No. 08-31958

In the

Supreme Court of the United States

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

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BRIEF FOR THE RESPONDENT

Team G
Counsel for the Respondent

QUESTIONS PRESENTED

I. Does the Fourth Amendment prohibit a police officer, acting under a reasonable suspicion, from moving aside an exterior garment of a suspect?

II. 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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The Thirteenth Circuit Court of Appeals' opinion in *Tracey v. Rushmore County*, No. 06-6436 (April 29, 2007), is unpublished but available in the Record. (R. at 8-12). The Circuit granted the petition for review. The United States District Court for the District of Craven, issued an opinion which is unpublished but available in the Record. (*Id.* at 2-7.)

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

While working undercover on a case involving the sale of illegal firearms, Plaintiff William Tracey's investigation was compromised when Rushmore County Police Officer Maxwell Calloway, approached and searched him. (R. at 3). Unbeknownst to Calloway, Tracey was also an officer with the Rushmore County Police Department but was undercover and belonged to a different precinct. (*Id*. at 2). Calloway approached Tracey on the suspicion that he was involved in criminal activity, questioned him, and searched him for weapons. (*Id*. at 3). After the frisk, Calloway reached out and pushed Tracey's jacket aside to reveal a weapon that was not discovered during the frisk. (*Id*. at 3).

Calloway then performed a full search, incident to what he perceived was a violation of a Craven statute prohibiting possession of a concealed weapon. (*Id*. at 3). Among the items recovered in the search was the contact information for the Police Chief's daughter, with whom Tracey was romantically involved. (*Id*. at 3) Tracey was subsequently fired for his "involvement in an extramarital affair in violation of the state's adultery statute." (*Id*. at 4).

Tracey claims that a violation of his Fourth Amendment right against an unreasonable search occurred when Calloway moved his outer garment during the stop. Tracey also claims that termination based on an extramarital affair is a violation of due process.

A. The Search

William Tracey served his community as a police officer with the Rushmore County Police Department for 7 years. (*Id*. at 2). On June 7, 2005, Tracey was working undercover on the north side of McDonough Square. (*Id.)* The undercover operation was aimed at the sale of illegal firearms and required the utmost caution. (*Id.)* Thus, Tracey did not carry any identification that could tie him to law enforcement and he was carrying a department issued "Glock 21" .45 caliber pistol, for which he had authorization. (*Id*. at 3).

While seated on a bench in McDonough Square, Tracey attracted the attention of Officer Maxwell Calloway. (*Id*. at 2). Calloway was also an officer with the Rushmore County Police Department, but worked in a different precinct than Tracey, and was unaware that Tracey was also an officer. (*Id.)* For 8 months prior to this incident, Calloway was working on investigation into a firearms distribution network that has ties to Red Tide ("R-T"), a private military company. *Id.*

Calloway was present in McDonough Square investigating a potential meeting between an R-T official and a buyer. *Id.* Although Tracey did not resemble the R-T official that Calloway was watching for, Calloway became suspicious of Tracey's clothing because he was

wearing a jacket despite relatively warm temperatures. (*Id.)* After noticing the jacket, Calloway continued to observe Tracey. (*Id.*) According to Officer Calloway, his suspicions increased because Tracey seemed agitated and was constantly scanning the area and the rooftops. (*Id.)*

At this point, Calloway made the decision to approach the plaintiff. (*Id.)* Tracey became increasingly agitated and would not respond immediately when Calloway asked his name. (*Id*. at 3). This solidified Calloway's reasonable suspicion and he initiated a pat down to determine if Tracey was armed. (*Id.*) Calloway did not feel any significant objects in the course of the pat down. (*Id.*)

However, as Tracey turned to leave, Calloway caught a glimpse of a leather strap that was largely hidden by Tracey's jacket. (*Id.*) Calloway admitted that he did not get a close look at the strap and was unsure of the strap's purpose, but felt that the strap may be part of a holster used to carry a firearm. (*Id.*) In order to investigate the strap further, Calloway attempted to move Tracey's jacket aside, to expose the strap. (*Id.*) Tracey resisted by brushing Calloway's hand away, at which point Calloway reached out more forcefully and managed to expose Tracey's pistol. (*Id.*)

Tracey attempted to explain that he was a police officer but could not provide proof since he did not carry identification while undercover. (*Id.*) Since Calloway assumed that Tracey was violating the law by carrying a concealed weapon, he arrested Tracey and opted to perform a more thorough search at the precinct. (*Id.*)

B. The Termination

Upon full search at the precinct, Officer Calloway seized Tracey's cellular phone and came across the contact information for Jacqueline Malone, daughter of the Rushmore County Police Chief Patrick Malone. (*Id*. at 3-4). Since Calloway still believed Tracey to be involved with illegal arms sales, he contacted Ms. Malone out of fear for her safety. (*Id*. at 4). Ms.

