No. 08-31958

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008

RUSHMORE COUNTY, CRAVEN POLICE DEPARTMENT,
Petitioner

v.

WILLIAM R. TRACEY,
Respondent.

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

BRIEF FOR PETITIONER

Team J
Counsel for Petitioner

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 extra-marital affair?

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BRIEF FOR PETITIONER

STATEMENT OF THE CASE

On June 7, 2005, in Rushmore County, Craven, Officer Maxwell Calloway ("Officer Calloway") of the Rushmore County Police Department observed the respondent, William Tracey ("the Respondent"), seated on a park bench (Record ("R.") at 2). Officer Calloway had for the previous eight months been part of an investigation of an illegal firearms distribution network tied to Red Tide ("Red Tide" or "R-T"), a private military company (R. at 2). The Respondent at time of arrest was also a seven-year

veteran of the Rushmore County Police, working undercover to target the sale of illegal firearms in the county (R. at 2). However, due to the Respondent's undercover work and his being from a different precinct than Officer Calloway, the latter was unaware of the Respondent's undercover status (R. at 2).

At the time and place he observed the Respondent, Officer Calloway was pursuing a lead that an R-T official was meeting with prospective buyers at that location (R. at 2). Although the Respondent did not match the official's description, he aroused Officer Calloway's suspicions due to his closely cropped hair and his wearing a black nylon jacket on a warm day (R. at 2). During twenty minutes of observation, Officer Calloway noted that the Respondent appeared agitated and spent much of the time scanning the location's layout and the tops of surrounding buildings, ultimately prompting Officer Calloway to approach the Respondent despite the risk of compromising the investigation (R. at 2).

Officer Calloway identified himself and asked the plaintiff his name, at which time the Respondent became visibly angry, glanced in both directions repeatedly, and ultimately responded, "Bill" (R. at 3). Still suspicious as the Respondent began to turn away, Officer Calloway grabbed the Respondent's left wrist, turned the Respondent to face him, and commenced a pat-down to determine if the Respondent was armed (R. at 3). Plaintiff did not physically resist, although he cursed and berated Officer Calloway, who did not feel anything consistent with a weapon (R. at 3).

After the frisk, the Respondent turned again to leave, at which time Officer Calloway noticed what appeared to be a vertical leather strap near the upper chest area underneath the Respondent's unzipped jacket (R. at 3). Officer Calloway, though unsure

of the strap's purpose and not having had a close look at it, felt it was consistent with those used to carry a concealed firearm, and therefore asked the Respondent to stop and turn around (R. at 3). Plaintiff reluctantly complied, but initially brushed Officer Calloway's hand away as he attempted to move aside the part of the Respondent's jacket obscuring the strap (R. at 3). Officer Calloway reached out again, with more force, and upon moving the Respondent's jacket, saw a "Glock 21" .45 caliber pistol (R at 3).

After Officer Calloway seized the firearm and placed the Respondent under arrest, the latter explained that he was a police officer and that Officer Calloway was jeopardizing both his investigation and his safety (R. at 3). Officer Calloway asked the Respondent for police identification, but the Respondent responded that due to his undercover status he was not carrying any (R at 3). Suspicious of the Respondent's story, Officer Calloway decided to hold him pending further investigation, and stated that since Craven does not have a concealed carry provision, his possession of a concealed firearm placed him in violation of Craven Statute 19-166.81 (R. at 3).

Officers performed a full search of the Respondent, which yielded a cellular phone containing several R-T officials' contact information (R. at 3). Also on the cell phone was contact information for Jacqueline Malone ("Ms. Malone") (R. at 3). Ms. Malone was the estranged daughter of Rushmore County Police Chief Patrick Malone ("Chief Malone") (R. at 3). Ms. Malone previously made public claims alleging corruption at the department (R. at 4). These allegations ultimately proved false (R at 4).

Concerned that the Respondent was targeting Ms. Malone due to her relationship to the police chief, Officer Calloway called Ms. Malone right away, to which she responded with alarm (R. at 4). Ms. Malone spontaneously disclosed that she had been

having an affair with the Respondent, who was an undercover police officer (R. at 4). Officer Calloway immediately contacted the Respondent's precinct, explained the situation, apologized for the arrest of one of their undercover officers, and disclosed his knowledge of the affair (R. at 4).

