

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**

*Petitioners,*

v.

**WILLIAM R. TRACEY,**

*Respondent.*

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

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**BRIEF FOR RESPONDENT**

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Team Code D

## **QUESTIONS PRESENTED**

- I. UNDER THE SEARCH AND SEIZURE CLAUSE OF THE FOURTH AMENDMENT, DID A POLICE OFFICER VIOLATE A SUSPECTS CONSTITUTIONAL RIGHT WHEN THE POLICE OFFICER, ACTING ONLY UNDER REASONABLE SUSPICION, MOVED ASIDE AN EXTERIOR GARMENT?
  
- II. IS THE FIRING OF A POLICE OFFICER FOR OFF DUTY PRIVATE SEXUAL CONDUCT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

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## CONSTITUTIONAL PROVISION

The text of the following Constitutional Amendments is relevant to the determination of the present case:

U.S. Const. amend. IV:

“The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . .”

U.S. Const. amend. XIV:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .”

## Statement of The Case

In 2005, Respondent William Tracey, was working for the Rushmore County Police Department as an undercover Police Officer targeting the sale of illegal firearms. (A. 2.) On June 7, 2005, William Tracey, a seven year veteran of the police force, was on assignment on the north side of McDonough Square. (A. 2.) While there attempting to uncover illegal firearms activity, he was seen by a fellow officer from a different precinct.(A. 2.) Not knowing that Respondent Tracey was an undercover officer, Officer Calloway became concerned by a number of behaviors he believed to be suspicious. (A. 2.) Respondent was wearing a black nylon bomber jacket in warm weather; had a closely shaven haircut; and while appearing ‘agitated,’ was taking stock of the surrounding area, including nearby rooftops. (A. 2.) It is clear in hindsight that the Respondent was merely attempting to effectively execute his undercover operation while keeping himself safe. However, as Officer Calloway did not know this, he approached the Respondent. (A. 2.)

Realizing his cover may be in jeopardy, Respondent Tracey became “visibly angry” when Officer Calloway identified himself as a police officer and asked Tracey for his name. (A. 3.) After a brief exchange, Officer Calloway still believed that the Respondent may be “involved in criminal activity.” (A. 3.) Officer Calloway conducted a pat down, often referred to as a “frisk,” or in legal parlance, a “Terry Search.” (A. 3.) The pat down was intended to determine whether the Respondent was carrying a weapon. (A. 3.) Undercover Officer Tracey did not resist, though he did verbally abuse Officer Calloway. (A. 3.) The frisk appeared to turn up no evidence that the Respondent was carrying a weapon. (A. 3.) Officer Tracey thus turned to leave, at which time Officer Calloway noticed “a vertical

leather strap” underneath his jacket. (A. 3.) Officer Calloway was unsure as to what the strap was, and ordered Officer Tracey to turn around, which he did. (A. 3.) In an attempt to search underneath the Respondent’s jacket, Officer Calloway reached towards his jacket and found inside Officer Tracey’s “Glock 21,” (A. 3.), which was department issued. (A. 4.)

Officer Calloway immediately arrested the Respondent and seized his gun. (A. 3.) At this time, Respondent Tracey tried to explain his undercover status to Calloway, but was unsuccessful in persuading him as he was not carrying his badge; something he did to avoid being identified as a police officer while on assignment. (A. 3.) Not believing his story, Officer Calloway told the Respondent that he was violating Craven Statute 19-166.81, a concealed weapons statute. (A. 3.) Officer Tracey was taken to Calloway’s precinct where he was searched, at which time Officer Calloway found a cellular phone which contained numerous contacts for suspected criminals and a woman whom Calloway knew to be Rushmore County Police Chief Patrick Malone’s daughter. (A.3.) Her name was Jacqueline, and Calloway only knew who she was because of her accusations of police corruption and subsequent estrangement from her father. (A.3.)

Fearing that Jacqueline was “being targeted” by Officer Tracey, Calloway called her. (A.4.) Herself surprised at a call from local law enforcement, Jacqueline informed Calloway that Respondent Tracey was indeed an undercover police officer and that she had been engaged in an intimate relationship with him. (A. 4.) Realizing his mistake, Officer Calloway called Tracey’s precinct to inform them that he had “unwittingly arrested one of their undercover officers.” (A. 4.) For reasons unknown, Calloway also disclosed to the Respondent’s precinct the relationship between Tracey and Jacqueline Malone. (A. 4.)

At the time of the incident, Officer William Tracey had been separated from his wife for some time, and has since been served with divorce papers. (A. 4.) Jacqueline Malone was unmarried, and the statute for adultery in Craven is largely ignored and unenforced, in fact no prosecutions have been brought under the state in over twenty years. (A. 4.) In addition, Officer Tracey was never on duty when he had encounters with Jacqueline Malone, nor was he performing any undercover duties when they were together. (A. 4.) Nonetheless, the day after being arrested by officer Calloway, the Respondent was fired by Rushmore County Police Department for “behavior unbecoming an officer.” (A. 4.) Police Chief Malone did concede that the reason the Respondent was being fired was for violating the adultery statute, despite its lack of enforcement over the past two decades. (A. 4.)

### **Summary Of The Argument**

The Rushmore County Police Department has violated the Constitutional Rights of Respondent Officer William Tracey by conducting an illegal search which through a series of events led to his termination from the police force in violation of his Constitutional Right to privacy under the Due Process Clause of the Fourteenth Amendment.