Malone was surprised by the call and immediately disclosed that she was having an affair with Tracey, an undercover police officer. (*Id.*) Although Calloway realized his mistake and apologized to Tracey, he still publicly disclosed the relationship between Tracey and Ms. Malone. *Id.*

Tracey was technically married at the time of the affair with Ms. Malone. (*Id.*) However, he had been separated for 18 months and had already been served with divorce papers. (*Id.*) In addition, the affair was never conducted while the plaintiff was on duty or in the course of performing his duties. (*Id.*) Nevertheless, Tracey was fired the following day for violating the state's adultery statute. (*Id.*) Enforcement of the adultery statue against Tracey constituted the first time in over twenty years that any one was held to the standard of the statute. (*Id.*)

C. Procedural History

Tracey brought a 42 U.S.C. § 1983 action against the Rushmore County Police Department in the United States District Court for the District of Craven, alleging a Fourth Amendment violation and a Fourteenth Amendment due process violation. (*Id*. at 2). Tracey alleged that the Fourth Amendment violation occurred when Officer Calloway searched him without probable cause. (*Id.*) The Court held that Officer Calloway acted reasonable when he moved Tracey's jacket aside to determine if he was armed. (*Id*. at 5). Judge MacGowan stated that extending the search by moving plaintiff's jacket was reasonable to ensure the officer's safety and only slightly beyond the search authorized in prior cases. (*Id.*)

Tracey further alleged that a Due Process violation occurred when he was terminated as punishment for engaging in an extramarital affair. (*Id*. at 2). However, the District Court failed to categorize private sexual activity as a fundamental right or liberty, thus according it only rational basis review. (*Id*. at 6). Under the rational basis standard, the Court reasoned that the state has an interest in regulating officer conduct and that firing an officer for inappropriate

conduct is rationally related. (*Id*. at 7). Therefore, the Court held that no violation of due process occurred when the police department fired Tracey. (*Id.*)

Tracey appealed to the United States Court of Appeals for the Thirteenth Circuit. The Court reversed the grant of summary judgment with regards to both alleged constitutional violations. (*Id*. at 12). Since Officer Calloway did in fact have reasonable suspicion to approach Tracey initially, he was entitled to perform a brief pat down to locate any possible weapons. (*Id*. at 9). However, when Calloway did not identify any weapons during the pat down or gain probable cause for a more intrusive search, he was not within the bounds of *Terry* to investigate further. (*Id.*) The Court ruled that Calloway exceeded the bounds of a *Terry* stop and the search violated Tracey's Fourth Amendment rights. (*Id*. at 10).

The Court then applied a balancing test between the state's interest and Tracey's interest in maintaining privacy in his personal life. (*Id*. at 11). Here, the state's interest can only be a moral one, and the Supreme Court previously held that it is impermissible to prohibit private sexual conduct to satisfy a moral state interest. (*Id.*) Since the state did not have a valid interest in regulating private sexual conduct, the Court concluded that Tracey's termination for participating in an extramarital affair was a violation of the Due Process Clause of the Fourteenth Amendment. (*Id.* at 12).

This Court granted the Rushmore County Police Department's petition for certiorari.

SUMMARY OF THE ARGUMENT

William Tracey suffered a violation of his Fourth and Fourteenth Amendment rights at the hands of the Rushmore County Police Department. The decision of the Thirteenth Circuit should be affirmed on both counts.

Officer Calloway exceeded the permitted bounds of an investigatory stop when he approached Tracey on the suspicion that criminal activity was in progress. If an officer's suspicion is reasonable, the officer is entitled to approach the suspect and investigate the situation. However, the warrant and reasonableness requirements cannot be abandoned completely. There is a governmental interest in ensuring the safety of officers in course of their duties. Consequently, any search of the suspect without probable cause must be limited in scope to a superficial search for weapons which could pose a threat to the officer. In prior cases, only a limited search of a suspect's outer clothing complied with the stated boundaries of this type of intrusion into privacy.