The informed Officer Calloway returned to consult with the Respondent (R. at 4). The Respondent explained that his firearm was department-issued and that he was fully authorized to carry it (R. at 4). Officer Calloway apologized to the Respondent and released him (R. at 4).

The Rushmore County Police Department terminated the Respondent the next day, June 8, 2005, for "behavior unbecoming of an officer" (R. at 4). However, Chief Malone conceded that the reason behind the termination was the Respondent's involvement in an extra-marital affair, in violation of the state's adultery statute (R. at 4). The Respondent was not on duty when his encounters with Ms. Malone occurred, nor was he in the course of performing any of his undercover duties (R. at 4). Although the Respondent is married, he has been separated from his wife for eighteen months and recently served with divorce papers (R at 4). Ms. Malone is unmarried (R. at 4). Although Craven Statute 11-198.01 prohibits adultery, court records show that no prosecutions have been brought under that provision in more than twenty years (R at 4).

SUMMARY OF ARGUMENT

Officer Calloway acted reasonably and constitutionally in moving aside the exterior garment of the Respondent. Officer Calloway's conduct in initially approaching the Respondent and putting a question to him did not amount to a stop. Officer Calloway

stopped the Respondent when he grabbed his wrist. At that point, Officer Calloway held a reasonable and articulable suspicion that the Respondent was involved in criminal activity. Officer Calloway then conducted a frisk of the Respondent which was justified by a reasonable fear for his own safety. Following this frisk, Officer Calloway engaged in a lawful plain-view seizure of the Respondent's "Glock 21" .45 caliber pistol. Additionally, at the point in time Officer Calloway seized the Respondent's "Glock 21" .45 caliber pistol, there existed probable cause for Officer Calloway to arrest the Respondent as a member an illegal criminal network engaged in illegal arms dealing, meaning that the officer's action were constitutional. Finally, Officer Calloway's search of the Respondent's cell phone was a legal search incident to an arrest.

Substantive Due Process and the 14th Amendment do not prohibit the termination of the Respondent for his participation in an extra-marital affair. Tracey asserts a right to private sexual intimacy that is not recognized by the Supreme Court and does not satisfy the requirements for the establishment of a new fundamental right. In this case, this Court should apply a rationale basis standard of review. Under a rationale basis standard of review, the Craven Police Department's actions, including Tracey's termination, is justified.

ARGUMENT

A. UNDER THE FACTS OF THIS CASE, THE FOURTH AMENDMENT DID NOT PROHIBIT A POLICE OFFICER, ACTING UNDER REASONABLE SUSPICION, FROM MOVING ASIDE AN EXTERIOR GARMENT OF A SUSPECT.

The 4th Amendment of the US Constitution protects citizens from unreasonable search and seizures. U.S. Const., Amend. IV. While adhering to these protections, the

Supreme Court has long recognized the need for police officers to perform investigatory stops. These are instances in which the officer does not have probable cause for an arrest but still may legally seize a suspect. Termed "Terry Stops," the Supreme Court has found such stops permissible where the officer has a reasonable and articulable suspicion of criminal activity. See Terry v. Ohio, 392 U.S. 1, 22 (1968). The Supreme Court recognizes that, during the course of an investigatory stop, where an officer reasonable fears for the safety of herself, she may conduct what is termed a "pat down" or "frisk" of the suspect. See Terry, 392 U.S. at 28. A pat down, or frisk, is a limited search of a suspect's outer garments for weapons on the suspect's person. Id. at 8.

Additionally, Officers may conduct what is termed a "plain view" seizure in instances where they lack a search warrant, yet legally view contraband that is obviously illegal and the officers have a legal right of access to. See Coolidge v. New Hampshire, 403 U.S. 443, 465 (1973).; Minnesota v. Dickerson, 508 U.S. 366, 375 (1993); Arizona v. Hicks, 480 U.S. 321, 322 (1987).