It is not unreasonable to believe that Officer Tracey was behaving somewhat suspiciously on the day in question in McDonough Square. He was after all attempting to infiltrate a criminal organization as an undercover police officer. Thus it is perfectly acceptable under Terry v. Ohio for Officer Calloway to engage in a relatively routine pat down. The fact that the Respondent was agitated and verbally abusive is understandable in light of the circumstances, and is surely the same behavior that many people exhibit when being patted down by the police. His general reluctance, though utter lack of refusal, does not change any

Constitutional analysis about his Fourth Amendment rights. Officer Calloway conducted his pat down and found nothing. Without probable cause, this is as far as a police officer may go in searching a citizen. Officer Calloway himself acknowledged that when he saw the strap under the Respondents jacket, he was unsure as to what it was. This is surely not probable cause, and therefore his extended search under the Respondent's clothing was an illegal search under the Fourth Amendment.

After being arrested, Officer Calloway became aware of the Respondent's private sexual relationship with the Police Chief's daughter, and it is this relationship that was the basis for the Respondent's termination from the force. A long line of Supreme Court cases, concluding with Lawrence v. Texas, make it quite clear that individuals have a Constitutionally protected right to make their own decisions about private sexual conduct. The existence of an adultery statute, that itself is a violation of the Due Process Clause in its attempt to regulate private sexual activity, does not provide any justification for the Police Departments actions. Officer Tracey was separated from his wife, and his intimate relationship with Jacqueline Malone did not interfere with his duties as a police officer in any way. There is no state interest asserted in regulating the private sexual relationships of police officers that could to justify the infringement of such an important and fundamental right as is implicated in the current case. It seems quite clear that in this case, the Respondent was fired not for violating a defunct adultery statue or police regulation, but because of the identity of the person with whom he was having a relationship. The termination of the Respondent was indeed a violation of his Fourteenth Amendment Due Process right to be free from government infringement in his private sexual conduct, especially in light of the fact the relationship did not affect his job performance in any way.

## Argument

### I. UNDER THE SEARCH AND SEIZURE CLAUSE OF THE FOURTH AMENDMENT A POLICE OFFICER VIOLATED A SUSPECTS CONSTITUTIONAL RIGHT WHEN THE POLICE OFFICER, ACTING ONLY UNDER REASONABLE SUSPICION, MOVED ASIDE AN EXTERIOR GARMENT.

The Fourth Amendment declares that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated. . .” U.S. Const. amend. IV. This Court has held that “no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others.” Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891). Further, this Court has “long held that the ‘touchstone of the Fourth Amendment is reasonableness,’” Ohio v. Robinette, 519 U.S. 33, 39 (1996)(quoting: Florida v. Jimeno, 500 U.S. 248, 250 (1991), and that “reasonableness, in turn, is measure in objective terms by examining the totality of the circumstances.” Id.

Further, “the Fourth Amendment protects people, not places,” Katz v. U.S., 389 U.S. 347, 351 (1967), and “wherever an individual may harbor a reasonable ‘expectation of privacy’ he is entitled to be free from unreasonable government intrusion.” Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting: Katz, 389 U.S. at 361 (Harlan, J., concurring)). The Fourth Amendment does not however forbid all searches and seizures, but only those that are unreasonable. Id. (citing: Elkins v. U.S., 364 U.S. 206, 222 (1960)). Individuals are undoubtedly entitled to Fourth Amendment protection when they are out on the public streets. Id.

In the course of police investigations this Court has annunciated two circumstances when a search or seizure is reasonable. The first, as established in Terry, is a “limited search of the outer clothing” Id. at 24, “limited to that which is necessary for the discovery of weapons which might be used to harm the officer or other’s nearby. . .” Id. at 25. Without probable cause to

arrest the search must be properly initiated and limited to less than a full search. Id. at 25-26.

But, before stopping and conducting a Terry search, the officer must have “constitutionally adequate, reasonable grounds for doing so.” Sibron v. New York, 392 U.S. 40, 64 (1968). The second, states “that under certain circumstances the police may seize evidence in plain view without a warrant.” Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

Because Officer Calloway lacked probable cause to arrest Respondent, did not find any weapons during the Terry search, and did not actually see the weapon under Respondent’s coat, the search was unreasonable and in violation of the Fourth Amendment.

A. Because the Officer Lacked Probable Cause to Arrest the Suspect, and a valid Terry Search failed to Uncover any Weapons, the Officer’s Continued Search of the Suspect was Unreasonable.

The Fourth Amendment typically requires probable cause in order to satisfy the reasonableness requirement of a search or seizure, yet sometimes a less stringent standard applies when certain governmental and private interests are weighed. U.S. v. Knights, 534 U.S. 112, 121 (2001). When an officer has a reasonable suspicion that illegal conduct is occurring or is likely to occur, he or she may engage in limited search based upon the circumstances surrounding the search. Id. Specifically, if an officer fears that a suspect may be armed with a dangerous weapon, the officer may conduct a limited search of the suspects outer clothing to search only for weapons. Terry, 392 U.S. at 24-25. This Court limited the holding in Terry to only apply to reasonable searches of the exterior clothing when the officer “reasonably believes the suspect is armed and dangerous.” Sibron, 392 U.S. at 63. In order to conduct the search the police officer must be able to point to “specific and articulable facts which taken together with rational inferences from these facts reasonably warrant the intrusion.” Terry, 392 U.S. at 21. The reasonable standard is an objective standard. Id. This Court also held that “a search for

weapons in the absence of probable cause to arrest . . . must . . . be circumscribed by the exigencies which justify its initiation. Id. at 25-26. Further, a full search incident to arrest may not occur prior to the arrest to justify the subsequent arrest. Sibron, 392 U.S. at 63.

