

No. 08-31958

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

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RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,

*PETITIONER,*

v.

WILLIAM R. TRACEY

*RESPONDENT.*

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

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BRIEF FOR THE PETITIONER

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Team H

## QUESTIONS PRESENTED

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

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## LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST., amend. IV  
U.S. CONST., amend. XIV, §1, Cl. 3  
CRAVEN STATUTE 19166.81  
CRAVEN STATUTE 11-198.01

## STATEMENT OF FACTS

On June 7, 2005, Respondent was arrested in McDonough Square for possession of a “Glock 21” .45 caliber pistol in violation of Craven Statute 19-166.81, prohibiting possession of a concealed firearm. (Record, hereinafter “R.” at 3.) The arrest was made pursuant to an investigatory (*Terry*) search for weapons, and an extension of that initial search, predicated on the sight of what appeared to be a strap for a device used to carry concealed weapons. (R. at 2-3, 9.) At the conclusion of this second search, the pistol was found on the Respondent. (R. at 3, 9.) The arresting officer, Officer Maxwell Calloway, of the Rushmore County Police Department (“Department”), conducted an inventory search at the precinct stationhouse that ultimately revealed information implicating Respondent in an adulterous affair, in contravention of the State’s adultery statute. (R. at 4.) Respondent, who was an undercover officer himself, was terminated from the Department for engaging in an extramarital affair with the Police Chief’s estranged daughter. He then brought the instant case.

In the eight months prior to the events giving rise to the instant suit, Calloway had been involved in an investigation into illegal firearms sales tied to a private military company, Red Tide (R-T). (R. at 2.) On June 7, 2005, Calloway was following a lead that a meeting between R-T and firearms purchasers was to occur in McDonough Square when he observed the respondent behaving suspiciously in the public square: Respondent was wearing unseasonably heavy clothing in warm weather, he appeared agitated, and he was surveying Square’s layout as well as the rooftops of the surrounding buildings. (R. at 2.) Although concerned that an encounter might

jeopardize the investigation, Calloway ultimately determined that public safety warranted approaching Respondent. *Id.*

At this point, Respondent engaged in conduct that gave Calloway even greater pause: he became visibly angry and verbally abusive, looked around guardedly and initially evaded Calloway's request for his name. (R. at 3.) Operating under a reasonable suspicion that Respondent was armed, Calloway attempted to conduct a *Terry* search of respondent. *Id.* Respondent was uncooperative; he cursed and berated Calloway during the pat-down. Calloway did not feel anything consistent with a weapon. *Id.*

As Respondent began to turn away, the officer caught sight of a vertical leather strap underneath respondent's unzipped jacket in the upper-chest region. *Id.* Calloway believed that this strap was consistent with those used to carry concealed firearms. *Id.* The officer feared that Respondent might still be armed. He requested that respondent turn back around, and Respondent "grudgingly complied." *Id.* Calloway then twice attempted to move aside the left exterior of respondent's unzipped jacket that now obscured his view of the strap. At the first attempt, Respondent obstructed Calloway's access to the strap – it was only upon Calloway's second attempt that he was able to view the concealed weapon, *Id.* Since carriage of concealed weapons is in violation of Craven Statute 19-166.81, Officer Calloway seized the pistol and arrested Respondent. *Id.*

During the arrest, Respondent insisted that he was an undercover police officer but he was unknown to Calloway. As Respondent was unable produce identification linking him to law enforcement, Calloway was forced to take Respondent to the precinct in order to investigate further. *Id.* Pursuant to Department protocol, a full search of respondent was conducted whereby several items were seized, including a mobile phone that contained the contact information of R-

T officials. *Id.* Also on the phone was the contact information for Ms. Jacqueline Malone, estranged daughter of Patrick Malone, Chief of the Department. *Id.*

Concerned that Respondent may have targeted Ms. Malone for harm as the daughter of the County's Police Chief, Calloway elected to notify her of the possible threat to her safety. (R. at 4.) Before Calloway could get in a word edgewise, Ms. Malone "spontaneously disclosed that she had been having an affair with [Respondent.]" *Id.* She also offered that Respondent was an undercover police officer for the Department.

Calloway immediately notified Respondent's precinct of the arrest and the adulterous relationship. *Id.* Craven Statute 11-198.01 prohibits adultery, and Respondent, at the time of his affair with Ms. Malone was married. *Id.* Also, Ms. Malone was publicly estranged from her father and it was widely reported that she had made false allegations to local newspapers claiming corruption in the Department. (R. at 3.) On June 8, 2005, Respondent was terminated for his illegal adulterous relationship and failure to conform to Department regulations. (R. at 4.)

The parties stipulated to the record for the purpose of a ruling on the motion for summary judgment. (R. at 2.) Respondent brought this claim pursuant to 42 U.S.C. §1983 for violations of the Fourth Amendment and the Due Process clause of the Fourteenth Amendment. Petitioner filed a motion for summary judgment. On February 19, 2006, the United States District Court for the District of Craven found in favor of the Department, petitioner, ruling that as a matter of law these constitutional rights were not violated. The District Court found that Calloway had acted "reasonably" under the scope of a *Terry* investigatory stop when he moved aside Respondent's jacket to search for a concealed weapon. Significantly, the court found no justification for the idea that this search was more intrusive than a *Terry* pat-down and noted, "it seems implausible that moving aside a piece of clothing would be the tipping point between proper conduct and a

constitutional violation.” (R. at 5.) The court also held that Respondent’s termination was not prohibited by the Fourteenth Amendment because this Court has never recognized a fundamental right to private sexual activity generally, (R. at 6.), and that per the test from *Washington v. Glucksberg*, rational basis was the appropriate standard of review of Respondent’s claim. Finding that the Department’s action was rationally related to a legitimate government interest the court thereby granted summary judgment to Petitioner.

Respondent appealed, and the Court of Appeals for the Thirteenth Circuit reversed, holding that Calloway required probable cause to perform the extension of the *Terry* search. (R. at 9.) As to the Due Process issue, the Thirteenth Circuit inferred a right to private sexual conduct from *Lawrence v. Texas* and decided that intermediate scrutiny should be the level of review. (R. at 10.) On the basis that the government’s only interest was morality, the court found that the Department’s action did not survive its level of scrutiny. (R. at 10, 11.) Petitioner sought *certiorari* in the Supreme of the United States, and was granted review.

#### **SUMMARY OF ARGUMENT**

The Court of Appeals’ determination that Respondent raises defenses sufficient to remand the case for trial is without merit and must be reversed. The rationale adopted by the appellate court was mired in substantive legal errors. The District Court’s grant of summary judgment to Petitioner as a matter of law was correct and should be reaffirmed here. First, Respondent suffered no violations of his Fourth Amendment rights as the extended investigative search conducted by Calloway, was entirely within the bounds circumscribed by the Fourth Amendment. Second, Respondent’s termination for his illegal adulterous affair is constitutionally permissible because it does not violate the Fourteenth’s Amendment’s Due Process Clause.

As this Court established in *Terry v. Ohio*, 392 U.S. 1 (1968), the overarching purpose of investigatory searches is protection: to ensure officer safety as they engage in close encounters with suspects in the course of their duty. Support for such minimally intrusive searches must simply be predicated upon reasonable suspicion, an articulable set of facts indicating the officer's belief the suspect is armed. Calloway had more than the reasonable suspicion required under *Terry* for an investigatory stop; he had probable cause to make an arrest upon catching sight of the strap "consistent with those used to carry a firearm" as under both the "plain view" doctrine and the well-settled doctrine permitting warrantless searches of apparent contraband in public places from *Payton v. N.Y.*, 445 U.S. 573 (1980).

As to the second claim, Respondent's termination from his employment was constitutionally permissible as the Department's action did not violate the Fourteenth's Amendment's Due Process Clause. First, termination of Respondent for his engagement in an adulterous relationship cannot be construed as the violation of a fundamental right. Second, the Department's termination of Respondent is clearly permissible under rational basis review: terminating officers for failure conform to Department policy is rationally related to the Department's legitimate interest in regulating officers' conduct. Even if the Court were to follow the appellate court's improper reading of *Lawrence v. Texas*, 539 U.S. 558 (2003), for an analysis of the termination under intermediate scrutiny review, the Department's interest in maintaining public respect for law enforcement and the integrity, efficiency, effectiveness, and unity of the police force still outweigh the Respondent's individual interests. Therefore, his termination is not prohibited by the Due Process Clause of the Fourteenth Amendment.