Officers may arrest suspects, without a warrant, where they hold probable cause to believe a crime is being committed. See United States v. Watson, 423 U.S. 411, 418 (1976). Officers hold probable cause to arrest an individual without a warrant when they possess knowledge of facts grounded in reasonably trustworthy information that warrant a prudent person to believe that an offense has been or is being committed by the suspect. See Beck v. Ohio, 379 U.S. 89, 91 (1964). Officers conducting an arrest have authority to conduct a search incident to an arrest of any area within the arrestee's reach. See United States v. Chimel, 395 U.S. 752, 763 (1969); United States v. Robinson, 414 U.S. 218, 235 (1973). This search extends to containers found upon an arrestee's person. Id.

at 223.

In the present case, Officer Calloway did not conduct an investigatory stop in simply approaching the Respondent and putting questions to him because a reasonable person would have felt free to leave. Rather, seizure first occurred when Officer Calloway grabbed the Respondent's wrist. At this time, Officer Calloway held a reasonable and articulable suspicion that the Respondent was involved in criminal activity. Officer Calloway conducted a frisk of the Respondent because, due to the suspect's location, appearances and actions, he held a reasonable fear for his safety.

Officer Calloway then conducted a "plain view" seizure of the Respondent's weapon. Additionally, when Officer Calloway seized the Respondent's weapon, he held probable cause to believe that the Respondent was engaged in criminal activity, justifying his seizure. Finally, extending current 4th Amendment jurisprudence to its logical conclusion, Officer Calloway's search of the Respondent's phone was a legal search incident to an arrest.

1. Officer Calloway's conduct in approaching the Respondent and putting question to him did not amount to a stop.

Where an officer approaches and puts basic questions to a citizen, no seizure occurs. See Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 185 (2004) (finding no seizure occurred where police officer asked suspect for identification). Indeed, the Supreme Court and the Federal Circuit Courts consistently hold that officers must be free to approach individuals and ask questions of them. See United States v. Drayton, 536 U.S. 194, 200 (2002) (holding law enforcement personnel do not violate 4th Amendment protections by putting questions to seemingly willing individuals on street); United States

v. Smith, 423 F.3d 25, 30-31 (1st Cir. 2005) (holding no seizure occurred where officers asked for man's identification in physically restrictive environment); United States v. Lockett, 406 F.3d 207, 211 (3d Cir. 2005) (finding no seizure where police officers approached suspect at train station, identified themselves as police officers, put questions to suspect, and asked for permission to search suspect's bags). As the Terry Court stated, "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." Terry, 391 U.S. at 34. Rather, seizure is found where a reasonable person would not feel free to terminate their encounter with law enforcement. See Kaup v. Texas, 538 U.S. 626, 630 (2003) (holding seizure occurred when reasonable person would conclude that they cannot "ignore the police presence"…"); see also Desyllas v. Bernstine, 351 F.3d 934, 940 (9th Cir. 2003) (finding no seizure occurred where suspect was not told he could leave but did not ask whether he could leave and was permitted to take smoke break and bathroom break); United States v. Wallace, 429 F.3d 969, 974-74 (10th Cir. 2005) (finding no seizure occurred where trooper asked suspect brief questions during traffic stop and exhibited no show of authority).

Applying the Supreme Court's jurisprudence to the instance at hand, no seizure occurred where Officer Calloway approached the Respondent and identified himself, asking for the Respondent's name. Such basic questions left the Respondent free to "ignore the police presence and go about his business." Kaup, 538 U.S. at 630. A reasonable person in the Respondent's position would feel free to go, meaning that no seizure occurred. Id. Officer Calloway's action of inquiring of the Respondent's name is specifically what the Supreme Court has time and again found not to constitute seizure.

See Terry, 391 U.S. at 34 ("[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets"); Muehler, 544 U.S. at 101 (holding no independent seizure occurred where officer asked suspect about immigration status while questioning).

2. Officer Calloway stopped the Respondent when he grabbed his wrist and that stop was based on reasonable and articulable suspicion.

Applying the above-mentioned jurisprudence of the Supreme Court, Officer Calloway seized the Respondent when he grabbed the Respondent's wrist. When Officer Calloway grabbed the Respondent's wrist it was the first point in time at which the Respondent could no longer "ignore the police presence and go about his business." Kaup, 538 U.S. at 630. Only at this point would a reasonable person not feel free to leave. Id.