Here, Officer Calloway approached Tracey with the reasonable suspicion that he was involved in criminal activity. Calloway's suspicion that Tracey may be armed could be quelled only by patting down the outside of Tracey's clothing. Calloway performed this but failed to locate any weapons. Since he lacked probable cause, Calloway violated the Fourth Amendment when he continued to move Tracey's jacket aside. The search was far from "limited."

Calloway's search could only extend further if his level of suspicion rose to probable cause. The central principle of the "plain view" doctrine is that a person loses his expectation of privacy in objects that are in plain view. Therefore, if an officer views a piece of evidence or contraband from a lawful vantage point, he can seize it and the evidence can provide a basis for probable cause. The "plain view" doctrine has two key elements.

First, the object must be in plain view and readily identifiable. An officer must have probable cause to believe that the visible item is evidence or contraband. Officer Calloway only saw a small piece of a leather strap. Although he believed that it *may* be part of a holster used to carry a weapon, he could not be sure. Additionally, the existence of a holster does not ensure the existence of a weapon.

Second, the officer must view the evidence from a lawful vantage point. Calloway was able to view the weapon only after invalidly exceeding the bounds of *Terry*. If he had abided by the limited nature of the stop, he would never have been in the position to see the weapon in the first place. The search must be justified before it is performed. Officers cannot embark on an open-ended search in hopes that it will reveal a justification for the same search.

Nothing in the circumstances of the incident justified the officer's extended search. A cursory search for weapons ends with a pat down of outer clothing. Furthermore, a glimpse of a leather strap does not entitle an officer to extend a warrantless search.

The Due Process Clause of the Fourteenth Amendment provides American citizens with certain fundamental rights. This Court should find a fundamental right to sexual privacy. It is argued that there is a *de facto* fundamental right to sexual privacy that has been created by a series of Supreme Court decisions over the past 50 years. This Court has created and expanded this *de facto* right to the fundamental right to sexual privacy through the *Griswald, Eisenstadt*, and *Lawrence* decisions. Accordingly, it is argued that Tracey had a fundamental right to sexual privacy when he was fired from the Rushmore County Police Department.

This Court held that the government may only infringe upon fundamental rights if the infringement passes strict scrutiny review. To pass strict scrutiny, the government must show that the infringement is 1) narrowly tailored, 2) to serve a compelling governmental interest, 3)

by the least restrictive means possible. Rushmore County Police Department's termination of Tracey because of his affair with Mrs. Malone fails all three prongs of this test. Chief Malone's termination of Tracey from the police force one day after he found out about Tracey's private sexual life was a broad action that was not narrowly tailored. The state's purported reason for firing Tracey – the violation of a state adultery statute – does not rise to level of a compelling governmental interest, as the statute had not been enforced in twenty years. Finally, the Rushmore County department could have suspended Tracey, or given him a hearing. The immediate firing of Tracey was not the least restrictive means of achieving any compelling state interest.

Accordingly, Rushmore County Police Department's infringement should be found unconstitutional. Even if this Court finds that the right to sexual privacy is only a liberty interest, The Police Department's termination of Tracey because of his sexual affairs is still unconstitutional. Under substantive due process, government infringement of liberty interests must pass rational basis review. Rational basis review involves a two-prong test – it requires that a government's actions be 1) rationally related to a 2) legitimate state interest in order for a violation of a liberty interest to be constitutionally permissible.

Rushmore County has not proven how the violation of a state statute on adultery affected the legitimate state interest of Tracey's job performance as a police officer. Tracey was a fully functioning cop who was only terminated once his adultery was made known. The Rushmore County Police Department has not proven how the existence of adultery affected Tracey's job performance. The department has not shown how knowledge of Tracey's private sexual affairs was rationally related to a legitimate interest. Accordingly, Rushmore County Police

Department's termination of Tracey should be found unconstitutional under either strict scrutiny or rational basis review.

Therefore, the Thirteenth Circuit should be affirmed on both counts.