#### **STANDARD OF REVIEW**

The District Court for the District of Craven properly granted Petitioner's motion for summary judgment. Summary judgment may be granted under FED. R. CIV. P. 56 only upon a

showing that after construing the evidence available, and the reasonable inferences which may be drawn therefrom, most favorably for the non-moving party, the proof is insufficient to support that non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). Additionally, on appeal, Fourth Amendment search and seizure's determinations of probable cause and reasonable suspicion are reviewed *de novo*, allowing this Court to revisit the factual basis for the lower courts' decisions and draw its own conclusions. *Ornelas v. United States*, 517 U.S. 690 (1996).

#### ARGUMENT

### I. OFFICER CALLOWAY'S MOVING ASIDE OF RESPONDENT'S JACKET WAS CONSTITUTIONALLY PERMISSIBLE SEARCH UNDER THE FOURTH AMENDMENT

As this Court established in *Terry v. Ohio*, the overarching purpose of investigatory searches is protection: to ensure officer safety as they engage in close encounters with suspects in the course of their duty. Support for such minimally intrusive searches must simply be predicated upon reasonable suspicion, an articulable set of facts indicating the officer's belief the suspect is armed. Here, Calloway's minimally and narrowly focused, act of moving aside Respondent's jacket was a constitutionally permissible search justified by probable cause, a higher level of certainty, in addition to reasonable suspicion.

#### **A. Officer Calloway's act of moving aside Respondent's jacket was constitutionally permissible protective search supported by reasonable suspicion that Respondent was engaged in criminal activity and potentially armed.**

This case is about the utmost importance of ensuring the safety of police officers as they perform their investigative duties. The Court of Appeals for the Thirteenth Circuit would interpret the limits of a *Terry* search so narrowly as to endanger a police officer in his reasonable search for weapons that may imminently be used against him. The slight moving aside of Respondent's jacket was constitutionally permissible because it was an act of minimal

intrusiveness that was reasonably related in scope to the circumstances justifying the concededly valid *Terry* pat-down search. Under *Terry* and its progeny, Calloway operated within the scope of the Fourth Amendment in conducting a limited search for a concealed weapon on the Respondent's person as predicated upon the officer's safety concerns for himself and the public.

This court, even in construing the summary judgment record, and its reasonable inferences, most favorably for the Respondent, must find that Petitioner's employee, Officer Calloway, possessed reasonable suspicion to justify moving aside Respondent's jacket in order to better see the leather strap crossing his chest. According to the District Court, Calloway was able to articulate substantial facts indicating his justifiable suspicion that Respondent was engaged in criminal activity, that he was potentially armed and that as a result he posed a danger both to the officer and to the public. (R. at 3.) Both the District Court and the Court of Appeals agree that Calloway possessed the requisite reasonable suspicion to conduct a *Terry* investigatory search of Respondent. (R. at 6, 9.) It is Petitioner's contention that the District Court was correct in ruling that the act of moving aside Respondent's jacket was similarly justified on grounds of reasonable suspicion in that the second 'search' was done specifically with the purpose of ascertaining whether or not Respondent was carrying a concealed weapon, in violation of Craven Statute 19-166.81 and at a danger to Calloway and the public.

This Court has always recognized 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, unless by clear and unquestionable authority of law." *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citing *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). However, this Court has consistently held that investigatory searches unsupported by probable cause may nonetheless be constitutionally valid

if the search is undertaken upon belief that “criminal activity may be afoot.” *Terry*, 392 U.S. at 30. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.” *Adams v. Williams*, 407 U.S. 143, 145 (1972). The requirement is simply that a law enforcement official be able to provide “some minimal level of objective justification” for making the stop and search. *INS v. Delgado*, 466 U.S. 210, 217 (1984). Reasonable suspicion is a less demanding standard than probable cause, but it must be more than an “inchoate and unparticularized suspicion or ‘hunch’.” *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citing *Terry*, 392 U.S. at 27). The constitutional permissibility of an investigatory search is based in the officer’s ability to point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.” *Terry*, 392 U.S. at 21.

Such investigative searches are allowed to ensure the “protection of the police officer and others nearby...[and must be] confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” *Id.* An officer’s search and seizure may be demonstrably justified by a showing of reasonable belief that the person was armed and dangerous. *Sibron v. New York*, 392 U.S. 40, 63 (1968) (citing *Terry*, 392 U.S. at 21). This Court has invariably held that this suspicion of a subject’s carriage of weapons must form the predicate to the actual pat-down. *Ybarra v. Illinois*, 344 U.S. 85, 93 (1979) (citing *Adams*, 407 U.S. at 146); *see also Terry*, 392 U.S. at 21-24, 27. A police officer may conduct a *Terry* frisk upon the officer’s reasonable suspicion that the suspect is armed even if that person’s carriage of a concealed weapon is not illegal *per se*, because the purpose of the

investigative frisk is to disarm a threatening subject, rather than to gather evidence of crime. *Painter v. Robertson*, 185 F.3d 557, 568 fn. 17 (7th Cir. 1999) citing *Adams*, 407 U.S. at 146.

“The search must be limited in scope to that which is justified by the particular purposes served by the exception [to the warrant requirement of the Fourth Amendment.]” *Florida v. Royer*, 460 U.S. 491, 500 (1983). The governing principle of *Terry* that allows searches and seizures upon a showing of less than probable cause is predicated upon an accepted presumption that “law enforcement interests warrant a limited intrusion on the personal security of the suspect[,]” allowing that the “methods employed [in the stop or search]...be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” *Id.* citing *Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975); *Adams*, 407 U.S. at 146.

The State maintains the burden of establishing that the officer’s actions were justified by reasonable suspicion at their inception and that the subsequent search was appropriately limited in scope and duration to satisfy constitutional requirements. *Royer*, 460 U.S. at 500; see *Terry*, 392 U.S. at 30; *Adams*, 407 U.S. at 146; *Alabama v. White*, 496 U.S. 325, 328 (1990). The permissibility of the investigatory stop is evaluated under *Terry*’s dual inquiry: whether the initial action was justified, and whether such action was “reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 19. In such an analysis, the “totality of the circumstances” are taken into account as to whether reasonable suspicion existed to justify the officer’s actions. *United States v. Cortez*, 449 U.S. 411 (1981).

Reasonable suspicion is to be determined by its predicate in commonsense judgments and their accompanying rational inferences. *Id.* at 418. Reasonable suspicion may be established upon a showing of information that differs both in terms of quantity and quality from that required for a demonstration of probable cause; and both the quantity and the quality of the

information possessed by the officer at the time of the search will be incorporated into the totality of the circumstances. *White*, 496 U.S. at 330; *Cortez*, 449 U.S. at 417. A number of factors may be considered in determining whether the officer possessed reasonable suspicion at the inception of the investigatory search. *Brignoni-Ponce*, 422 U.S. at 885 (nervous, evasive behaviour can support reasonable suspicion); *Illinois v. Wardlow*, 528 U.S. 119 (2000) (flight or attempts to flee is suggestive of wrongdoing and may support reasonable suspicion); *Adams*, 407 U.S. at 147-148 (Suspect's presence in a high-crime area may be a factor in support of reasonable suspicion). Here, the appropriate question for the court is whether the officer possessed such information and experience to "justif[y] the length and intrusiveness of the stop and detention that actually occurred." *United States v. Hensley*, 469 U.S. 221, 235 (1985).

**1. Officer Calloway acted within the constitutional bounds of the Fourth Amendment in moving aside the Respondent's jacket immediately after a concededly valid *Terry* stop, because that minimal intrusion facilitated the officer in ascertaining whether Respondent was in fact armed, which was the reasonably related justification for the initial *Terry* search.**

The Court of Appeals found, and Respondent concedes, as he must, that Calloway's initial pat-down of Respondent was "entirely proper" as under the reasonable suspicion principles that govern *Terry* protective searches. (R. at 9.) In agreeing with the District Court below on this matter, the appellate court notes that Calloway was able to point to several discrete factors indicating his suspicion of Respondent's behavior: the information available to the police officer concerning the imminence of criminal operations in the area within view, the unseasonable attire of the Respondent, his personal experience as a police officer applied to observation of Respondent's dubious behaviour, and the continuation of such nervous behaviour by the Respondent. (R. at 8-9.) The District Court held, and the Court of Appeals agreed, that under such circumstances, Calloway was possessed of reasonable suspicion that Respondent was engaged in the very criminal activity under investigation in McDonough Square, and that he was

therefore justified in patting the Respondent down to determine if he was armed with a concealed weapon. (R. at 5-6, 9.) It is as to the extension of the initial *Terry* search that the Court of Appeals disagrees with the finding of the trial court. The appellate holding would read *Terry* so narrowly as to construe that in all circumstances the scope of an initial protective, investigatory search is limited to the “limited patting of the outer clothing of the suspect.” (R. at 9.) (citing *Sibron v. New York*, 392 U.S. 40, 65 (1968)).