Where law enforcement officers have a reasonable and articulable suspicion that an individual is involved in criminal activity, they conduct a brief investigatory stop of that suspect. See Terry, 392 U.S. at 20-21. An investigatory stop, or "Terry Stop," refers to an officer's stop of a suspect that is short of an arrest. Id. at 16-17. Rather, it is a brief detention based upon reasonable and articulable suspicion that a suspect is involved in criminal wrongdoing. Id. at 20-21. Reasonable and articulable suspicion is a less taxing standard upon police officers than probable cause. Compare id. at 21; with Illinois v. Gates, 462 U.S. 213, 238 (1983) (defining probable cause as "a fair probability . . .").

Courts employ a totality of the circumstances test in judging whether an officer held a reasonable and articulable suspicion of criminal activity, meaning that the court must look to all permissible factors in determining if an investigatory stop is justified.

See Terry, 392 U.S. at 21; United States v. Arvizu, 534 U.S. 266, 275-77 (2002) (holding investigatory detention appropriate where totality of circumstances created reasonable suspicion of criminal activity). The totality of the circumstances test effectively constitutes a balancing test, balancing the government's interests in crime prevention against the personal liberty interests of citizens. See United States. v. Hensley, 469 U.S. 221, 228 (1985).

Where an officer is aware of reports of criminal wrongdoing, observations consistent with such reports strongly aid the formation of a reasonable and articulable suspicion of criminal wrongdoing. See Holeman v. City of New London, 363 F.3d 213, 218 (3d Cir. 2005); United States v. Garner, 416 F.3d 1208, 1214 (10th Cir. 2005) (holding officer held reasonable and articulable suspicion where officer detained suspect for public intoxication after observing suspect slumped over, corroborating report suspect was slumped over for several hours). For instance, in Holeman, the Third Circuit held that an officer's observation of a suspect driving randomly in a circuit, when coupled with the officer's knowledge that a prowler had been reported, allowed for the formation of a reasonable and articulable suspicion. 363 F.3d at 218. Additionally, an officer's knowledge that a crime has been, or may be, committed may appropriately heighten his suspicions of criminal wrongdoing. See Hensley, 469 U.S. at 232-35. Thus, in Hensley, the Supreme Court held that an officer could consider a police bulletin in the formation of a reasonable and articulable belief of criminal activity. Id.

In the case at hand, Officer Calloway was not only aware that the illegal arms dealership network "Red Tide" was active in McDonough Square, Officer Calloway was dispatched to McDonough Square specifically to pursue a lead that Red Tide was

planning a meeting in that area. (R. 2). Just as in United States v. Hensley, and such Federal Circuit Court cases as Holeman v. City of New London, Officer Calloway was aware of reports of criminal wrongdoing which the Respondent's actions collaborated. (R. 2); Hensley, 469 U.S. at 232-235; Holeman F.3d at 218; Garner, 416 F.3d at 1214. The Respondent concedes that he was an undercover officer, attempting to appear to be a member of Red Tide. (R. 3). Officer Calloway's knowledge of reports of possible criminal wrongdoing, which the Respondent's actions related to his undercover work collaborated, validly aided the officer in the formation of a reasonable and articulable suspicion of criminal wrongdoing.

A suspect's agitation and anger at police presence is a valid factor in an officer's formation of a reasonable and articulable suspicion of criminal activity. See United States v. Romain, 393 F.3d 63, 72 (1st Cir. 2004); United States v. Soares, 521 F.3d 117, 120-21 (1st Cir. 2008) (finding suspect's agitated and belligerent use of profanity validly aided officers in forming reasonable suspicion); United States v. LeBrun, 261 F.3d 731, 734 (8th Cir. 2001) (holding suspect's agitation during traffic stop added to officer's reasonable suspicion of drug trafficking). For instance, in Romain, the First Circuit held that a suspect's "belligerence" validly aided an officer in the formation of a reasonable and articulable suspicion of criminal wrongdoing. 393 F.3d at 72. In the same way, when the Respondent became "visibly angry" as Officer Calloway approached him, the officer could consider the Respondent's angry behavior in forming a reasonable and articulable suspicion. (R. 3).

A suspect's furtive and evasive actions may be considered as a factor that might lead an officer to a reasonable and articulable suspicion of criminal wrongdoing. See

Terry, U.S. 392 at 28 (holding officers may lawfully consider suspect's pacing and nervous actions in forming reasonable and articulable suspicion of criminal activity). In the case at hand, Officer Calloway observed the Respondent glance to his left and right repeatedly. (R. 3). This display of nervous and furtive behavior appropriately went towards Officer Calloway's formation of a reasonable and articulable suspicion of criminal behavior.