For example, this Court held that a police officer who ‘stopped’ and ‘frisked’ three individuals, and subsequently found guns on two of them, acted reasonably, and within the confines of the Fourth Amendment, after the officer observed the individuals exhibit behavior consistent with planning a robbery. Terry, 392 U.S. at 30. This Court reasoned that, “it must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away he has ‘seized’ that person.” Id. at 16. Further, “it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find a weapon is not a ‘search.’” Id. This Court held that such a search “is a serious intrusion upon the sanctity of a person, which may inflict great indignity and arouse string resentment, and is not to be undertaken lightly.” Id. at 17. This Court reasoned that this “limited search of the outer clothing for weapons constitutes a severe, though brief intrusion upon cherished personal security, and it must surely be annoying, frightening, and perhaps humiliating experience.” Id. at 24-25. However, such searches “must be limited to that which is necessary for the discovery of weapons,” Id. at 26.

Here, Officer Calloway relied upon his many years of police experience to reasonably believe that Respondent was engaging in possibly illegal conduct. When Calloway approached Respondent he asked him a series of questions and was concerned that Respondent may be carrying a weapon because he was wearing a bomber jacket and was acting nervous. When Calloway approached and stopped a Respondent he, within the meaning of Terry, seized Respondent, and when he conducted the proper Terry search he in affect had conducted a search.

At that point both the search and seizure were reasonable. Calloway's purpose for questioning Respondent, and searching him for weapons by 'frisking' him was reasonable in light of all the circumstances. However, once Calloway confirmed that Respondent was not concealing a weapon, through his 'frisk' of Respondent's outer clothing, the exigency of the situation was no longer a factor. Calloway had no reason to believe that Respondent was carrying a concealed weapon and therefore was unreasonable in conducting any further search. This Court was extremely clear in Terry, that even the mere act of patting down a person's outer clothing is a serious intrusion upon a person's Fourth Amendment right, and such searches must only be tolerated for the search of a weapon. Because Calloway conducted a reasonable and thorough Terry search and did not discover a weapon, his further intrusion into Respondent's inner clothing was an unreasonable search.

Similarly, this Court held that when a police officer reached into a suspect's pocket looking for drugs, based only upon a suspicion that the suspect was carrying narcotics, and was not in fear for his safety, the officer violated the suspect's Fourth Amendment right. Sibron, 392 U.S. at 65. The court reasoned that a police officer may lack probable cause for an arrest, but a 'stop' and 'frisk' may be reasonable if there is reasonable suspicion that the individual is carrying a dangerous weapon. Id. at 63. The Court further reasoned that the search approved in Terry must be "limited [to] patting the outer clothing of the suspect for concealed objects which might be used as instruments of assault." Id. at 65. Further, this Court reasoned that when an officer is not acquainted with an individual, and only has reasonable suspicion, and not probable cause to believe that the suspect is carrying illegal goods, the officer cannot reasonably conduct a search for those goods. Id. at 62.

Here, Officer Calloway believed that Respondent may have been engaged in the trade of illegal weapons, but did not actually observe Respondent engage in any illegal conduct. Like in Sibron, Officer Calloway had no reason to search Respondent other than he was in a public area where police believed illegal weapon sales were occurring, and Respondent's actions were unusual. Further, Respondent did not even match the description of the individual in the flyer Calloway had previously seen. When Calloway conducted the Terry search of Respondent he properly limited it to the outer layer of his clothing. At that point his reasonable suspicion for stopping and talking with Respondent had been extinguished. Only after he completed the Terry search of Respondent did Calloway notice a leather strap under Respondent's jacket. Calloway was not sure of what the strap was, and only believed that it could possibly be used for a concealed carry holster. Calloway only had a suspicion that Respondent may have been carrying a concealed weapon, and not probable cause as is required by Terry and Sibron. Further, like in Sibron, Calloway was not acquainted with Respondent, and had no actual observations to support his belief that Respondent may have been carrying a weapon. Based upon Respondent's actions, he may have been possibly engaging in illegal conduct, or he may have just have an affinity for bomber jackets, and did not like talking to police officers. There is nothing in the record to support a finding that based upon Respondent's actions, that Respondent was concealing illegal goods. Also, Calloway's suspicion that Respondent was carrying a concealed weapon was dispelled when he conducted the 'frisk' of Respondent. At that point, Calloway no longer had reason to believe that Respondent was in fact carrying a concealed weapon, and the subsequent search was an exploratory one, and subject to probable cause. Because Calloway lacked probable cause to conduct a full search, Calloway's search under Respondent's jacket was unreasonable.