Petitioner does not argue that the police investigative process may, at some stage, become so intrusive as to trigger the full protection of the Fourth and Fourteenth Amendments; this, however is *not* such a case. *Cf. Hayes v. Florida*, 470 U.S. 81, 815-16 (1985) *citing Dunaway v. New York*, 442 U.S. 200, 212 (1979) (emphasis added); *see Royer*, 460 U.S. at 499. The Court of Appeals has made a fundamental error in their holding: narrowing the reasonable suspicion doctrine to such a literal reading of *Terry* as to endanger police officers exercising caution for their own and the public’s safety in the course of their duties. *Terry* stands for the proposition that the “Fourth Amendment does not require a policeman...to simply shrug his shoulders and allow a crime to occur or a criminal to escape” in the absence of irrefutable probable cause, but rather that it “may be the essence of good police work” to take an immediate response for protective purposes. *Adams*, 407 U.S. at 145.

Calloway’s investigative steps pursuant to his observations that Respondent was behaving in a manner consistent with “an individual waiting to conduct a purchase or sale of illegal firearms,” (R. at 8), were admittedly within the purview of a valid *Terry* stop. Both the district and appellate courts found that Calloway, given the information at his disposal, was entitled to conduct his initial protective search of Respondent. (R. at 5-6, 9.) These facts do not change following the completion of that brief officer-suspect encounter. Immediately following

Calloway's conclusion of the physical frisk, Respondent turned away from the officer, revealing a vertical leather strap across his chest; a strap that was consistent with what Calloway knew to be holsters for carrying concealed firearms. (R. at 3.) The "specific and articulable facts," *Terry*, 392 U.S. at 21, that formed Calloway's initial reasonable suspicion that Respondent was engaged in criminal activity and carrying weapons were still relevant; Calloway now had even more information with which to form an opinion that Respondent was armed. Moreover, the initial detention while Calloway attempted to effectuate his *Terry* search was upon the same exact basis that the extension of his search was predicated upon: a belief that Respondent was carrying a concealed weapon and could therefore be a danger to himself or a member of the public. This is exactly the basis upon which pat-down searches are found permissible: the entitlement of the officer to determine whether the suspect with whom he is engaging with at close quarters is armed with a weapon that "could unexpectedly and fatally be used against him." *Id.* at 23.

In *Terry*, this Court found that Officer McFadden's pat-down of the outer clothing of the suspects "confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons." *Id.* at 30. The analysis as to the existence of reasonable suspicion at the initiation of the search is entirely factually based and the principle for which *Terry* stands in terms of how intrusive a protective search may be is not defined by the types of clothing that the suspect wears, but rather whether the officer's search is "reasonably related in scope to the justification for [its] initiation. *Id.* at 29 (citing *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

Calloway's act of moving aside Respondent's jacket was minimally intrusive and was taken for the singular purpose of determining whether Respondent was carrying a concealed weapon. This is exactly the justification for *Terry* searches and is therefore "reasonably related in scope to

the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 19-20. Calloway did not completely remove Respondent’s jacket nor did he reach underneath the jacket; indeed, Calloway’s action was the most minimally invasive possible given the new information available to the officer concerning the holster-like strap observed. As required by *Terry* and its progeny, Calloway employed the “least intrusive means reasonably available to verify or dispel [his] suspicion.” *Royer*, 460 U.S. at 500.

Moreover, a myriad of circuit courts have upheld searches, predicated upon reasonable suspicion, that are undisputedly far more intrusive than the one at issue here as within the limits prescribed by the Fourth Amendment. *United States v. Trullo*, 809 F.2d 108 (1st Cir. 1987) (Officer, having noticed a “bulge” in suspect’s pocket was justified in reaching into the pocket and seizing the item once a pat-down confirmed that the “bulge” was a hard object); *United States v. Rogers*, 129 F.3d 76 (2d Cir. 1997) (Officer’s belief that the suspect’s pocket contained drugs, although unable to exclude the possibility that there was a weapon in the pocket, combined with the suspect’s evasive and suspicious conduct, permitted the opening of a paper bag found in the suspect’s pocket); *United States v. Samuels*, 131 Fed. App’x 859 (3d Cir. 2005) (Officer’s acted permissibly under the principles of *Terry* in lifting suspect’s shirt where the officer observed a “bulge” in order to expose a gun in suspect’s waistband); *United States v. Harris*, 313 F.3d 1228 (10th Cir. 2002) (Officer did not exceed the scope of a protective *Terry* frisk by reaching into defendant’s boot in order to retrieve an unknown object).

**2. Officer Calloway was entitled to detain Respondent for the extension of the initial *Terry* search because the officer already had reasonable suspicion to justify the stop that was developed further during his interaction with Respondent.**

Calloway was acting entirely within the precepts of the Fourth Amendment by detaining Respondent in order to verify what he suspected was the means of carrying a concealed weapon under his jacket. Respondent’s claim that the extended *Terry* search is unsupported by reasonable

suspicion must fail for the simple reason that protection is the predicate purpose of such investigatory stops, and this was overwhelmingly justified by the circumstances Calloway faced. The subsequent search was predicated upon Officer Calloway's observation of a vertical leather strap across Respondent's chest that was consistent with a holster used to carry a concealed weapon, Respondent's conduct in pushing Officer Calloway's hand away from the jacket, and Respondent's earlier uncooperative conduct during the pat-down as evidenced by his belligerence and his verbal abuse of the officer. (R. at 3.)

Of particular consequence for courts in upholding extended *Terry* searches is the totality of the circumstances that would justify an investigatory protective search that is not simply limited to the outer clothing of the suspect. *Cortez*, 449 U.S. at 418. In *Cortez*, this court presents guidelines for seamless, two-element analysis under which the totality of circumstances inquiry is to be constructed: 1) the determination is to be based upon all of the circumstances available; and 2) taken as a whole, those circumstances must point to some "particularized suspicion" that the suspect at issue is "engaged in wrong-doing." *Id.* There, the Court found that 1) the decision to stop the defendant's car was based upon all of the facts then available to the border agents, and, 2) evaluated in their entirety, the agents deduction that the criminal activity of the transportation of illegal aliens across the border was entirely reasonable. *Id.* at 419-20.

The trial court, to whom this Court grants "due weight" in the context of reasonable suspicion determinations, *Ornelas v. United States*, 517 U.S. 690, 699 (1996), found the rationale in *State v. Heitzmann*, 632 N.W.2d 1, 9 (N.D. 2001), particular instructive in justifying the extended *Terry* stop. That case is cited for the proposition that "[c]ourts have recognized that a more intrusive *Terry* search may be constitutionally permissible when the detainee attempts to prevent an officer from performing an effective pat-down." *Id.*

There, the Supreme Court of North Dakota found that in the course of a valid investigative automobile stop, the initial reasonable suspicion possessed by the investigating officer was further enhanced by a number of factors, principal among them the suspect's active failure to cooperate in the pat-down. *Id.* The suspect's nervous, evasive behaviour during the pat-down, that would have had the effect of completely frustrating the search, justified the proportionate response of the officer in completely removing the subject's wallet and wad of money from his pockets. *Id.* at 10. It is this proportionality of response of the officer conducting a search that remains "reasonably related in scope to the circumstances which justified the interference in the first place," that ensures that the investigating officer acts within the grounds prescribed by the Fourth Amendment. *Terry*, 392 U.S. at 19-20.

Here, Calloway undisputedly possessed the requisite reasonable suspicion to effectuate the first *Terry* search of Respondent. As in *Heitzmann*, under the totality of circumstances immediately after the pat-down, Calloway was entitled to detain Respondent in order to verify his suspicion that Respondent was carrying a concealed weapon. This justification is made in light of the existing validity of the reasonable suspicion factors as to Respondent – his nervous behavior (as in *Heitzmann*), his unseasonably heavy outerwear, his presence in a place that Calloway believed to be the location of an imminent illegal firearms transaction, (R. at 2-3) – coupled with the more imminently developed circumstances of Calloway observing the leather strap under his jacket, his uncooperative and verbally abusive behaviour during the pat-down, and his repeated attempts to prevent Calloway from seeing beneath the jacket. (R. at 3.)