Additionally, otherwise innocent activity or appearances may cumulatively aid a trained law enforcement officer in the formation of a reasonable and articulable suspicion of criminal wrongdoing. See Terry, 392 U.S. at 22-23 (holding individuals' continual peering into store window could be considered in forming reasonable and articulable suspicion); Arvizu, 534 U.S. at 277 (holding officers could legally consider suspect's use of unpaved back road near border to be consistent with drug smuggling); United States v. McQueen, 445 F.3d 757, 759 (4th Cir. 2006) (stating officer may consider damage to rear bumper as factor under totality of circumstances). In United States v. Sokolow, the Supreme Court held that law enforcement could legitimately consider a suspect's characteristics and actions, which are not patently illegal, in their formation of a reasonable and articulable belief of illegal drug activity. 490 U.S. 1, 9 (1989). Such legal characteristics and actions officer could consider included: a suspected drug dealer's purchase of airline tickets with cash, no checked luggage for plane trip, a short length of stay in city of destination, and arrival from a city known for drug exportation. Id. Similarly, in United States v. Jones, the First Circuit held that an officer may legally consider a suspect's inappropriate dress for the climate in forming a reasonable and articulable suspicion. 432 F.3d 34, 40-41 (1st Cir. 2005). In the same way, Officer

Calloway legally considered Respondent's characteristics and actions, which were not patently illegal, but to the eyes of a trained law enforcement officer suggested that the Respondent was a member of Red Tide. These characteristics and actions included: the Respondent's closely cropped hair and the inordinate amount of time the Respondent spent surveying rooftops of surrounding buildings and the square. (R. 2). Additionally, the Respondent wore a jacket which was consistent with a member of Red Tide, and also, as in Jones, was peculiar for the weather. (R. 2).

Standing alone, it may be that none of the factors discussed above dispositively support a reasonable and articulable suspicion of criminal activity. However, this Court examines those factors justifying an investigatory stop under a totality of the circumstances test. See Terry, 392 U.S. at 21 (viewing a totality of circumstances in judging officer's actions); Arvizu, 534 U.S. at 275-77 (examining totality of circumstances in judging officer's actions). Prior to Officer Calloway's first seizure of the suspect, he did legally take into consideration the following legitimate factors: the Respondent's collaboration of reported potential criminal activity, the Respondent's suspicious characteristics and activity to the trained eye of a law enforcement officer, the Respondent's furtive and nervous behavior, and the Respondent's agitation and belligerance. (R. 2-3). These factors, examined in their totality, form a definite and objective reasonable and articulable suspicion of criminal wrongdoing on the part of Officer Calloway.

Officer Calloway was not an overly-zealous rookie police officer eager to stop citizens on the street, instead he was an officer dispatched specifically to pursue a lead regarding criminal activity in McDonough Square, similar to the trained police officer in

Terry. (R. 2). Officer Calloway did not make unlawful assumptions about the defendant due to a past course of conduct, the officer and the defendant had never met. (R. 3-4). As was the case in Terry v. Ohio, Officer Calloway's seizure of the defendant was not "the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman . . ." 392 U.S. at 28. Indeed, if Officer Calloway failed to perform an investigatory stop of the Respondent, considering all the reasonable and articulable factors that he witnessed, Officer Calloway would have been derelict of his duties.

Finally, a seizure is determined to become an arrest where the suspect's individual liberty is significantly restrained and the officer does not act quickly to dispel their belief that criminal activity is afoot. See Robinson, 30 F.3d at 784 (arrest occurred where officer placed suspect in handcuffs); Oliveira v. Mayer, 23 F.3d 642, 645-646 (2d Cir. 1994) (holding suspects were placed under arrest when they were surrounded by police cruisers, were held at gunpoint, were placed in handcuffs, and were placed in police cruisers); United States v. Ricardo D., 912 F.2d 337, 340 (9th Cir. 1990) (arrest occurred where officer conducted pat-down of suspect, gripped the suspect's arm, commanded suspect not to flee, and placed suspect in back of cruiser). Officer Calloway's grabbing of the Respondent's wrist did not constitute a custodial arrest because there was no significant restraint placed upon the Respondent and the officer did not detain the Respondent for any significant length of time. See United States v. Dykes, 406 F.3d 717, 720 (D.C. Cir. 2005) (finding no arrest occurred where officers tackled suspect as suspect fled); United States v. Stewart, 388 F.3d 1079, 1084-85 (7th Cir. 2004) (finding no arrest occurred where suspect was put into handcuffs and placed in police cruiser for ten

minutes).