Also, the Supreme Court of North Dakota found a more intrusive search search reasonable when an officer reached into a suspects pocket due to his unwillingness to comply with a standard Terry search. State v. Heitzmann, 632 N.W.2d 1, 9 (N.D., 2001). The court reasoned that “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.” Id. at 8-9 (citing: Illinois v. Wardlow, 528 U.S. 119 (2000)). Further, the court reasoned that a “more intrusive Terry search may be conducted when the detainee attempts to prevent an officer from performing an effective pat-down.” Id. at 9.<sup>1</sup>

However, the facts of Heitzmann are significantly different from those in this case. While Respondent did acted annoyed at the fact that Officer Calloway initiated a ‘frisk’ he at no time resisted or physically attempted to prevent Calloway from performing the search. Although Respondent did use vulgar and offensive language, he never threatened Calloway, nor did he make any attempt to actually prevent the search from happening. While it is clear that Calloway had reasonable suspicion to ‘frisk’ Respondent, the second search under his clothes was not supported by reasonable suspicion, or probable cause as is required for a more in depth search when a suspect is being cooperative, as outlined above. Unlike in Heitzmann, Respondent did brush Calloway’s hand away from his jacket until after Calloway conducted the Terry search with Respondent’s cooperation. Also, unlike Heitzmann, Respondent never attempted to flee, nor attempt to conceal any items from Calloway’s search. Because Calloway conducted a reasonable and proper Terry search of Respondent, without finding any weapons, Respondent’s actions of swatting Calloway’s hand away after the conclusion of the ‘frisk’ did authorize Calloway to extend his search into Respondent’s inner clothing.

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<sup>1</sup> The North Dakota Supreme Court finds support for this assertion in its reading of Adams v. Williams, 407 U.S. 143 (1921).

Because Calloway conducted a proper Terry search of Respondent based upon reasonable suspicion, and did not find any weapons he was unreasonable in continuing his search of Respondent's inner clothing. The mere fact that Calloway saw a leather strap that resembled one used for holsters is not enough to support probable cause, especially because Calloway's previous suspicions had been mitigated after conducting the Terry search. Tracy was not attempting to flee or prevent Calloway from conducting a 'frisk' and Calloway was unreasonable in conducting a further exploratory search without probable cause. Thus, the Thirteenth Circuit was correct holding that Calloway's extended search of Respondent was in violation of the Fourth Amendment.

B. Because the Officer Did Not Actually See a Weapon Under the Suspects Outer Clothing, and Did Not Have Probable Cause After Conducting A Terry Search To Believe a Weapon Existed, the Officer's Continued Search Of the Suspect Was Unreasonable.

This Court has long held that "under certain circumstances the police may seize evidence in plain view without a warrant." Coolidge, 403 U.S. at 465. This Court has held that "the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object," Id. at 466, while in hot pursuit, or during a search within the limited scope of search where a warrant is not required. Id. at 465. Thus, "what 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." Id. at 466. However, "the extension of the original justification [for the search] is legitimate only where it is immediately apparent to the police that they have evidence before them. . ." Id. at 466. Further, for the search to be

reasonable the officer must have probable cause to conduct the search. Arizona v. Hicks, 480 U.S. 321, 326 (1987).

For example this Court held that when an officer, based upon a reasonable suspicion, moved a piece of stereo equipment he saw in a suspect's apartment to read the serial number after entering the suspects apartment and arresting the suspects for a weapons violation. Id. at 329. This Court reasoned that for by moving an object in order to further reveal it constitutes a search, and "probable cause . . . is required." Id. at 328. This Court further reasoned that a mere cursory inspection that does not require any disturbance of the item is already exposed and does not receive Fourth Amendment protection. Id. at 328. However, when an officer is required to actually move an object he must have probable cause. Id.

Here, Officer Calloway lacked probable cause to move aside Respondent's jacket in order to investigate what the leather strap was used for. Calloway stated that he knew that the strap was consistent with the use of a holster used to conceal a firearm, but was not entirely sure what its purpose was for. Like in Hicks, had Caloway been able to see the firearm he would clearly would have had the right to seize it. However, because he had to conduct a search beyond the scope of a 'frisk,' as defined in Terry, and did not have probable cause to conduct the search, the plain-view doctrine does not apply, and the search was unreasonable within the meaning of the Fourth Amendment.

Conversely, this Court held that the seizure of a handgun and subsequent arrest of a suspect was reasonable when an officer stopped a vehicle based on a reasonable suspicion and saw the butt of a revolver protruding from underneath the passenger seat. U.S. v. Hensley, 469 U.S. 221, 235 (1985). The police in Hensley stopped the vehicle based upon a wanted flyer issued by another department. Id. at 224. This Court reasoned that it is reasonable for a an

officer to briefly stop a suspect who was possibly involved in a previously committed crime in order to question the suspect and check identification. Id. at 229. This Court further reasoned that it is the best interest of the public to allow reasonable stops based upon reasonable suspicion, and not probable cause, when obtaining reasonable cause could substantially hinder the investigation of crimes. Id. Further, this Court reasoned that reliance on another department's wanted flyer that was issued based upon reasonable suspicion "justifies a stop and request for identification." Id. at 232. Finally, this Court reasoned that when a proper stop has occurred any evidence in plain view is subject to seizure "when [the] evidence in plain view gave probable cause to believe the . . . [suspect] had committed a crime." Id. at 235.

In this case, Officer Calloway's initial stop and questing of Respondent was reasonable. Like in Hensley, Calloway reasonably relied on information that led him to believe that an individual was involved in illegal conduct that could have been occurring where Respondent was stopped. However, after Calloway stopped and interviewed Respondent, and completed a Terry search he did not have probable cause to arrest Respondent, nor did he have probable cause to continue a search. Unlike Hensley, Calloway did not actually see any items in plain view that would have led him to believe that Respondent had committed a crime. Respondent did not actually see a gun, nor did he definitively see a device that is used to conceal a weapon. Calloway only saw an item which he believed may have been consistent with such a device. Lacking probable cause to conduct a further search, and the fact that he did not actually see anything illegal in plain view, the plain view doctrine does not apply. Because Calloway did not have probable cause to conduct a further search, and because the plain view doctrine does not apply, Calloway's search of Respondent's inner garments and the subsequent seizure of the

firearm and arrest of Respondent was unreasonable within the meaning of the Fourth Amendment.