Thus, contrary to the appellate court's casual disposal of the reasonable suspicion question following the conclusion of the initial *Terry* stop, Calloway's reasonable suspicion did not dissipate upon viewing the leather strap across Respondent's chest, but rather was augmented by

the new information that became available to him. As per the above facts, this was clearly not a pat-down that was conducted under circumstances most conducive to the officer actually locating a concealed weapon secreted on the person of Respondent. It was likely that given the Respondent's behavior Calloway may have been unable to successfully conduct the search.

**3. Officer Calloway was entitled to effectuate a search of Respondent by directly moving aside Respondent's jacket in order to retrieve the weapon suspected to be hidden there without re-frisking Respondent because Respondent's behavior was potentially threatening, justifying a swift removal of the weapon.**

Calloway's act of moving aside Respondent's jacket rather than subjecting him to another pat-down search was entirely reasonable. As set forth by *Adams*, the pat-down search conducted in *Terry* is not the only permissible method by which a protective search might be made and still pass constitutional muster. *Adams*, 407 U.S. at 147-48. This case is closely analogous to *Adams* for the overarching rationale of officer safety justifying a narrow search. In *Adams*, this Court upheld an officer's search where the policeman reached straight for the defendant's waistband in anticipation that a revolver was carried there. Such a singularly-focused search was justified by reasonable suspicion in that the officer was informed that defendant was carrying a gun, coupled with defendant's noncompliance with the officer's request that defendant step out of the car. *Id.*

"When [defendant] Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could be more easily seen, the revolver allegedly at Williams' waist became an even greater threat." The officer's subsequent retrieval of the weapon by reaching straight for Williams' waistband rather than conducting an full pat-down was justifiable. *Id.* at 148; *see also United States v. Baker*, 78 F.3d 135 (4th Cir. 1996) (Officer was reasonable in directing that suspect lift his shirt for immediate determination as to whether defendant was armed); *United States v. Price*, 409 F.3d 436 (D.C. Cir. 2005)

(Officer's narrow search of defendant's waistband was justified under principles enumerated in *Terry* and *Adams*).

In *Adams*, this Court paid particular attention to the informant's tip that the defendant was carrying a weapon as to whether that information was of sufficient reliability in underpinning the officer's particularly focused *Terry* search, holding that the officer did possess a reasonable suspicion on such a basis. *Id.* at 147. Here, the corollary would be Calloway's actual observation of the leather strap in light of his experience that such a strap is consistent with the carriage of concealed weapons. (R. at 3.) It is entirely rational to conclude that an officer's observations of suspicious items may give rise to reasonable suspicion.

Calloway's continuation of the *Terry* search was entirely reasonable given his adherence to its protective purpose, given the very real possibility that the belligerent and obstinate Respondent who was at close quarters with the officer could and would harm the investigating officer. Calloway then faced an elevated risk to his safety. Respondent's attempts to knock Calloway's hand away from the jacket could also be interpreted by the officer to be a motion reaching for whatever might be hidden under the jacket. Under these circumstances, Calloway was justified in moving aside the jacket to immediately verify the existence of a concealed weapon on Respondent's person. Moreover, as above, this targeted search was minimally intrusive – it was conducted in such a manner as to expose only the minimum required in order for Calloway to verify his suspicion.

**A. Officer Calloway possessed the requisite probable cause to conduct a more extensive search of Respondent under the “plain view” doctrine.**

Calloway was justified in initiating a more intrusive search for weapons because he possessed probable cause under the “plain view” doctrine. The “plain view” doctrine was triggered when Calloway noticed what appeared to be a vertical leather strap underneath

Respondent's jacket (R. at 3.) Calloway's knowledge that this type of strap was "consistent" with those used to conceal firearms is similar to the officer's knowledge supporting a finding of probable cause in *Ariz. v. Hicks*, 480 U.S. 321. The Court of Appeals erred in reading *Hicks* to require that Calloway possess actual knowledge of the strap's purpose; the Supreme Court has explicitly stated that this is an "unduly high degree of certainty." *Tex. v. Brown*, 460 U.S. 730 at 741 (1983). In light of the Respondent's suspicious appearance and behavior in the Square, (R. at 2, 8), against the backdrop of a serious firearms network in Rushmore County, (R. at 2), and obstructions during the initial *Terry* search in Part A, the black strap that Calloway observed had sufficiently incriminating meaning to establish probable cause under the "totality of the circumstances" analysis that this Court has dictated for probable cause determinations. *Ill. v. Gates*, 462 U.S. 213 (1983).

The roots of the "plain view" doctrine lie in the "well-settled" principle that "objects such as weapons or contraband in a public place may be seized by the police without a warrant," *Payton v. N.Y.*, 445 U.S. 589, 586 (1980). The Court has stated that seizure of property in "plain view" is also presumptively reasonable as it involves no further invasion of privacy, "assuming that there is probable cause to associate the property with criminal activity." *Id.*

The plurality in *Coolidge* placed three limitations on the "plain view" doctrine to eliminate searches lacking probable cause, and to address the "specific evil" of a 'general warrant,' and the problem of a "general exploratory rummaging in a person's belongings[:]" lawful intrusion, inadvertence, and incriminating evidence that is "immediately apparent." *Coolidge v. N.H.*, 403 U.S. 443, 466-7 (1971). *Coolidge*'s progeny further refined the "plain view" doctrine and it is now a two-pronged inquiry. First, the encounter must take place from a lawful vantage point, which in this case has been conceded by the Thirteenth Circuit and is not at issue. The second

prong contains two related requirements, it must be “immediately apparent” to the officer that the evidence is of incriminating nature, *Tex. v. Brown*, 460 U.S. 730 (1983) and the evidence must also establish probable cause. *Hicks*, 480 U.S. at 326. The only issue here is whether the Officer Calloway meets this second prong of the test.

**1. The Court of Appeals erred in requiring Officer Calloway to possess actual knowledge of the strap’s criminality under the “plain view” doctrine to establish probable cause because an officer may draw inferences from the surrounding circumstances based on his training and experience.**

The “immediately apparent” requirement of the “plain view” doctrine does not require that an officer have actual knowledge of the incriminating quality of the evidence. Rather, an officer may draw inferences based on his training and experience. Nor does probable cause require a high standard of certainty. Probable cause has been defined as “existing where the known... circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” *Ornelas*, 517 U.S. 690 (1996), and by the “totality of the circumstances.” *Ill. v. Gates*, 462 U.S. 213. Probable cause and reasonable suspicion are “fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed,” *Ornelas*, 517 U.S. at 690, (citing *Gates*, 462 U.S. at 232). The facts are to be “viewed from the standpoint of an objectively reasonable officer.” *Ornelas*, 517 U.S. at 696.

In *Ariz. v. Hicks*, the Court clarified that probable cause was a necessary requirement for application of the “plain view” doctrine. A plurality of the Court in *Brown* also clarified that the requirement of the “plain view” doctrine that incriminating nature of evidence be “immediately apparent” did not call for any additional measure of certainty. The Court overturned the Court of Criminal Appeals for an erroneous reading of the “plain view” doctrine that effectively required a police officer to “be possessed of near certainty as to the seizable nature” of a green party

balloon that was “knotted about one half inch from the tip.” *Brown*, 460 U.S. at 733. The balloon was observed near some vials in the glove compartment of defendant’s car at a check point, and the officer conducted a further search and arrest, relying on his experience “from his participation in previous narcotics arrests and from discussions with other officers that balloons tied in the manner of the one possessed by [defendant] were frequently used to carry narcotics.” *Id.* at 734. The Court found it irrelevant that the officer could not see through the opaque balloon to absolutely determine whether it contained narcotics; “the distinct character of the balloon itself spoke volumes as to the contents – particularly to the trained eye of the officer.” *Id.* at 741.

Similarly, in *Ornelas* the Court suggested that an officer could deduce probable cause that a loose panel above the armrest of a car might signify a hiding place for narcotics based on consideration that the officer’s experience that “older model, two-door General Motors cars are a favorite with drug couriers because it is easy to hide things in them,” and his knowledge that California was a “source State for drugs.” *Ornelas*, 517 U.S. at 692. An officer established probable cause by his observation in the course of a valid traffic stop of “a bundle approximately five to six inches wide, four to six inches tall, and approximately two inches thick,” based on officer criminal interdiction training, his involvement with drug seizures, and experience that “these packages usually contained illegal drugs, and if not drugs, then currency involved in drug trafficking.” *United States v. Castorena-Jaime*, 285 F.3d 916, 922 (10th Cir. 2002). *See also Johnston v. United States*, 832 F.2d 2, 2 (1st Cir. 1987) (upholding court’s finding that adding machine tapes, loose pages containing columns of numbers could satisfy the “immediately apparent” requirement after marijuana was found in the house during warranted search).