ARGUMENT

I. THE FOURTH AMENDMENT REQUIRES THAT AN OFFICER HAVE PROBABLE CAUSE TO PERFORM A SEARCH THAT EXTENDS BEYOND A "FRISK," AND MOVING A SUSPECT'S OUTER GARMENT EXCEEDS THE BOUNDS OF A "FRISK."

The Thirteenth Circuit correctly ruled that William Tracey's constitutional rights were violated when an officer pushed Tracey's jacket aside during a stop that was justified only by reasonable suspicion. When an officer has a reasonable suspicion that a person is engaged in criminal activity the officer is entitled to make an investigatory stop and perform a limited search for weapons. *Terry v. Ohio,* 392 U.S. 1, 30 (1968). This type of search is referred to as a "Terry stop" or "stop and frisk." However, absent probable cause, the search must be confined to patting down the suspect's outer garments in search of a weapon. *Sibron v. New York,* 392 U.S. 40, 65 (1968). Probable cause can arise and justify an arrest and full-blown search if during the course of a valid stop the officer observes a weapon or other incriminating evidence in plain view (the "plain view" doctrine). *U.S. v. Hensley,* 469 U.S. 221, 235 (1985). In this situation the evidence or contraband must be readily identifiable without requiring further investigation. *Horton v. California,* 496 U.S. 128, 136 (1990). Here, the limitations of the stop were surpassed when the officer went beyond a simple pat down of outer garments. Additionally, the "plain view" doctrine cannot be invoked because the weapon was not in plain view and a glimpse of a leather strap certainly did not provide the officer with probable cause to perform a more invasive search.

A. During a *Terry* stop, an officer is limited to a pat down search of the suspect's exterior clothing.

Officer Calloway violated the Fourth Amendment when he brushed aside Tracey's jacket because moving an outer garment exceeds the scope of a *Terry* stop. The Fourth Amendment

proclaims that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IX. In effect, the Fourth Amendment inherently requires a balancing of the state's interests with the rights of the individual and prohibits only the searches and seizures that are considered "unreasonable" under this type of analysis. *Elkins v. United States,* 364 U.S. 206, 222 (1960).

The state's interest is naturally in the prevention and detection of crime, but also in ensuring officer safety. *Terry,* 392 U.S. at 22-23. In *Terry*, the court held that governmental interests in crime prevention and safety outweigh a personal interest in privacy when an officer has a reasonable suspicion that a suspect is committing a crime and may be dangerous. *Id.* at 24. Police officers are forced to take "swift action predicated upon the on the spot observation . . . [which] could not be subjected to the warrant procedure." *Id.* at 20.

It would be unreasonable, however, for the governmental interests to cast such a shadow on personal privacy interests that law enforcement could perform any level of search or seizure based merely on suspicion. *Id.* at 24-25. Thus, the court in *Terry* further defined the limits placed on law enforcement when performing searches based on less than probable cause. *Id.* Notably, the officer's actions were reasonable because he only patted down the outer clothing of the suspects. *Id.* at 29-30. The governmental interest at issue here was the interest in allowing the officer to take proper safety precautions when dealing with potentially armed suspects. *Id.* at 22. Therefore, justification for the search was the need to evaluate the present danger, and the officer's search was tailored to that end. A pat down would likely reveal weapons and yet does not invade the suspect's privacy more than is necessary to ensure safety of the officer and bystanders. *Id.* at 30. Essentially, a limited search for weapons is deemed reasonably related to

the "exigencies which justify its initiation." *Id.* at 26. The scope of a *Terry* stop was reinforced when this Court noted that a *Terry* stop authorized only a "limited patting of the outer clothing of the suspect for concealed objects" that could be used as weapons. *Sibron,* 392 U.S. at 65. In fact, once it is determined that a suspect is not carrying a weapon further exploration is considered unreasonable. *Minnesota v. Dickerson,* 508 U.S. 366, 378 (1993).