Because the plain-view doctrine requires that an officer see contraband in plain view, and Calloway never actually saw the firearm, his search was unreasonable. Further, because Calloway only had reasonable suspicion, and therefore lacked probable cause to conduct a more thorough search, the plain-view doctrine does not apply and the search was unreasonable. Thus, the Thirteenth Circuit was correct in its holding that the plain-view doctrine is inapplicable in this case, and Calloway's further search of Respondent was in violation of the Fourth Amendment.

## II. FIRING A POLICE OFFICER FOR OFF DUTY PRIVATE SEXUAL CONDUCT IS A VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14<sup>TH</sup> AMENDMENT

The Fourteenth Amendment states that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .” U.S. Const. amend. XIV. By firing the Respondent, the Rushmore County Police Department deprived him of his liberty in violation of the Constitution.

### A. The Right To Engage In Private Sexual Conduct Free From Government Interference Is A Fundamental Right And Any Infringement Of The Right Must Be Analyzed By The Court By Means Of Strict Scrutiny.

The Court of Appeals in this case found that it was appropriate to apply an intermediate level of scrutiny to the question of whether the Respondent's firing by the Police Department violated his 14<sup>th</sup> Amendment rights. Tracy v. Rushmore County, (2007 13<sup>th</sup> Cir.). After reviewing the

language of Lawrence v. Texas, 539 U.S. 558 (2003), the Court of Appeals concluded that the Lawrence Court applied a test that balanced the states interest against those of the individual. Respondent agrees that a heightened level of scrutiny is required in this case. However, based on the language of Lawrence, and the cases upon which it relied, it is more appropriate to apply a strict scrutiny standard, and it is clear that the Police Departments action do not meet such a standard. In the alternative, even if an intermediate standard of scrutiny is applied, the firing of the Respondent still must be found to be a violation of his Due Process protections under the 14<sup>th</sup> Amendment.

When a fundamental right is in question, the state must show that there is a “compelling state interest” and the action or restriction on the right must be “narrowly drawn.” Roe v. Wade, 410 U.S. 113, 155 (1973). Fundamental sexual privacy rights were first acknowledged by the Court in Griswold v. Connecticut, 381 U.S. 479(1965). The case involved the rights of married couples to make decisions without government interference concerning their private sexual behaviors, namely contraception. Id. at 485. The Court found that such laws or state actions which infringe on relationships “lying within the zone of privacy” may not be regulated by means “which sweep unnecessarily broad and thereby invade the area of protected freedoms.” Id. The Lawrence Court recognized the sexual privacy right illuminated by Griswold, and more importantly the extension of this right to single persons in the case of Eisenstadt v. Baird, 405 U.S. 438 (1972). Lawrence, 539 U.S. at 565. Adding to their analysis the weight of Roe and Carey (Carey v. Population Services Int’l, 431 U.S. 678 (1977)), the Court stated that the line of cases “confirmed that the reasoning of Griswold could not be confined to the protection of rights of married adults.” Lawrence, 539 U.S. at 566.

The Lawrence Court then took on Bowers v. Hardwick, 478 U.S. 186 (1986) overturning the decision which had upheld similar anti sodomy laws as those before the Court in Lawrence. Bowers was decided based on a rational basis test, namely because the Bowers Court did not believe that there was a fundamental right for “homosexuals to engage in sodomy.” Bowers, 478 U.S. at 190. The strongest signals from the Lawrence opinion that strict scrutiny should be the proper standard are the Court’s admonition of Bowers “failure to appreciate the extent of the liberty at stake” Lawrence, 539 U.S. at 567, and the Lawrence Court’s own formation of the question to be answered. Specifically the Court in Lawrence found that Bowers was incorrect to look at the statute as a simple proscription of certain sexual conduct. Id. The statutes instead must be acknowledged to have “far reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.” Id. To highlight this point, and clearly place private sexual behavior within the zone of privacy protected by the 14<sup>th</sup> Amendment, the Court explicitly stated that it granted cert in Lawrence to consider among other things:

“ Whether petitioner’s criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.” Id. at 564.

The Lawrence Court went on to find that the convictions and the statute criminalizing their private sexual conduct did indeed violate the petitioner’s Due Process rights. Id. at 576. Quoting and adopting the reasoning and conclusions of Justice Stevens’ dissent in Bowers , the Court reiterated that decisions by either married or unmarried people concerning “the intimacies of their physical relationships, even when not intended to produce offspring, are a form of liberty protected by the Due Process Clause of the Fourteenth Amendment.” Lawrence, 539 U.S. at 578, (quoting Bowers, 478 U.S. at 216). The Court concluded that the Texas anti sodomy law

was a violation of the petitioners Substantive Due Process rights, and quoted Casey in stating that “it is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” Lawrence, 539 U.S. at 578 (quoting Casey, 478 U.S. at 216)

