (1985) (holding that a zoning ordinance preventing the construction of a group home for the mentally retarded was unconstitutional because it was based on an irrational prejudice against the accused); see also Romer, 517 U.S. at 632 (striking down a proposed amendment to state constitution denying protected status to homosexuals because of its "inexplicable...animus toward the class it affects.").

The county police department cannot demonstrate how the commission of adultery by Officer Tracey would adversely influence his job performance. His extramarital affair only occurred while he was off duty, and never while he was performing his duties as an undercover officer. Nor did it involve any persons with which a relationship could lead to a conflict of interest. See, e.g., Sylvester v. Fogley, 465 F.3d 851, 853 (8th Cir. 2006) (officer involved in sexual relationship with victim of crime he was investigating). The respondent does not question the validity of the state's general interest in the Rushmore County police department regulating conduct on the part of its officers, but the policies it promulgates must be rationally related to that goal. See, e.g., Thorne, 726 F.2d at 471 (holding that police department could not terminate employee for previous affair with a police officer "in the absence of any showing that private,

off-duty, personal activities of the type protected by the constitutional guarantees of privacy...have an impact upon an applicant's on-the-job performance”); cf. Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969) (stating that “the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity.”); Mindel v. U.S. Civil Service Commission, 312 F.Supp. 485, 488 (D.C.Cal. 1970) (holding that the United States Postal Service had not “shown any legitimate reasons for imposing its undefined moral code upon plaintiff” after terminating him due to unmarried cohabitation with another). A blanket departmental ban on adulterous relations bears no rational connection to the department’s goal of regulating officer conduct.

The district court’s reliance on Shawgo v. Spradlin, 701 F.2d 470 (5th Cir. 1983), is misplaced in that the regulation in question involved a police departmental policy of prohibiting off-duty dating and cohabitation *amongst its own officers*. The Fifth Circuit in that decision acknowledged the “rational connection between the exigencies of Department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit.” Id. See also Kukla v. Village of Antioch, 647 F.Supp. 799, 810 (N.D.Ill.,1986) (upholding dismissal of two cohabitating police employees due to the conduct’s potential detrimental effect on the department’s overall job performance); but see Swope v. Bratton, 541 F. Supp 99, 108 (W.D. Ark. 1982) (requiring government to show that sexual activities were interfering with the officer’s “work performance or efficiency of the government service.”). Here, the respondent’s conduct was with an individual who was not an employee of the police department, and thus presented no issue of any “conduct [that could be] prejudicial to good order.” Shawgo, 701 F.2d at 482.

- b. After Lawrence morality is now an insufficient justification for a legitimate state interest

If rational basis review is the proper scrutiny to use, then mere morality is now an insufficiently legitimate state interest for punishing sexual behavior of the type proscribed in Lawrence. In Lawrence, the Court rejected the notion previously accepted in Bowers that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” Lawrence, 539 U.S. at 578 (quoting Bowers, 478 U.S. at 216 (Stevens, J., dissenting)). The Court acknowledged that the Bowers decision “was making the broader point that for centuries there ha[d] been powerful voices to condemn homosexual conduct as immoral” in upholding a Georgia statute that prohibited sodomy, but stated that these “profound and deep convictions” could not answer the question before them. Id. at 571. The Court concluded that the state could not “demean th[e] existence [of homosexuals] or control their destiny by making their private sexual conduct a crime.” Id.

The state interest that the petitioner raises as a justification is a moral one: that throughout human history society has generally condemned extramarital affairs as being immoral. Lawrence however, stands now for the proposition that in dealing with the type of sexual conduct at stake here, such a rationale is no longer sufficient. While the issues surrounding adultery may present certain ethical, moral, and perhaps religious quandaries, the Court’s role is to not to deal with these considerations but rather answer the issue of whether “the majority may use the power of the State to enforce these views on the whole.” Lawrence, 539 U.S. at 571. The Constitution and this Court’s jurisprudence answer this in the negative---the judiciary’s obligation is to “define the liberty of all, not to mandate [its] own moral code.”

Casey, 505 U.S. at 850. Thus, the department's desire to regulate the moral conduct of its officers can no longer be a legitimate state interest.