The notion of "reasonableness" is inherent in Fourth Amendment inquiries. Each individual case demands a totality of the circumstances approach in order to take into account novel factual situations. *Ohio v. Robinette,* 513 U.S. 33, 39 (1996). A holistic approach is warranted in determining whether a specific intrusion was justified. *Id.* Only "clear and articulable facts" can support a warrantless search or seizure. *Terry,* 392 U.S. at 21. Citizens must not have their Fourth Amendment rights disregarded on the basis of "inarticulate hunches." *Id.* at 22. Courts have previously noted that situations where a suspect acts particularly evasive or resists a valid *Terry* search may call for a more invasive search. *State v. Heitzman,* 632 N.W.2d 1, 9 (N.D. 2001). In *Heitzman*, the suspect attempted to break free from the officer during a valid frisk and his behavior suggested he may try to flee. *Id.*

Here, Officer Calloway's search strayed outside the boundaries outlined by this Court in *Terry*. 392 U.S. 1. Calloway did not have probable cause to arrest or thoroughly search Tracey, but rather a reasonable suspicion that he could be involved in criminal activity. Even assuming that Calloway was within the bounds of *Terry* to pat down Tracey, he was limited to a narrow search aimed at locating anything that felt like a weapon. If Calloway had stopped after he failed to locate a weapon during the frisk, he may have fallen within the permissible limitations. But, he continued his search by pushing Tracey's jacket aside and this cannot be justified without probable cause. In *Terry,* the officer's conduct was reasonable *because* it was limited to the outer

garments. 392 U.S. at 25. As in *Dickerson*, once Calloway performed the pat down and did not find a weapon, he was restrained by the Fourth Amendment and obligated to cease the search. 508 U.S. at 378.

Despite Tracey's angry outbursts during the frisk, he did not attempt to frustrate the pat down or physically threaten Calloway. Tracey's behavior did not rise to a level that would justify a more extensive search. Unlike the suspect in *Heitzman*, Tracey did not require Calloway to physically restrain him during the frisk nor did he try to run away. His behavior did not justify any further search than was authorized by *Terry.*

Since a valid Terry stop permits only a very limited pat down search of a suspect's outer clothing, Calloway committed a constitutional violation when he performed a more intrusive search on Tracey.

B. The plain view doctrine does not apply because Calloway could not reliably identify the weapon and did not view the weapon from a lawful vantage point.

The "plain view" doctrine does not apply here because the weapon was not in plain view or immediately identifiable. The Fourth Amendment protects a citizen's expectation of privacy. *Illinois v. Anderson,* 463 U.S. 765, 771 (1983). One loses a privacy interest in an object when an officer can plainly see the object from a lawful vantage point. *Id.* So, if evidence is in plain view, seizing it does not constitute a violation. *Payton v. New York,* 445 U.S. 573, 587 (1980).

This Court has interpreted the Fourth Amendment to imply that if an "inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause." *Anderson,* 463 U.S. at 771. In the course of a valid *Terry* stop, a suspect loses his privacy expectation in evidence or contraband that is in plain view, and the officer can seize the item without a warrant. *Hensley,* 469 U.S. at 235. In *Hensley,* during a *Terry* stop, officers saw a portion of a gun in plain view inside the suspect's car. *Id.* at 225. This Court held

that under the “plain view” doctrine, the officers were authorized to seize the gun and any other evidence in plain view. *Id.* at 235. The evidence that police discovered gave them probable cause to arrest the suspects and do a full search incident to lawful arrest. *Id.*

Like a *Terry* stop, the “plain view” doctrine must be severely limited in order to fall within the bounds of the Fourth Amendment. It would nullify the prohibition against unreasonable seizures if an officer could seize anything within his view, because “any evidence seized by the police will be in plain view, at least at the moment of seizure.” *Coolidge v. New Hampshire,* 403 U.S. 443, 465 (1971). So, plain view only has “legal significance” if the officer lawfully arrived at vantage point from which he can view the evidence. *Id.* at 465-66. Otherwise, the evidence in plain view is merely the fruit of an illegal search. *See Horton,* 496 U.S. 128, 133-34.

The “plain view” doctrine is also restricted by an additional condition. The item in plain view must clearly be evidence or contraband. *Horton,* 496 U.S. at 136. A warrantless search, like the one permitted by *Terry* is by nature very limited. “The rationale of the exception to the warrant requirement . . . is that a plain view seizure will not turn an initially valid (and therefore limited) search into a ‘general’ one . . . .” *Coolidge,* 403 U.S. at 469-70. To avoid misuse of the “plain view” doctrine, the “incriminating character” of the evidence must be “immediately apparent” without requiring any further search. *Dickerson,* 508 U.S. at 379.