In two Appellate level cases fighting the armed forces “Don’t Ask Don’t Tell” (DADT) policy, the First and Ninth Circuits found the need for a heightened level of scrutiny. Witt v. Department of the Air Force, 527 F.3d 806 (2008 9th Cir.), Cook v. Gates, 528 F.3d 42 (2008 1st Cir.). In Witt, an Air Force Major was honorably discharged from the Air Force for engaging in a homosexual relationship. Witt, 527 F.3d at 810. Interpreting the Supreme Court’s ruling in Lawrence, the Ninth Circuit found the need for a heightened level of scrutiny, and remanded to the lower court so as to develop the record more fully to determine how important the governmental interest was. Id. at 821. The dissenting Judge in Witt argued for a strict scrutiny standard, citing Lawrence and its treatment of the fundamental privacy right in question. Id. at 823 (Canby, J., dissenting). Specifically the dissent contended that “though the Court did not expressly characterize the right as ‘fundamental,’ it certainly treated it as such.” Id. Out of this analysis, the dissent came to the conclusion that, as with any fundamental right announced by the Supreme Court, “Lawrence itself mandates strict scrutiny of the ‘Don’t Ask Don’t Tell’ statute.” Id.

Similarly, the First Circuit came to a similar conclusion as the majority in Witt, finding Lawrence to require a heightened level of scrutiny. Cook, 528 F.3d at 52. Faced with a challenge to DADT by twelve former military members, Cook held that the proper approach to the claim of Substantive Due Process violation was a balancing of the state interest against the privacy interests of the individual. Id. Of particular importance was the fact that Lawrence relied on landmark protected liberty interest cases (namely Griswold, Roe, Casey and Carey) and 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.” Id.

Furthermore, it was acknowledged that rational basis review could not have been the standard applied as the Texas sodomy statute would have been upheld on the government’s interest in prohibiting immoral conduct. Id. at 53. As stated by the Cook Court, “rational basis review does not permit consideration of the strength of the individual’s interest or the extent of the intrusion on that interest by the law,” which is exactly the type of inquiry engaged in by the Lawrence Court. Id. at 55. The Court ultimately decided to dismiss the claims of Cook citing the special deference the courts give to Congressional judgment in military matters and the “substantial government interest” in the DADT policy. Id. at 60.

Just as in both Circuit Court cases, it is clear that at the very least a heightened level of scrutiny is required in determining the validity of the Respondents Fourteenth Amendment challenge. Both Courts properly identify that Lawrence did not employ rational basis review, and requires that there be some governmental interest that in some way outweighs the protected liberty interest of the individual. More appropriate than the intermediate level applied by the two majorities is the approach advocated by the dissenting opinion in Witt. Lawrence analyzed and treated the right to be free from governmental intrusion into private sexual choices as a fundamental right, and thus as with other fundamental rights, it must be subject to strict scrutiny review.

While the Lawrence Court does not expressly say that they are applying a strict scrutiny test, it is clear from the way in which it frames and answers the question about private sexual behavior that the opinion recognizes that private sexual behavior is indeed a fundamental right. All of the cases the Court relies upon in Lawrence are cases dealing with the fundamental rights

that are guaranteed protection under the Fourteenth Amendment. Furthermore, the Court admonishes the Bowers decision for failing to understand the importance of the rights that were being invaded. By framing their own question around private sexual conduct, and through its analysis of case law, the Court in Lawrence sent a clear signal the private sexual behavior falls within the zone of privacy protected by the Fourteenth Amendment. As numerous prior Supreme Court cases have noted, when such a right has or is being infringed upon by the government, the State must show that they have narrowly drawn the remedy to what must be a compelling state interest. This is the level of scrutiny that must be applied to all cases which involve private sexual conduct. In the alternative, as Witt and Cook both illustrate, at the very least an intermediate level of scrutiny is required as Lawrence clearly did not utilize a rational basis review. Under either level, the state cannot show that its intrusion is compelling or even legitimate to an extent that it justifies a violation of Respondent's Constitutional rights.

B. Under Strict Scrutiny or Intermediate Scrutiny, The Rushmore County Police Department Violated The Respondents Due Process Rights Under the Fourteenth Amendment In Firing Him For Private Sexual Conduct.

The Rushmore County Police Department cannot satisfy either a strict scrutiny or intermediate scrutiny standard in defending their actions against the Respondent. There is no legitimate state interest, let alone a compelling state interest in firing the Respondent for his off duty conduct as would be required by the long line of Substantive Due Process cases. Even accepting the proposition that there is a stronger interest in restricting the behavior of police officers than the general public, the Police Department still cannot show that the infringement upon Respondents rights were permissible. While at the time in question he was married, the Respondent was separated from his now ex wife and the only reason that anyone became aware of his intimate relationship was because he was arrested by a fellow officer (as discussed above,

after an illegal search) while undercover. The truth of the matter is that the Respondent was fired because he was having a sexual relationship with the daughter of the Chief of Police. It would not matter who he was engaging in private sexual behavior with, as firing the Respondent for such behavior would violate his rights; however it is illustrative of the weakness of the Petitioner's case that the Respondent was seemingly fired because of who he was having an 'extra marital' relationship with, not for having one at all. The adultery statute on which Petitioner relies to justify the Police Department's action is itself a violation of protected Constitutional rights and certainly cannot be used to support the deprivation of liberty sustained by the Respondent. Under the heightened scrutiny of Lawrence, the Police Department's actions and the statute upon which it relied are violations of the Respondent's Fourteenth Amendment Due Process rights.

i. There Is Neither A Compelling State Interest Nor Even A Legitimate State Interest In Terminating The Respondent For Engaging In An Off Duty Sexual Relationship In Violation Of An Unconstitutional Adultery Statute.