3. Officer Calloway's frisk of the Respondent was justified by a reasonable fear for his own safety.

An officer conducting an investigatory stop may subject a Respondent to a limited search for weapons where the officer reasonable believes that the suspect may be armed and dangerous. See Terry, 392 U.S. at 24; and Dickerson, 508 U.S. at 373. The Supreme Court reasons that "law enforcement officers [must] . . . protect themselves and other prospective victims of violence . . . [Where] an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous . . ." Terry, 392 U.S. at 24. Thus, wherever an officer conducting an investigatory stop reasonably believes that a suspect is armed, that officer may conduct a limited pat-down. See Adams v. Williams, 407 U.S. 143, 146 (1972). This pat-down is limited to a search for weapons, not contraband, and is thus confined to the suspect's outer clothes. Id.

In the case at hand, Officer Calloway reasonably believed that the Respondent posed a violent threat and may have been armed, accordingly conducting a limited pat-down for weapons. In fact, in situations where officers held weaker reasons than Officer Calloway to believe a suspect to be armed, courts have found an officer acted reasonably in conducting a frisk, such as in Jefferson v. United States, 776 A.2d 576 (D.C. Cir. 2001). In Jefferson, an officer conducted an investigatory stop of a suspect following an anonymous tip that a robbery was about to occur in the area. Id. at 577-578. Due to the anonymous tip of an imminent robbery and the high crime nature of the neighborhood, the arresting officer feared for his safety and conducted a pat-down for weapons. Id. at

580. The D.C. Circuit Court of Appeals found that, considering the anonymous tip and the high crime nature of the neighborhood, the officer "had reasonable grounds to believe that . . . [the suspect] might be armed and a danger . . ." Id.

Officer Calloway's fear for his own safety was reasonable. Due to the Defendant's appearance, manner, and a lead, Officer Calloway reasonably suspected that the Respondent was a member of the illegal firearms distribution network Red Tide. (R. 2). Needless to say, it is reasonable to fear that an illegal weapons dealer may be armed with an illegal weapon. Additionally, the Respondent appeared visibly angry, furtive, and evasive when Officer Calloway approached. (R. 2-3). Such behavior only reinforced Officer Calloway's reasonable suspicion that the Respondent was, in all likelihood, an armed illegal weapons dealer.

Indeed, in Jefferson v. United States, the D.C. Circuit found that the officer reasonably feared for his safety with less information to support that belief than Officer Calloway held. In Jefferson, the officer was only aware of an anonymous tip of a robbery. 776 A.2d at 580. Similar to the anonymous tip of a robbery, Officer Calloway was aware that he was pursuing a lead that a member of Red Tide was meeting a potential client at McDonough Square. (R. 2). In Jefferson, the officer was aware of the rather ambiguous fact that the suspect was in a high crime area. 776 A.2d at 580. In the present case, Officer Calloway observed specific characteristics of the Respondent which collaborated and confirmed his suspicion of criminal activity, specifically his dress and suspicious actions. (R. 2-3). Additionally, unlike the officer in Jefferson, Officer Calloway observed the defendant act in angry, furtive, and evasive manners. (R. 2-3). Thus, Officer Calloway held a more reasonable fear for his safety than the officer in

Jefferson. Officer Calloway reasonably feared for his own safety, justifying his limited pat down of the Respondent.

4. **Officer Calloway's seizure of the Respondent's "Glock 21" .45 caliber pistol was a plain view seizure.**

Law enforcement officers may engage in "plain view" seizures, meaning that in certain situations officers may seize evidence without a warrant. See Coolidge, 403 U.S. at 465 ("under certain circumstances the police may seize evidence in plain view without a warrant"). The Supreme Court requires that three prerequisites be met before an Officer may seize evidence that is in "plain view". See Dickerson, 508 U.S. at 375. Firstly, the officer must be lawfully in a position to view the evidence. See Dickerson, 508 U.S. at 375. Secondly, the incriminating character of the evidence must be immediately apparent. See Horton v. California, 496 U.S. 128, 136 (1990). Thirdly, the officer must have a legal right of access to the evidence. See Hicks, 480 U.S. at 322 .