In *Arizona v. Hicks,* 480 U.S. 321, 326-27 (1987), the officer violated the Fourth Amendment when he moved stereo equipment that he suspected was stolen, in order to locate the serial numbers. The search violated the Fourth Amendment because the stereo equipment was unrelated to the reason for the intrusion and it could not be affirmed as stolen without further investigation. *Id.* Its evidentiary relevance was not immediately apparent and thus the search

could not be justified under the "plain view" doctrine. *Id.* The Court went further and held that probable cause to believe that the item is evidence or contraband is required to invoke the "plain view" doctrine. *Id.* If the officer must perform a more intrusive search to determine whether an object is evidence or contraband, its incriminating character is not apparent and the officer would have at best a reasonable suspicion that the object was contraband. *See Dickerson* 508 U.S. at 379. There must be "probable cause to associate the property with criminal activity." *Payton,* 445 U.S. 586. Reasonable suspicion is simply not enough to utilize the "plain view" doctrine.

Here, the circumstances do not support use of the "plain view" doctrine. Most importantly, Tracey's weapon was not in plain view. The gun was located beneath his jacket, in an area where he maintained a valid expectation of privacy. The privacy interest would be eliminated only if the officer had a legitimate reason to perform a full search of Tracey's person. Since Officer Calloway exceeded the bounds of a valid *Terry* stop when he pushed aside Tracey's jacket, he did not view Tracey's weapon from a lawful vantage point. Although he caught sight of something under Tracey's jacket as he turned away, it was not obvious enough to be considered "in plain view." Had Calloway not performed the illegal search, he would not have had occasion to view the gun. Therefore the gun was the fruit of an illegal search and the "plain view" doctrine clearly does not apply.

Even if the Court equates seeing a gun holster with the existence of a weapon, Calloway's search still does not meet the limitations of the Fourth Amendment. Calloway stated that he was not certain that the strap was of the type used to carry a weapon. (R. at 3). Calloway also admitted that he did not even get a very good look at the strap. (*Id.*) He caught a glimpse of the strap for a second at the most while Tracey was turning around. (*Id.*) This is precisely the

kind of general search that violates the principles behind a limited exception to the warrant requirement.

A visible leather strap, *even of the type used to carry a gun,* provides at best a reasonable suspicion that the suspect in fact is carrying a gun. Here, Calloway had already performed a pat down search for weapons. (*Id.*) After failing to find a weapon after the initial search, it is illogical to consider a small portion of an unidentifiable strap enough evidence to supply probable cause that the suspect is carrying a weapon. Therefore, the "plain view" doctrine cannot be used to justify Calloway searching underneath Tracey's jacket.

Since Calloway did not have a warrant or probable cause to arrest Tracey, he was limited to performing a *Terry* stop to investigate possible criminal activity. Calloway was only authorized by *Terry* and subsequent cases to perform a pat down of Tracey's exterior clothing. Calloway exceeded his authority when he moved Tracey's jacket aside. Although a suspect relinquishes his privacy interest in objects left in plain view, Tracey's weapon was not readily visible or immediately identifiable. Therefore, the Thirteenth Circuit's decision regarding the Fourth Amendment violation should be affirmed.

II. THE RIGHT TO SEXUAL PRIVACY IS A FUNDAMENTAL RIGHT PROTECTED BY SUBSTANTIVE DUE PROCESS AND THE RUSHMORE COUNTY POLICE DEPARTMENT FAILED TO SHOW THAT THE INFRINGMENT WAS NARROWLY TAILORED TO FULFILL A COMPELLING GOVERNMENTAL OBJECTIVE.

Tracey had a fundamental right to sexual privacy under substantive due process, and the Rushmore County Police Department failed to show how its infringement was narrowly tailored to fulfill a compelling governmental objective.

A. The Right to Sexual Privacy is a Fundamental Right.

The Fourteenth Amendment to the Constitution reads:

> 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; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C.A. Const. Amend. 14.

This Court held that the Fourteenth Amendment protects certain rights fundamental to the concept of ordered liberty. *See Griswald v. Connecticut,* 381 U.S. 479, 526 (1965). This Court held that:

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Collins v. Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 1061, 1068-1069, 117 L.Ed.2d 261 (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them' ") (quoting *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores,* 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1446-1447, 123 L.Ed.2d 1 (1993); *Casey,* 505 U.S., at 851, 112 S.Ct. at 2806-2807. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, *ibid.; Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, *Casey, supra. Washington v. Glucksberg*, 521 U.S. 702, 719-720 (1997).