In the instant case, it was “immediately apparent” to Calloway’s trained eye that the leather strap he observed was incriminating as he was able to recognize on sight that it was “consistent

with those used to carry a concealed firearm.” (R. at 3, 9.) Calloway was able to note several distinguishing features from the strap, including the fact that it was “vertical,” (R. at 3.), constructed of leather, *Id.* and “located around the [Respondent’s] upper chest area.” *Id.* These characteristics could be similarly incriminating to a well-trained police officer investigating illegal weapons as the seemingly innocuous clues that law enforcement officials in the preceding cases relied upon: a green party balloon knotted a certain way could contain narcotics, *Brown*, 460 U.S. at 741, a mismatched screw on the panel of an armrest could establish probable cause of a hiding space for drugs, *Ornelas*, 517 U.S. at 700, a bundle of a certain thickness was likely to contain could be evidence of drugs or currency from drug trafficking, *Castorena-Jaime*, 285 F.3d at 922, and benign objects such as an adding machine, a notebook and cash could be evidence of marijuana distribution, *Johnston*, 832 F.2d at 2.

The sole reason offered by the Court of Appeals for finding that Calloway lacked probable cause is that he lacked knowledge as to “the purpose” of the black leather strap he observed. (R. at 9.) Such knowledge is exactly the “unduly high degree of certainty” that the plurality in Supreme Court found unnecessary for an application of the “plain view” doctrine. It was of no concern to the Tenth Circuit in *United States v. Castorena-Jaime* that the officer was unsure as to whether the suspicious bundle contained drugs or currency. Nor do courts require a clear sighting of the object in question. This Court was unconcerned in *Brown* that the opaqueness of the green balloon prevented the officer from seeing its contents. Similarly, in *Castorena-Jaime* it was “all but irrelevant” that the trooper could not see through the tape on the bundle, *Castorena-Jaime* 285 F.3d at 925. On the same principle, it should be of no importance that Calloway did not “have the opportunity to get a close look” at the strap. (R. at 3.) Calloway was able to see enough to determine that it was “consistent” with a holster used to carry a concealed weapon, a violation

of Craven Statute 19-166.81, (R. at 3), and that Respondent's behavior was "consistent" with an individual awaiting to conduct an illegal transaction. (R. at 2.)

Thus, the Court of Appeals failed to recognize that Calloway's belief was informed by eight months of police investigation into a network suspected of dealing illegal firearms, intelligence that the Square was to be the site for an arms transaction that day, Respondent's suspiciously vigilant behavior in the park, his unnecessarily bulky attire on a warm day, and evasiveness and obstruction during a lawful and ineffective pat-down. *Id.* at 2-3. As in *Brown*, this reading of the law is reversible error. This Court should find that Calloway properly deduced probable cause based on all of these factors through the lens of his trained eye and expertise in law enforcement.

**2. The search producing the concealed "Glock 21" .45 caliber pistol was conducted as lawful public search for weapons and is presumptively reasonable under the Fourth Amendment.**

Upon a finding a probable cause, this Court must uphold Calloway's more extensive search of the Respondent under the presumption of reasonableness afforded warrantless seizure of weapons in public places under the Fourth Amendment. *Payton*, 445 U.S. 589. Respondent is trying to limit the scope of a search conducted in public that already has its grounding in well-settled doctrine. As probable cause renders these searches "presumptively reasonable," the Court must shift the burden to the Respondent to show why public seizure of a concealed weapon should be found to be unreasonable.

In determinations of "reasonableness" under the Fourth Amendment, this Court has used a balancing test, weighing "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United States v. Hensley*, 469 U.S. 221, 228 (1985). Courts have upheld searches far more invasive of one's personal privacy using a probable cause predicate than the one in the instant case. The Eighth Circuit upheld the reasonableness of searching inside a defendant's pants for narcotics, *United*

*States v. Williams*, 477 F.3d 974, 976 (8th Cir. 2007), citing to a similar case in the Seventh Circuit, upholding the removal of crack cocaine from area of suspect's buttocks, *United States v. Williams*, 209 F.3d 940 (7th Cir. 2000). Drawing from the Court's reasoning in *Terry v. United States*, 392 U.S. 1 (1968), a higher interest than the government's mere interest in investigating crimes exists when weapons are involved; "there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could and fatally be used against him," *Terry*, 392 U.S. at 23.

In the instant case, an officer merely moved aside a portion of an already unzipped jacket. As the district court noted, this was a limited intrusion, comparable to a pat-down (R. at 5). The district court also noted that Calloway actually risked blowing his cover and eight months of detective work by approaching Respondent (R. at 5.) As Calloway's interest was in locating a concealed weapon, the search clearly survives the balancing test of reasonableness from *Hensley*. Thus, the Court should reverse the opinion of the Thirteenth Circuit and find in favor of Petitioner on the summary judgment motion.

## **II. THE TERMINATION OF RESPONDENT FOR HIS PARTICIPATION IN AN EXTRAMARITAL AFFAIR IS NOT PROHIBITED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

Respondent's termination was constitutionally permissible because it did not violate the Due Process Clause of the Fourteenth Amendment. First, termination for participation in adultery does not infringe upon a fundamental right. Second, terminating police officers who fail to conform to department policy is rationally related to regulating officers' conduct, satisfying rational basis review. Furthermore, even if the Court rules that *Lawrence v. Texas* is controlling and requires intermediate scrutiny as the standard of review for the termination, the police department's interests in maintaining the integrity, efficiency and unity of the force outweigh

Respondent's individual interests. Thus, his termination is not prohibited by the Fourteenth Amendment.

The Fourteenth Amendment establishes that: “[n]o state shall... deprive any person of life, liberty, or property without due process of the law.” U.S. CONST., amend. XIV, §1, Cl. 3. It is well settled that “[t]he Due Process Clause guarantees more than fair process.” *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). It “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.” *Id.* at 721. State actions that do not substantially impair a fundamental right enjoy a presumption of constitutionality and may only be invalidated if the action is proven to have no possible rational relationship to any legitimate interest of government. *See id.* at 728; *see Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993).

**A. No fundamental liberty interest was infringed upon by the termination.**

Respondent's fundamental rights were not infringed upon by his termination from the police department. Only fundamental rights and liberties which are “deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty” receive protection under the Due Process Clause of the Fourteenth Amendment. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003). On many occasions, the Court has expressed its reluctance to expand this substantive due process doctrine. *Chavez*, 538 U.S. at 775. Significantly, the Court warns that it must “‘exercise the *utmost care* whenever asked to break new ground in the field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of Members of this Court.” *Glucksberg*, 521 U.S. at 720 (emphasis added). Thus, the Court has identified very few protected liberty interests. *See Seegmiller v. LaVerkin City*, 528 F.3d 762, 770-71 (10th Cir. 2008). The Court has held that the right to intimate association implied by the First Amendment and protecting infringement into certain narrowly defined relationships, is a liberty interest.

*Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984). The Court has recognized a limited right to privacy in matters relating to an individual's personal life, including choices regarding reproductive concerns, child-rearing, and marriage. *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child rearing); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives within marriage), *Eisenstad*, 405 U.S. 438 (1972) (distribution of contraceptives), *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (purchase of contraceptives), *Roe v. Wade*, 410 U.S. 113 (1973) (abortion).

In the case at hand, the Thirteenth Circuit suggests Respondent has a potential liberty interest in private sexual conduct, which was impermissibly infringed upon by his termination. (R at 8.) However, the correct characterization of the liberty interest at issue is the right to engage in adultery. Clearly, this is not a fundamental right protected under substantive due process doctrine. For the Court to recognize such an interest would violate its own substantial warnings heeding extreme caution in adjudication of new fundamental rights. The Court must avoid doing so absent circumstances where the right at issue meets the appropriate judicial standard. Furthermore, Respondent's adulterous conduct and relationship are not protected within the fundamental right to privacy. Nor is an extramarital affair the kind of relationship protected under the right to intimate association. Therefore, contrary to the Court of Appeals holding no fundamental liberty interest has been infringed upon by Respondent's termination.

**1. The right to adultery is not a fundamental liberty interest.**

In order to determine if a right is a protected liberty interest for purposes of substantive due process the Supreme Court developed a two-part test in *Washington v. Glucksberg* requiring: first, a careful description of the asserted liberty interest; and that the liberty interest be “‘deeply rooted in this nation's history and traditions’ and ‘implicit in the concept of ordered liberty,’ such that neither liberty nor justice would exist if they were sacrificed.” *Glucksberg*, 521 U.S. at 720-

21. Various courts have explicitly concluded that there is no fundamental right to adultery. *See Oliverson v. West Valley City*, 875 F.Supp. 1465, 1477 (D. Utah 1995); *See also Marcum v. McWhorter*, 308 F.3d 635, 642-43 (6th Cir. 2002) (involving police officers disciplined for adulterous conduct).