As discussed above, when a fundamental right is at issue, the state must show a "compelling interest" and that the means it chooses to restrict a person's liberty must be "narrowly drawn" to meet that compelling interest. Roe, 410 U.S. at 155. The required compelling state interest is clearly absent from the circumstances of this case. Furthermore, even under the balancing test analysis of Lawrence put forth by the First Circuit in Cook, there is no legitimate state interest in firing a police officer for a private sexual relationship that could outweigh the fundamental right to privacy in such matters.

In a post Lawrence Eleventh Circuit Court of Appeals case, Judge Birch incorrectly ruled that there was no right to sexual privacy under Lawrence v. Texas, and upheld an Alabama statute that prohibited commercial distribution of "sexual devices." Williams v. Attorney

General of Alabama, 378 F.3d 1232 (2004 11th Cir.) The Court interpreted Lawrence as advocating a rational basis review of sexual rights because it did not expressly proclaim that sexual privacy was a fundamental right. *Id.* The dissent makes a more thorough and, Respondent argues, correct analysis of Lawrence and the application to the Alabama statute. Williams, 378 F.3d at 1253 (Barkett, J., dissenting). Circuit Judge Barkett found that based on the question the Court set out to answer in Lawrence, and its conclusion, that Lawrence indeed made clear that an individual's private sexual conduct is protected as a fundamental right under the Due Process Clause of the Fourteenth Amendment. *Id.* at 1254 (Barkett, J., dissenting). Rather than disagree with the majorities proposition that Lawrence didn't "create a new fundamental right," Barkett agreed, finding rather that Lawrence merely affirmed that a fundamental right to sexual privacy that had already existed. *Id.* Finding that a fundamental right was at issue in the claim against the Constitutionality of the sex toy prohibition, Barkett cited the strict scrutiny language of Roe ("compelling interest . . . narrowly drawn") as the appropriate standard to use. *Id.* The only state interest relied upon by the majority in Williams was that of public morality. Williams, 378 F.3d at 1250. Barkett concluded in his dissent that public morality fails even a rational basis standard, and falls far short of any compelling interest that would be required to sustain a law that infringes upon a fundamental right. *Id.* at 1259 (Barkett, J., dissenting). As for the interest of the individual, Barkett likened the sex toy law to the anti sodomy law of Lawrence, and found that it placed a heavy burden on "private adult sexual activity within the home." *Id.* at 1257.

Just as the dissent in Williams found, the current action by the Police Department, as well as the adultery statute on which the firing was predicated, are burdens on the private sexual activity of consenting adults in their homes. The reason for the firing, as conceded by the Police Chief, was that the Respondent was committing adultery. The state interest in the statute itself

can hardly be said to be compelling or even legitimate, especially in light of the fact that the statute is rarely enforced. At most the states interest would be similar to those asserted in Williams, namely public morality. Just as the dissent recognized in Williams, public morality is perhaps not even a legitimate interest under a rational basis test, and certainly not an interest that could outweigh the fundamental privacy right which the Respondent has to engage in private sexual conduct without government interference. By relying on a statute that itself infringes on a fundamental right to privacy, and firing the Respondent for his private sexual conduct, the Rushmore County Police Department violated the Fourteenth Amendment. There was no legitimate or compelling state interest asserted or conceived in the adultery statute or firing that could permit such a deprivation of Constitutional rights.

Lawrence itself is illustrative of the proposition that the actions by the Rushmore Police Department and the adultery statute cannot pass Constitutional muster. In Lawrence, two men were convicted under an anti sodomy statute that made it illegal for two people of the same sex to engage in certain sexual behavior. Lawrence, 539 U.S. at 558. After an in depth analysis of Bowers, a case based on a similar statute, and the history surrounding anti sodomy laws, the Court overturned Bowers and held that the Texas statute was an impermissible violation of the Substantive Due Process Clause of the Fourteenth Amendment. Id. at 579. Citing prior Supreme Court case law on fundamental rights, the Court concluded that there was “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” Id. at 572. To illustrate this point, the opinion referenced the 1980 ALI Model Penal Code §213.2 comment 2 which explicitly did not recommend criminal penalties for “consensual sexual relations conducted in private” on three grounds: “(1)the prohibitions undermined respect for the law by penalizing conduct many

people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail.” Id. at 573 (citing ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955)). On the weight of authority and the acknowledgment that sexual privacy is a protected right, the Court held that “the petitioners are entitled to respect for their private lives,” and that the State could not make their “private sexual conduct a crime.” Id. at 578. In striking down the statute the Court concluded by finding that the “Texas statute further s no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” Id.

The Respondents firing and the adultery statute upon which it was purportedly based also can further no legitimate state interest which would justify the infringement upon the Respondent’s Fourteenth Amendment rights. The facts of this case illustrate perfectly the comments of the Model Penal Code which the Lawrence court found useful in their determination that sexual privacy should be protected. The Respondent was engaged in a private sexual relationship which was not harmful to anyone, and however a person may feel about adultery, it is far from a rare occurrence in society. Perhaps most disturbing is the third ground; this adultery statute is rarely enforced, and in this case was used as a pretext for firing a police officer because he was having a relationship with the Police Chief’s daughter. A fundamental right, which this Court has deemed sexual privacy to be, cannot be abridged by a law aiming to control moral behaviors, be they based on notions of fidelity or anti homosexual sentiment. Furthermore, it is abhorrent to think that the Constitution would allow a person’s *private* sexual conduct to be grounds for dismissal simply because an employer does not believe that a relationship is appropriate. As Lawrence reiterates, “there is a realm of personal liberty which the government may not enter.” Lawrence, 539 U.S. at 578 (quoting Casey, 505 U.S. at 847 ).