To successfully infringe upon these rights, a state must pass the 'strict scrutiny' test administered by the Courts. *Griswald,* 381 U.S. at 503-504. The test states that the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). This strict scrutiny test will be discussed further below.

Over the past 50 years, this Court has created a *de facto* fundamental right to sexual privacy. Three Supreme Court cases have served to create this *de facto* fundamental right to sexual privacy. This Court first recognized that a fundamental right to privacy extended to sexual associations between married couples in *Griswald v. Connecticut. See* 381 U.S. at 485. In *Griswald*, this Court invalidated state laws that controlled contraceptive use among married couples, stating that such laws infringed upon the fundamental right to marital privacy. *Id.* at 497-98. This right to marital privacy included protection of the right to sexual intimacy between married couples. *Id.* In *Eisenstadt v. Baird*, this Court expanded these 'marital rights' beyond married couples; the case dealt with a state law banning the distribution of contraceptives to unmarried couples, where this Court stated:

> If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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 as the decision whether to bear or beget a child. 405 U.S. 438, 485 (1972) (emphasis added).

Finally, in *Lawrence v. Texas*, this Court struck down a Texas statute banning homosexual sodomy. 539 U.S. 558, 578 (2003). This Court noted that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Id.* at 558. The statute in question was found to unconstitutionally infringe upon the constitutional rights of the individual. *Id.* at 578. Read together, the three Supreme Court cases should stand for the proposition that the right to sexual privacy exists outside of the marital realm, and that sexual conduct between two consenting adults is a fundamental right to be

protected by the Fourteenth Amendment of the Constitution. Indeed, the First Circuit has already found that *Lawrence* does in fact create a fundamental right to sexual privacy. *See Cook v. Gates,* 528 F.3d 42, 52 (1st Cir. 2008).

B. Rushmore County Police Department's termination of Tracey was not narrowly tailored to serve a compelling state interest.

Rushmore County Police Department's termination of Tracey was not narrowly tailored to serve a compelling state interest. Accordingly, Rushmore Country unconstitutionally infringed upon Tracey's fundamental right to sexual privacy.

It is has been argued that Tracey had a fundamental right to sexual privacy. To successfully infringe upon a fundamental right protected by the Fourteenth Amendment, the state's action must pass the strict scrutiny test. *See Glucksberg*, 521 U.S. at 719. This test has three components. First, the state's actions must be "narrowly tailored." *Id.* Second, the infringement must serve a "compelling state interest." *Id.* Finally, the infringement must be the least restrictive means of achieving the state's objectives. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 116 (1989).

Here, Rushmore County Police Department's infringement fails all three prongs of this strict scrutiny test. The Police Department's termination of Tracey was not "narrowly tailored." The County terminated Tracey within one day of Police Chief Patrick Malone discovering Tracey's affair. (R. at 4.) Tracey was not given a hearing, nor was an extensive investigation done into the allegation that Tracey was having an affair. Tracey's immediate termination cannot be seen as a narrowly tailored means of government action. Second, the Rushmore County Police Department did not have a compelling state interest to protect. The reason for Tracey's termination was that he had violated the state's adultery statute. *Id.* However, the state conceded that the statute had not been enforced in twenty years, suggesting that the statute was

not a compelling state interest. *See id.* Finally, Rushmore County's actions were not narrowly tailored. Rushmore County could have suspended Tracey, given him a hearing, or investigated any of the allegations. Tracey's immediate termination cannot be seen as the "least restrictive" means of serving the states interest.

Because Tracey had a fundamental right to sexual privacy, and because Rushmore County's actions were not narrowly tailored to serve a compelling governmental interest by the least restrictive means possible, Rushmore County's termination of Tracey should be found an unconstitutional infringement on his fundamental right to sexual privacy.

C. Even under rational basis review, the actions of the Rushmore County Police Department violated William R. Tracey's constitutional liberty interest.

This Court should recognize the right to sexual privacy as a fundamental right. However, even if this Court recognizes the right to sexual privacy as merely a liberty interest and applies rational basis review, the actions of the Rushmore County Police Department *still* should be found to violate Tracey's constitutional liberty interest in sexual privacy.