The Court has emphasized that the requirement of a ‘careful description’ of the right is intended to prevent the reviewing court from addressing constitutional issues larger than those presented by the facts of the case before it. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). Thus, “the scope of the asserted right and the parameters of the inquiry must be dictated ‘by the precise facts’ of the immediate case.” *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004); *see also Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 277-78 (1990).

Here, a broad description of the right Respondent asserts would contradict this requirement: a careful and correct articulation of the right specific to the facts of this case is Respondent’s right to engage in adultery.

As to the next part of the *Glucksberg* test, the right to adultery is clearly not deeply rooted in our nation’s traditions. It is rather the opposite: the common law shows a longstanding legal history of criminalizing adultery that remains strong today; in some jurisdictions it remains a basis for civil divorce. *Oliverson*, 875 F.Supp. at 1474. The long history of disfavored treatment of adultery in our legal system further erodes the respondent’s attempt to have a right to adultery deeply rooted in our nation’s traditions.

Certainly, adultery has never been regarded as implicit in the concept of ordered liberty because it was and is a punishable crime in many jurisdictions. *Id.* at 1483-84; *see also Hollenbaugh v. Carnegie Free Library*, 426 F.Supp. 1328, 1334 (W.D. Pa. 1977) (“[n]othing... intimates that there is a fundamental privacy right ‘implicit in the concept of ordered liberty’ for

two persons, one of whom is married, to live together...). Adultery is certainly not a constitutional protected right in jurisdictions where adultery is illegal. *Suddarth v. Slane*, 539 F. Supp. 612 (W.D. Va. 1982); see *Shawgo v. Spradlin*, 701 F.2d. 470, 483 (5th Cir. 1983) (“[p]olice officers enjoy no constitutionally protected right to privacy against... investigations of their violations of... law.”)

In *Craven*, adultery remains a punishable crime, bolstering the contention that the right to adultery should not be recognized as deeply rooted in our nation’s history nor implicit in the concept of ordered liberty. (R. at 4.) Thus, Respondent’s asserted right fails under the *Glucksberg* test and should not be recognized by this court. Most importantly, acknowledging a fundamental right to adultery would be antithetical to established jurisprudence where the Court has identified specific fundamental rights to marriage and other areas associated with family life (such as child-rearing, marriage, and child bearing). *Carey*, 431 U.S. at 685. In *Griswold*, 381 U.S. at 495, the Court discusses, at great length, the sanctity of marriage and the significant history of the preserving marriage and promoting of familial integrity in our nation’s jurisprudence. The conduct associated with adultery is inapposite to the fundamental rights that have been recognized by the Court. *Oliverson*, 875 F.Supp. at 1479, directly undercutting and contradicting the institution of marriage that is preserved and promoted in our nation’s legal traditions and promotes familial disharmony. Acknowledgement of adultery as a fundamental right would require the Court to greatly depart from its jurisprudence and disregard its own warnings in this area. *Williams*, 378 F.3d. at 1239. Thus, it must not do so here.

**2. Respondent’s participation in an adulterous relationship and adulterous sexual conduct is not protected by the narrow right to privacy recognized by the Court.**

Neither Respondent’s adulterous sexual conduct nor his adulterous relationship is protected by current constraints on the right to privacy. The Constitution does not explicitly

mention a right to privacy. The Court has read a narrow right of privacy, or a guarantee of certain zones of privacy, certain constitutional provisions. Whereby only personal decisions deemed “implicit in the concept of ordered liberty” are within the right to privacy. *Roe*, 410 U.S. at 152. Constitutional protection has been extended to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey*, 431 U.S. at 685. The recognition of right to privacy in these areas does not “warrant the sweeping conclusion that any and important, intimate, and personal decisions are so protected.” *Glucksberg*, 521 U.S. at 728. Rather, the right to privacy is a narrow one that is still evolving. *Oliverson*, 875 F.Supp. at 1478. While a right to privacy has been found in areas surrounding personal autonomy; the Court has never recognized a broad right to sexual privacy. *Williams*, 378 F.3d at 1235.

**(a) The Court has not recognized a broad fundamental right to sexual privacy despite the opportunity to do so in *Lawrence v. Texas*.**

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court had the opportunity to recognize a broad fundamental right to sexual privacy, but declined to do so. *See Williams*, 378 F.3d at 1235. *See also Carey*, 431 U.S. at 688 n.5 (Court explicitly stated it was not declaring a broad right to sexual privacy). “It is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.” *Lofton v. Sec’y of Dept. of Children and Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004); *see also Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008) (holding there is no broad right to engage in private consensual intimacy after *Lawrence*).

Reading *Lawrence* for the proposition of a broad fundamental liberty interest in sexual privacy would dangerously depart from the principles of judicial caution implicit in substantive due process analysis. First, *Lawrence* did not follow *Glucksberg’s* formative fundamental rights test and has impermissibly extended precedential holdings. Second, *Lawrence’s* holding is limited to prohibiting State criminalization of private, consensual, adult homosexual sodomy.

Third, *Lawrence* itself does not state that it asserts a fundamental right nor does it apply the correct standard of review for such a conclusion. Therefore, *Lawrence* does not assert a broad right to sexual privacy.

As to the first point, the *Lawrence* decision failed to mention *Glucksberg*, the leading case in the area of substantive due process analysis, or use its formative test to determine if a Constitutionally protected liberty interest is at issue. *Lofton*, 358 F.3d at 817. Indeed, the opinion barely addressed whether the Petitioner's asserted right for consensual adults to engage in private sexual conduct is deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty, an essential element of the *Glucksberg* test. Additionally, the decision never provides a "careful description of the asserted right", but rather described the potential interest with broad generality, in clear contradiction of this requirement. *Id.* at 816; *see Lawrence*, 539 F.3d at 562 ("The instant case involved liberty of the person both in its spatial and more transcendent dimensions."). Moreover, the Court neglects to narrowly define the right according to the facts before it, a key element to all constitutional analysis according to *Cruzan*, 497 U.S. at 277-8. The asserted interest is not described as "fundamental" or located in the Constitution. *See Lofton*, 358 F.3d at 815. For the above reasons, *Lawrence* should emphatically not be interpreted to recognize a broad right to sexual privacy even despite dicta suggesting a potential broader liberty interest. *Williams*, 378 F.3d at 1238.

Furthermore, *Lawrence's* analysis in finding a potential right to privacy rests overwhelmingly on cases dealing with reproductive rights, each of which was narrowly crafted to the specific facts at issue. *Lawrence*, 539 U.S. at 564-7 (relying on *Griswold*, 381 U.S. 479 (holding a state law prohibiting the use of contraceptives was unconstitutional violation of marital privacy)); *Eisentadt v. Baird*, 405 U.S. 438 (1972) (holding that prohibiting the

distribution of contraception to unmarried persons violated equal protection); *Carey*, 431 U.S. 678 (1977) (holding that a state law prohibiting the distribution to individuals under sixteen was unconstitutional)). While these decisions by nature implicate sexual matters, “the court has never indicated that the mere fact that an activity is sexual and private entitled it to protection as a fundamental right.” *Williams*, 378 F.3d at 1236. *Lawrence* incorrectly expands the narrowly articulated right to privacy regarding certain reproductive rights matters to suggest a broader right to sexual privacy.

Secondly, *Lawrence* did not assert a broad fundamental right to privacy because it applied rational basis to the statute under review, the improper standard if a fundamental right is implicated. *Witt v. Dept. of Air Force*, 527 F.3d 806 (9th Cir. 2008). Under *Glucksberg*, 521 U.S. at 701, the state may infringe upon a fundamental right only if the government action is narrowly tailored to serve a compelling state interest. The decision in *Lawrence* did not use this quintessential language of strict scrutiny but rather used terms such as “rationally related” and others associated with rational basis review, the standard used when there is no fundamental right present. *Lofton*, 358 F.3d at 820. Moreover, several courts have followed *Lawrence* employing rational basis. *Seegmiller*, 528 F.3d at 770; *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006). This all suggests that *Lawrence* did not declare a broad fundamental right to sexual privacy.