First, Officer Calloway did not "violate the Fourth Amendment in arriving at the [place] from which the evidence could be plainly viewed." Horton, 496 U.S. at 136. Officer Calloway first viewed the strap consistent with a strap used to carry concealed firearms "as the plaintiff turned away . . ." without physically moving any part of the Respondent's clothing. (R. 3). Thus, Officer Calloway in no way violated the 4th Amendment in gaining a vantage point to view the Respondent's strap used to carry a concealed firearm.

Secondly, Officer Calloway immediately formed probable cause to believe that the evidence he viewed was an illegal weapon, satisfying the second requirement of a plain view seizure. See Dickerson, 508 U.S. at 375. Probable cause is defined by the

Supreme Court as "a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238; see also Ornelas v. United States, 517 U.S. 690 (1996) (holding probable cause for arrest exists where, in light of established facts, it is "objectively reasonable" for officer to believe probable cause exists). Officers may take into consideration the fruits of lawful investigations that do not constitute illegal seizure in their formulation of probable cause. See United States v. Dunn, 480 U.S. 294, 305 (1987) (holding police officer's use of flashlight through open door did not constitute search, meaning officer could consider what he viewed in finding probable cause).

Granted, Officer Calloway did not view a weapon on the Respondent's person. However, Officer Calloway did not have to be absolutely sure that the Respondent carried a concealed weapon; rather he simply required probable cause. Dickerson, 508 U.S. at 375 (holding officers must have probable cause to believe the evidence in plain view is contraband before seizure); Brown, 460 U.S. at 741-42 (holding that plain view seizure is legal where probable cause exists to associate evidence with criminal activity). Officer Calloway viewed what "was consistent with [a strap] . . . used to carry a concealed firearm." (R. at 3). Additionally, in arriving at probable cause that the Respondent carried an illegal weapon, Officer Calloway could consider those factors that are discussed above in regards to Officer Calloway's lawful investigatory stop and frisk of the Respondent, including the suspect's dress and suspicious actions. Dunn, 480 U.S. at 305 (holding that police officer's could lawfully consider what he lawfully viewed in formulating probable cause). Also, in forming a belief that criminal activity is afoot, officers may consider a suspect's belligerent nature. Romain, 393 F.3d at 72 (holding suspect's visible agitation and belligerence went towards formation of reasonable and

articulable suspicion); Soares, 521 F.3d at 120-21 (finding suspect's agitated and belligerent use of profanity validly aided officers in forming reasonable suspicion); LeBrun, 261 F.3d at 734 (holding suspect's agitation during traffic stop added to officer's reasonable suspicion of drug trafficking). Officer Calloway could consider the Respondent's agitated behavior during the pat down when forming the belief of ongoing criminal activity. No objectively reasonable person can argue that, in light of all those factors justifying an investigative stop and frisk discussed above and the suspect's further belligerent nature, considered in conjunction with the strap that Officer Calloway viewed, there did not exist a "fair probability" that the Respondent carried a firearm.

Thirdly, where an officer forms probable cause of the illegal nature of contraband, it allows for a legal right of access to that illegal contraband. See Texas v. Brown, 460 U.S. 730, 742 (1983) (holding seizure of property in plain view reasonable where probable cause exists to associate evidence with criminal activity); Colorado v. Bannister, 449 U.S. 1, 3-4 (1980) (finding probable cause sufficient to seize evidence under plain view doctrine); Payton v. New York, 445 U.S. 573, 587 (1980) (holding that seizure of evidence in plain view is presumptively reasonable where officer holds probable cause of evidence's illegality). In Texas v. Brown the Supreme Court held that an officer holding probable cause to believe evidence in plain view is contraband may seize that evidence. 460 U.S. at 742. In sum, Officer Calloway viewed a strap on the Respondent's person consistent with an illegal firearm. This allowed him, in conjunction with other factors considered, to form probable cause that the Respondent was carrying an illegal weapon, giving him a legal right to seize the weapon.