In the same vein as anti sodomy statutes, the adultery statute in this case, and the firing of a police officer for off duty private sexual conduct is a Constitutional violation, and must not be allowed to stand.

ii. Regulation Of Police Officer Conduct Does Not Provide Any Sufficient Or Additional State Interest Which Would Justify An Infringement Of A Fundamental Right To Privacy.

The Rushmore County Police Chief initially fired the Respondent for “behavior unbecoming an officer” and subsequently conceded that Respondent was fired for violating the adultery statute. The status of the statute has been discussed in the prior portion of this brief. Especially considering the importance the Supreme Court has attached to fundamental sexual privacy rights, there is no compelling or legitimate state interest in regulating the conduct of police officers that could somehow justify the Rushmore County Police Department to infringe upon the Respondent’s rights by firing him for his off duty private sexual conduct.

In 1983, before Bowers v. Hardwick, and twenty years before Lawrence v. Texas, a United States District Court found that a Michigan Police Department had violated a part time officers Fourteenth Amendment rights by firing him for engaging in a relationship with a married woman. Briggs v. North Muskegon Police Department, 563 F.Supp. 585 (W.D. Mi. 1983). In the case, a man who was separated from his wife moved in with a married woman and was suspended for conduct unbecoming an officer, and subsequently fired. Id. at 587. It was undisputed that the officer had performed his job satisfactorily until his suspension. Id. at 586. The District Court found that under the Griswold, Eisenstadt and Carey, the officer had a Constitutionally protected right to privacy regarding his private sexual conduct. Id. at 588. After determining that Supreme Court case law recognized this right, the court held that there was no governmental interest furthered by firing the officer in light of the fact that there was clearly no

effect on his ability to perform his job. Id. at 592. Addressing the issue raised by the Police Department concerning moral community standards, the Court explicitly rejected “the notion that an infringement of an important constitutionally protected right is justified simply because of general community disapproval of the protected conduct.” Id. at 590. Conceding that there is some interest in police officers conduct when it affects their job performance, the Court concluded that there was a Constitutional right to privacy, and the state must make some showing that private off duty intimate relationships actually have an effect on job performance to warrant any action. Id.

Without the guidance of Lawrence v. Texas, the Briggs Court came to the same conclusion that the Supreme Court would come to twenty years later: Supreme Court case law had already acknowledged a right to sexual privacy in cases such as Griswold and Eisenstadt. Briggs, well ahead of its time, stands for the proposition that an individual’s right to sexual privacy may not be infringed upon simply by virtue of the fact that the individual in question is a police officer. Just as the Michigan Police Department, the Rushmore County Police Department has arguably some interest in regulating police officers so that they may effectively protect and serve. However, the interest required by the State to overcome a fundamental Fourteenth Amendment right is quite high, and surely off duty conduct that has no affect on job performance could not rise to such a level. The Respondent was fired for ‘conduct unbecoming,’ just as the officer in Briggs, and here, as in Michigan case, there is nothing close to a significant enough state interest to permit the police department to act based on an officers private sexual relationship. There was absolutely no effect on the Respondent’s job performance, in fact the relationship was not even known before he was arrested after an improper search while working under cover. As the District Court in Michigan concluded,

sexual privacy is a protected right, and absent significant interests in the officers job performance, the Rushmore County Police Department may not Constitutionally fire officers for their off duty private sexual conduct.

### **Conclusion**

Based upon a totality of the circumstances Calloway acted reasonably when he ‘stopped’ and ‘frisked’ Respondent. However, once Calloway conducted the Terry search, in order to provide for his own safety, and failed to find any weapons, Calloway’s suspicion was relieved. Respondent was cooperative in the initial search and any further intrusion would have required probable cause. Because Calloway’s belief that the leather strap he observed was used to conceal a weapon was only based upon reasonable suspicion and not probable cause, Calloway lacked the requisite authority to continue the search. In addition, because the plain-view doctrine is not applicable, Calloway was unreasonable in continuing his search, and the Thirteenth Circuit was correct in finding that Calloway violated Respondent’s Fourth Amendment rights.

The Rushmore County Police Department violated the Respondent’s Constitutional rights by firing him for an off duty private sexual relationship that had no bearing on his job performance. Under a number of Supreme Court cases, notably *Lawrence v. Texas*, private sexual conduct is a fundamental right and the State must have a compelling interest, and means that are narrowly tailored, in order to legitimately infringe upon an individuals sexual choices. The adultery statute, under the guise of which the Respondent was fired, is itself an infringement of his fundamental rights, and the Police Department’s actions an even more egregious example

of the State invading the personal privacy of an individual. The Respondent was a respected and qualified police officer of seven years, was separated from his wife and engaged in a consensual private relationship with a woman that had no impact on his ability to perform his job. The State has shown no reason why such termination is Constitutional, and the Respondent should be given the opportunity to pursue his Section 1983 claims.

The respondent respectfully requests that this Court affirm the decision of Thirteenth Circuit reversing the District Court's grant of summary judgment, and remand for further proceedings.