Finally, *Lawrence*’s holding is limited to the narrow proposition that a state is prohibited from criminalizing homosexual sodomy. *Lawrence*’s holding is limited to prohibiting the criminalization of certain forms of consensual sexual activity. *Lofton*, 358 F.3d at 815. The Court there emphasized that the state cannot infringe on the petitioners’ private lives “by making their private sexual conduct a crime.” *Lawrence*, 539 U.S. at 578. The focus on the criminal

context reflects the Court's deep concern for the harsh penalties and stigma attached to criminal convictions, such as having a record and being registered as a sex offender. *Id.* at 575. Also, all the cases the Court relied upon in *Lawrence* invalidated criminal statutes. *See Lawrence*, 539 U.S. at 564-67. *Lawrence* does nothing more than assert that certain kinds of consensual, adult sexual acts should be free from criminalization; thus, its holding is inapplicable outside the criminal context.

For all these reasons Respondent cannot assert a broad fundamental right to sexual privacy under *Lawrence*. The conduct at issue in the instance case is adulterous sexual activity, and at best, could be characterized as private sexual activity. Such a generalized right to private sexual activity has never been recognized and therefore this conduct cannot construe protection as a fundamental right. The state action at issue is the termination of Respondent that, based on the facts, has no criminal penalties attached to it. (R. at 4.) Craven's adultery statute is not under review here and based on the facts Respondent is not being criminally prosecuted for his behavior nor will he suffer criminal penalties of a criminal record or registration as a sex offender as was required by conviction under statute in *Lawrence*. Most significantly, he is still free to engage in a sexual relationship with Ms. Malone. As the instant conduct occurs outside of the criminal context, *Lawrence's* holding is inapplicable to the situation. Thus, the Court should find no fundamental right infringed upon by Respondent's termination.

**(b) Even if the Court interprets *Lawrence* to recognize a broad fundamental right to sexual privacy, Respondent's conduct is not protected under *Lawrence*.**

In *Lawrence*, the Court describes liberty as vaguely protecting adult persons in matters pertaining to sex in their private lives; however, it also identified scenarios that appear to place a limit on the potential zone of liberty described. *See Lawrence*, 539 U.S. at 578 (“[t]he present case does not involve minors. It does not involve persons who might be injured or coerced...

prostitution, etc). The suggestion that the case does not reach certain kinds of behavior seemingly allows lower courts to address the scope of the interest articulated in *Lawrence* and its limitations as applied to the facts before them. See *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004). Some boundaries are set: the Court explicitly holds that as a general rule, the State should not attempt to “define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.” *Lawrence*, 539 U.S. at 567. It follows that if a relationship or behavior were to abuse an institution the law protects, the State would not be barred from regulating in such an area, and that such conduct would not be covered by the potential liberty interest under *Lawrence*.

While lower courts have been divided on whether sexual conduct outside a marriage is constitutionally protected, there appears to be wide agreement that police officers’ off-duty sexual relationship that violate a statute are not constitutionally protected. *Cronin v. Town of Amesbury*, 895 F. Supp. 375, 384 (D. Mass. 1995); See *Andrade v. Phoenix*, 692 F.2d 557, 559 (9th Cir. 1981) (disciplining police officer for criminal adultery constitutionally permissible); see also *Fugate v. Phoenix Civil Serv. Bd.*, 791 F.2d 736, 742 (9th Cir. 1986) (disciplining officer for relations with prostitutes).

In the case at hand, the relationship and conduct Respondent is seeking the court to protect is adulterous. There is a strong suggestion in the decision that this behavior *is* precluded from whatever potential protections *Lawrence* may provide. Adultery is a relationship that directly conflicts and is antithetical to the institution of marriage. Marriage is a tradition that is deeply rooted, protected, and valued in our nation’s laws and norms. Thus, since adulterous conduct conflicts with and abuse this institution, these relationships should be designated as outside the

scope of any potential liberty interest asserted in *Lawrence*. Neither Respondent's conduct nor relationship are protected.

**(c) Adulterous sexual activity is not protected under the general right to privacy, particularly in the context of police officers' sexual misconduct.**

Numerous courts have held that discharging or disciplining a police officer for an adulterous relationship does not violate the officer's right to privacy under the Fourteenth Amendment. *Mercure v. Van Buren*, 81 F. Supp. 2d 814 (E.D. Mich. 2000); *Suddarth*, 539 F. Supp. at 618; *Wilson v. Swing*, 463 F. Supp. 555, 563 (D.N.C. 1978); *Oliverson*, 875 F.Supp. at 1479. A court has similarly held that an employee's termination from employment, outside of the police context, does not violate a constitutionally protected right to privacy. *Hollenbaugh*, 426 F.Supp. 1328 (holding library staff members demoted for adulterous relationship did not violate right to privacy under the Fourteenth Amendment). Furthermore, courts have held that sanctioning police officers, including termination, for other acts of sexual misconduct were similarly not protected under the right to privacy. *Shawgo*, 701 F.2d. 470 (holding suspension of police officer's for dating and cohabitation did not violate right to privacy). Significantly, after *Lawrence* courts have maintained that adulterous sexual conduct is specifically not protected in the right to privacy in the police context. *Seegmiller*, 528 F.3d at 770 (holding the officer did not have a fundamental right in private consensual sex protecting her against reprimand for sexual relations with a co-officer while separated). *Sylvester*, 465 F.3d at 858.

In the instant case, Respondent was terminated from the police department for engaging in an adulterous relationship with the Police Chief's estranged daughter. (R. at 4.) Although separated from his wife, Respondent remains married and his behavior violated the Craven statute. *Id.* The Court should follow the well-established precedents and hold that adulterous relationships and

sexual misconduct are not protected by the right to privacy under the Fourteenth Amendment, particularly in the police context.

**3. Respondent’s adulterous relationship with Ms. Malone is not protected under the right to intimate association.**

The right of intimate association, as derived from the penumbra of rights surrounding the First Amendment, is unavailable to protect Respondent’s adulterous relationship. That right protects specific highly personal relationships from unjustified State interference. *Roberts*, 468 U.S. at 618. Not all government conduct affecting the right of intimate association receives heightened scrutiny. *Anderson v. Lavergne*, 371 F. 3d 879, 882 (6th Cir. 2004). Also, in order for the analysis of the state interference in the right to receive heightened scrutiny a threshold requirement must be met: a showing that the action has a “direct and substantial influence” on the right of intimate association. *Flaskamp v. Dearborn Public Schools*, 385 F.3d 935, 942 (6th Cir. 2004).

In determining the particular relationships protected in this area the Court analogizes to familial relationships, emphasizing that the relationship must implicate the sharing of deep commitments with other individuals. *Roberts*, 468 U.S. at 620. (“[One]... with whom one shares...distinctively personal aspects of one’s life.”). Factors considered in whether a relationship should be preserved by the right of intimate association, include: “relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusions from others in critical aspects of the relationship.” *Id.* at 620. It does not follow that *any* relationship objectively characterized as intimate is protected under this right. *Marcum v. McWhorter*, 308 F.3d at 640. Moreover, whether the relationship is typified as adulterous is a factor taken into account in determining if an intimate association is protected at all. *Id.* The court then considers

these objective factors in such a way as to locate the relationship at issue on a spectrum that ranges from the most intimate to the most attenuated of personal attachments. Only the most intimate of these receive constitutional protection. *Roberts*, 468 U.S. at 620. This Court has held that “certain kinds of personal bonds have played a critical role in the culture and tradition of the Nation by cultivating and transmitting shared ideals and beliefs.” *Id.* at 619.

Here, Respondent’s relationship with Ms. Malone is not an intimate association warranting constitutional protection. Despite the nature of the adulterous relationship as a small unit, involving a high degree of selectivity, and characterized by seclusion from others, the court must seriously consider that this is an adulterous relationship in order to locate where on the spectrum it falls. *Marcum v. McWhorter*, 308 F.3d at 639 (holding an adulterous relationship was not one of the nature granted elevated constitutional protection nor one that safeguards “the individual freedom central to our Constitutional scheme”). Significantly, the right of intimate association was created to protect personal bonds that play a critical role in our culture and tradition - clearly, an adulterous relationship is not of this sort.

Many courts have held that adulterous relationships are not protected under the right to intimate association. *Id.*; *Suddarth*, 539 F. Supp. at 618; *Wilson*, 463 F. Supp. at 563. Even if the Court were to find this relationship to be an intimate association under *Roberts*, there is an additional hurdle for the infringement of this right to be reviewed under heightened scrutiny. Only a direct and substantial effect on the right receives heightened scrutiny.<sup>1</sup> Here, Respondent’s termination has not directly and substantially impact his right to intimate association since his termination does not substantially bar him from forming intimate

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<sup>1</sup> Government action has a direct and substantial effect on intimate association only where a large portion of those affected by the rule are absolutely or largely prevented from [forming intimate associations], or where those affected by the rule are absolutely or largely prevented from forming intimate associations] with a large portion of the otherwise eligible population of [people with whom they could form intimate associations]. *Anderson*, 371 F.3d at 882.

relationships generally or from forming these relationships with a large portion of the eligible population. Furthermore he is free to remain in a relationship with Ms. Malone despite his termination. Therefore, even if Respondent's relationship is deemed an intimate association, the standard of review is not heightened because the termination does not directly and substantially impact that right.