- c. Society's unwillingness to enforce adultery legislation suggests that it no longer carries the same social stigma as before

Finally, the state may argue that it has a legitimate government interest in upholding the image of the police department by prohibiting adulterous relations. E.g., Suddarth v. Slane, 539 F. Supp. 612 (W.D. Va. 1982) (district court ruling that officer's termination after adulterous relationship proper because police department had an interest in "prevent[ing] conduct which is likely to bring it into disrepute."). This is a dubious claim at best. Courts have in the past viewed adultery as "an offense against the marriage relation", S. Sur. Co. v. Oklahoma, 241 U.S. 582, 586 (1916), and as the "antithesis of marriage." City of Sherman, 928 S.W. 2d at 469-470 (Tex. 1996). Yet by the same token, laws that once prohibited adultery have since been repealed in over half the United States. See Gabrielle Viator, The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas, 39 Suffolk U. L. Rev. 837, 837 (2006) (noting that only twenty three states still have statutes prohibiting adultery). In the states which still have these laws on the books, they have generally not been enforced, including in the state of Craven. See Tracey, No. 05-1947 at 4 (district court noting that no prosecutions have been brought under Craven's adultery statute in over twenty years); see also Com. v. Stowell, 449 N.E.2d 357, 360 (Mass. 1983) (Massachusetts supreme court stating that adultery statute had "fallen into a very comprehensive desuetude" due to lack of enforcement).

This general practice of non-enforcement has led to adultery statutes being considered by the American Law Institute as "dead letter statutes subject to abuse by selective enforcement and blackmail, thereby tending to bring the penal law into disrepute." Viator, supra, at 842 (quoting

Model Penal Code § 213.6 note on adultery and fornication at 433 (Proposed Official Draft 1962)). See also, e.g., Jonathan Turley, Of Lust and Law, Wash. Post, Sept. 5, 2004 at B01 (noting that in Virginia’s last adultery prosecution in 2004, the adulterer went straight to police to report the relationship and later expressed “outrage that [defendant] would not receive a criminal record for his adulterous affair with her”). This element of vindictiveness is present in this case, in that the respondent’s affair was with the police chief’s estranged daughter. See Tracey, No. 05-1947 at 3. The daughter had recently made public charges of corruption against her father and her department. Id. The circumstances of the case suggest ulterior motives on the part of the police chief and demonstrate why this Court should be wary in considering whether the state’s interest is truly a legitimate one.

In short, adultery in today’s day and age is far more common than it was back then, and, ethical merits notwithstanding, does not carry the same level of social stigma and condemnation that it used to. See, e.g., Alfred C. Kinsey, Sexual Behavior in the Human Male 585, 597 (1948) (study estimating that 50% of adult married males had engaged in extramarital sex) While this may bring out questions of which came first, the chicken or the egg – that is, is adultery no longer considered to be serious due to lack of enforcement or is lack of enforcement due to adultery no longer being considered to be serious --- it cannot be denied that adultery is not the same crime that it was a century ago. See Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, 30 J. Fam. L. 45 (1991) (“ If [adultery] laws were regularly brought to bear, though, we might expect most Americans to reflect more deeply on the relationship between their government and their families, their lovers and themselves.”). The lack of willingness to carry out prosecutions indicates that adultery does not bring with it the scarlet letter condemnation of years past. Thus, outside observers are much less likely to look

disfavorably on the Rushmore County police department, or more importantly, consider it as an obstacle in it being able to adequately perform its duties, due to the respondent's conduct.

CONCLUSION

While the petitioner argues that Officer Calloway had reasonable suspicion to search the plaintiff, this Court's precedent clearly establishes that the requirement for a search of the manner Calloway conducted is probable cause. Protection against invasive government searches is a right closely guarded by the Fourth Amendment. And as such, government actors who wish to impede this right are required to show that such an intrusion is truly necessary. A balance must be maintained between the government's interest in protecting officers of the law who do their jobs and society's interest in ensuring that they are truly "secure in their persons, houses, papers and effects." U.S. Const. amend. IV.

As to the Fourteenth Amendment due process issue, the respondent recognizes that the analysis Lawrence utilized is "difficult to pin down." Nan D. Hunter, Living with Lawrence, 88 Min. L. Rev. 1103 (2004). Thus, this case will present the first opportunity for the Court to determine the scope of its opinion. But regardless of the level of scrutiny Lawrence calls for and how it is employed in this situation, termination of the respondent's employment for his participation in an extramarital affair was unconstitutional and violated his rights to due process.

For the reasons aforementioned the respondent respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Thirteenth Circuit which concluded that the district court erred when it concluded that his Fourth and Fourteenth

Amendment rights had not been violated, and remanded the case back to the district court for further proceedings consistent with its opinion.

Respectfully submitted,

Team B
Counsel for the Respondent

CERTIFICATE OF SERVICE

This document certifies email delivery of one copy of this brief in Microsoft Word and Adobe Acrobat PDF format to sarah.oettinger@gmail.com, and delivery of four copies of this brief via USPS Priority Mail to Craven Bench, Holderness Moot Court, University of North Carolina School of Law, Campus Box # 3380, Chapel Hill , NC 27599-3380

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