Lawrence v. Texas could be read to state that private sexual activity is only a constitutionally protected liberty interest, not a fundamental right. *See* 539 U.S. at 586 (J. Scalia, dissenting). Government infringement on liberty interests is subject to rational basis review. *Id.* Rational basis review involves a two prong test – it requires that a government's actions be 1) rationally related to a 2) legitimate state interest for a violation of a liberty interest to be constitutionally permissible. *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993).

However, even under rational basis review, Rushmore County Police Department unconstitutionally infringed upon Tracey's liberty interest. The Police Department's termination of Tracey was not rationally related to a legitimate state interest.

It is true that government has a greater ability to restrict public employees' activities than the activities of the greater population. *Kelly v. Johnson,* 425 U.S. 238, 245 (1968). However, this Court has recognized that states "may not without substantial justification condition employment on the relinquishment of constitutional rights." *Briggs v. North Musekegon Police Department*, 563 F. Supp. 585, 587 (D.C. Mich. 1983) (with *see* cite to: *Pickering v. Board of* Education, 391 U.S. 563 (1968)).

Some lower courts have held that a police department may be interested in a police officer's private life if such activities affect the officer's job performance. *See id.* at 591; also *Shuman v. City of Philadelphia,* 470 F.Supp. 449 (E.D. Pa.1979). The legitimate state interest is the officer's job performance. *See id.* Any factor in the officer's private life only has to be shown to be rationally related to job performance to be considered related to the state interest. This Court should follow this standard in determining whether activities in an officer's private life are rationally related to a legitimate state interest.

Here, Rushmore County Police Department offered no evidence that Tracey's 1) job performance was suffering, 2) because of his private affair. The record reflects that Tracey was a fully functioning officer – he was acting undercover when he was first searched. (R. at 2.) There is no indication that Tracey had been suspended or reprimanded by the police department for poor performance on the job. Additionally, Police Chief Patrick Malone did not know that Tracey was having an affair with the estranged Ms. Malone until June 7, 2005. (R. at 4.) One day later, without a hearing, Tracey was terminated. Police Chief Patrick Malone stated that this termination occurred because Tracey had violated an adultery statute. (*Id.*) However, Chief Malone did not indicate that Tracey's job performance had suffered in any way because of violation of this statute.

Because Rushmore County Police Department's firing of Tracey was not rationally related to a legitimate state interest, the termination of Tracey was unconstitutional under rational basis review.

CONCLUSION

The decision of the Thirteenth Circuit should be affirmed on both counts.

The Fourth Amendment prohibits a police officer from probing beyond the exterior garments of a suspect during a *Terry* stop. Reasonable suspicion of a crime in progress only entitles an officer to make an investigatory stop and ensure his own safety by performing a limited search for weapons. During the initial pat down, Officer Calloway did not discover a weapon. He was at that point no longer permitted under the Fourth Amendment to continue searching Tracey. Anything beyond a search of a suspect's outer garments must be supported by probable cause. Observing evidence or contraband in plain view can provide probable cause if the officer is lawfully in a position to view the evidence *and* it is immediately identifiable. However, in this case the weapon was not in plain view and Officer Calloway had to perform a more invasive search to discover the weapon. Therefore, the plain view doctrine does not apply. Accordingly, Calloway's search of Tracey violated his Fourth Amendment rights when Calloway moved Tracey's jacket during the search.

This Court should find a fundamental right to sexual privacy. If Tracey had this fundamental right to sexual privacy, then the Rushmore County Police Department failed to prove how its infringement of Tracey's fundamental right passed strict scrutiny review. Rushmore County's termination of Tracey was not narrowly tailored to serve a compelling governmental interest by the least restrictive means. However, even if this Court finds that the right to sexual privacy is merely a liberty interest, the Rushmore County Police Department's termination of Tracey does not pass rational basis review either. Tracey's private sexual affairs did not affect his job performance in any way. Accordingly, the termination of Tracey's employment on the basis of his sexual affairs was not rationally related to a legitimate state

interest. So, Tracey's termination was an unconstitutional infringement of his rights under both strict scrutiny and rational basis review.

Therefore, the Thirteenth Circuit's holding regarding both constitutional violations should be affirmed.