**B. Respondent's termination should be analyzed under rational basis review and found constitutional under this level of scrutiny.**

No fundamental liberty interest of Respondent's was infringed upon by his termination; thus, it should be reviewed under rational basis according to *Glucksberg*. Under *Glucksberg*, state action that does not substantially impair a fundamental right enjoys a presumption of constitutionality and is subjected to rational basis review. An action is invalidated under rational basis only if the complaining party can demonstrate that the action has no possible rational relationship to any legitimate interest of government. *Glucksberg*, 521 U.S. at 708. This form of judicial review is incredibly deferential and has been described as "a paradigm of judicial restraint." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). Judicial intervention is unwarranted no matter how unwise the court may think the political actor's decisions may be. *Id.* In fact, so long as the court can conceive of a rational interest, even if not articulated by the state, then a policy satisfies rational basis. *Id.* at 315.

This Court should follow the District Court's holding that regulating police officers' conduct is a legitimate state interest and terminating officers who fail to conform to departmental policy is rationally related to this interest. (R. at 7.) This court would not be the first to come to such a conclusion. *Kelley v. Johnson*, 425 U.S. 238 (1976); *Shawgo*, 701 F.2d at 483; *Seegmiller*, 528 F.3d at 772. It is not for this Court to determine the wisdom of this policy, but rather to exhibit

judicial restraint in agreeing with the District Court that Respondent's termination clearly satisfies rational basis.

Furthermore, even if *Lawrence* is controlling, the correct standard of review is rational basis. While courts and commentators interpreting *Lawrence* diverge over the standard of review the Court applied, numerous courts have held that the Court applied rational basis. *Sylvester*, 465 F.3d at 858 (8<sup>th</sup> Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005); *Williams*, 378 F.3d at 1238; *Lofton*, 358 F.3d at 804. The Court used language implying that it used rational basis review. For example, the Court held that “the statute furthered no *legitimate state* interest;” key language in rational basis review. *Lawrence*, 539 U.S. at 578 (emphasis added). Furthermore, the Court never used language suggesting heightened review. *Witt v. Dept. of Airforce*, 548 F.3d 1264, 1266 (9th Cir. 2008) (O’Scannlain, J., dissenting) While courts have diverged, there is much case support for the proposition that the appropriate standard under *Lawrence* is rational basis. The Court should be cautious and apply rational basis review to Respondent’s termination and find his termination constitutionally permissible.

**C. Even if the Court determines *Lawrence* controls and the termination must be subjected to intermediate scrutiny, the Department’s interests outweigh Respondent’s interests.**

When the police department’s interests outweigh a private officer’s individual interests, the police’s sanctioning of misconduct is constitutionally permissible. *See Cronin*, 895 F. Supp. at 385. The Thirteen Circuit incorrectly analyzed the termination action under intermediate scrutiny. (R. at 11.) *Cook* held intermediate scrutiny required: “balanc[ing] the strength of the state’s asserted interest in prohibiting immoral conduct against the degree of intrusion into the petitioner’s sexual life... to determine whether the law was unconstitutionally applied.” *Cook*, 528 F.3d at 56.

This Court has granted the State wider latitude and notably different interests in imposing restrictive policies on its employees than in regulating the citizenry at large. *See Kelley*, 425 U.S. at 245. Specific to the police context, courts have recognized that the department may put demands on its officers that it may not on the public at large. *Id.*; *Seegmiller*, 528 F.3d at 772. The Department has a substantial interest in maintaining the integrity of the police force, encouraging the effectiveness of the department and promoting the harmony of its employees. *Id.*; *see Wilson*, 463 F.Supp. at 563.

Sexual relationships suggesting a conflict of interest can affect the impartiality and trustworthiness of an officer. *See Sylvester*, 465 F.3d at 860. More specifically, where the sanctioning of an officer for engaging in adulterous sexual activity is under review, the Court has held that the police department's interests in public respect for law enforcement and the unity, morale and efficiency of other officers are particularly strong and outweigh the individual's interests. *Id.*; *see Wilson*, 463 F. Supp. at 563 (adultery). Police departments have a strong interest in the effect of the private sexual conduct on the particular officer's effectiveness and trustworthiness. *Id.*; *See Cronin*, 895 F. Supp. at 385. And, courts have recognized the police department has a strong interest in ensuring the trustworthiness of its officers and minimizing conflicts of interests with the police force. *See id.* at 385; *see also Sylvester*, 465 F.3d at 855-6 (officer terminated for affair with victim in an embezzlement case).

Additionally, courts have found the department to have particularly strong interest where officer has engaged in sexual activity that is criminal in nature. *Suddarth*, 539 F. Supp. at 618; *See Cronin*, 895 F. Supp. at 384. When this is the case, courts have suggested that such conduct causes particularly severe damages to public confidence in the police department. *Oliverson*, 875 F.Supp. at 1469. "It seems clear that criminal activity by an officer charge with enforcement of

the law will diminish his respect in the eyes of the community, arouse cynicism, discourage public cooperation and perhaps encourage crime by others.” *Andrade*, 692 F.2d at 559.

The Fifth Circuit has referred to the police force as a “quasi-military unit,” emphasizing that the department faces security and significant public integrity concerns. *See Shawgo*, 702 F.2d at 483. When sanctioning military personnel for sexual misconduct, the Court has found the military’s interest in maintaining good order and discipline to outweigh private interests of the officer. *Witt*, 527 F.3d at 821; *Cook*, 528 F.3d at 46.

In the case at hand, the Department has numerous significant interests in regulating Respondent’s conduct. His conduct violated Craven’s Adultery Statute 11-198.01. (R. at 4.) The Department has a strong interest in ensuring that its officers obey the law to maintain the Department’s respect and to encourage others from engaging in illegal conduct. Clearly, this is similar to *Andrade*, 692 F.2d at 559, where the court acknowledged the Department’s strong interest ensuring that officers follow the law and allowing the sanction of those who do not.

Similarly, this Department has a legitimate interest in maintaining the integrity, unity and effectiveness of the Department. Respondent was involved in an adulterous relationship with the Police Chief’s estranged daughter. Ms. Malone has previously made public, widely reported false accusations of corruption against the Department. (R. at 3-4.) Understandably, while an officer’s adulterous relationship with an “outsider” could be detrimental to the officer’s performance the police have an emboldened interest when the relationship is with an individual who has hurt the force. Thus, his relationship with Ms. Malone could clearly impact the effectiveness and unity of the entire department.

Similarly, the Department has a substantial interest in the potential effect of this relationship on the integrity of Respondent’s job performance and trustworthiness. The police have a

particular interest and concern in regulating the conduct of undercover officers who presumably have significant, confidential responsibilities. Those intimately involved often share personal and significant facts about their work; thus, there is too great of a risk that Respondent will disclose information to Ms. Malone, who has already disclosed false information about the Department to the media. *Id.* The Department is justified in maintaining heightened concerns about the confidences and trustworthiness of undercover officers; thus, a potential conflict of interest poses a serious concern for them.

Police departments act as “quasi-military” unit. *See Shawgo*, 702 F.2d at 483. Maintaining good order and discipline are significant interest in the military and the police because they are charged with similar duties to protect and insure the safety of the public. Thus, the Department has strengthened interests in regulating the conduct of Respondent and this Court should find the interest in maintaining good order and discipline to be similarly important in the police context.

Balancing these various strong interests against “the degree of intrusion into the [petitioners]] private sexual life caused by [the action]...” *Cook*, 528 F.3d at 56, it is clear that the police’s interests outweigh Respondent’s individual interests. The degree of intrusion into his private sexual life is low because he is not barred from engaging in a particular kind of sexual activity as in *Lawrence*, 539 U.S. at 563. Thus, the Department’s many strong interests in maintaining functionality outweigh Respondent’s weak interest in adultery; thus, the Court must find his termination was constitutionally permissible.

## **CONCLUSION**

For the reasons set forth above, Petitioner, Rushmore County, Craven, Police Department, respectfully requests that the Court overturn the Court of Appeals of the Thirteenth Circuit and grant Petitioner’s motion for summary judgment.