The present case can be clearly differentiated from the most prominent case in

which an officer was found to have not engaged in a valid plain view seizure, Hicks v. Arizona, 480 U.S. 321 (1987). In Hicks, officers responded entered an apartment to search for a shooter and while there an officer took notice of expensive stereo equipment which seemed out of place in the ill-furnished apartment. Id. at 323. The officer suspected that the stereo equipment was stolen and moved the stereo equipment so that he could view the serial numbers. Id. The officer used these serial numbers in order to determine that the stereo components were stolen. Id. The Supreme Court determined that the officer's action of moving the equipment constituted a search, so the subsequent seizure of the stereo was not a plain view seizure. Id. at 324-326.

In the case at hand, Officer Calloway "Officer Calloway noticed what appeared to be a vertical leather strap underneath the plaintiff's unzipped jacket" without moving or disturbing the Respondent's clothing, thus holding a legal vantage point to view what gave him probable cause to believe the Respondent possessed contraband. (R. 3). Additionally, Officer Calloway realized that "the strap was consistent with those used to carry a concealed firearm", meaning that Officer Calloway immediately realized the incriminating nature of the Respondent's weapon. (R. at 3). Finally, considering what Officer Calloway saw in plain view, in conjunction with those factors discussed above, Officer Calloway clearly held probable cause to believe that the Respondent carried an illegal firearm. (R. at 3). Thus, the present facts bear no resemblance to Hicks, as Officer Calloway conducted a legal search in arriving at probable cause to seize the contraband. Under this Court's jurisprudence, Officer Calloway's seizure of the Respondent's firearm was a legal plain view seizure and bears no factual resemblance to Hicks. Compare Brown, 460 U.S. at 741-42 (holding plain view seizure legal where

probable cause exists to associate evidence with criminal activity) with Hicks, 480 U.S. 324-326 (finding officer's conduct amounted to search with no probable cause or warrant).

5. **At the point in time that Officer Calloway seized the Respondent's "Glock 21" .45 caliber pistol, there existed probable cause for Officer Calloway to arrest the Respondent as a member an illegal criminal network engaged in illegal arms dealing, meaning that the officer's action were constitutional.**

As discussed above, Officer Calloway held probable cause to believe that the Respondent possessed a gun. Even assuming *arguendo* Officer Calloway did not possess probable cause to believe with specificity that the Respondent held a gun on his person, Officer Calloway held probable to believe that the Respondent was a member of the illegal firearms distributive network, "Red Tide", currently engaged in the sale of illegal firearms.

Officers hold probable cause to arrest an individual without a warrant where, at the moment of arrest, they possess knowledge of facts grounded in reasonably trustworthy information that warrant a prudent person to believe that an offense has been or is being committed by the person arrested. See Beck, 379 U.S. at 91. In the present instance, a prudent person in the shoes of Officer Calloway would believe that the Respondent was engaged in the sale of illegal firearms as a member of Red Tide. In forming probable cause that the Respondent was engaged in criminal activity, Officer Calloway could consider all of those factors discussed above. Officer Calloway was present in McDonough Square because he had a "lead that an R-T official was meeting with prospective buyers . . ." (R. at 2-3). The Respondent appeared and acted in a manner entirely consistent with an R-T official preparing to meet prospective buyers,

such as the Respondent's dress and haircut and his scanning of rooftops and surrounding buildings. When Officer Calloway approached the Respondent, the Respondent displayed agitation, anger, and furtiveness, all suggesting that he was involved in illegal activity. As discussed in Section II of this brief, each of these factors are legitimate for law enforcement personnel to consider in their formulation of a belief that criminal activity is afoot. As discussed in Section IV, Officer Calloway could consider the Respondent's further belligerent nature during their brief dialogue. Additionally, Officer Calloway could consider the suspect's possession of what appeared to be a firearm.

It is conceded by the Respondent that he was working undercover, making every attempt to appear to be a member of "Red Tide." Thus, the Respondent must make the implausible argument that, though he made every attempt to appear to be a member of Red Tide, and Officer Calloway perceived this attempt, Officer Calloway nevertheless did not hold probable cause to believe the Respondent was a member of Red Tide engaged in illegal arms sales.

All of the factors discussed above coalesce to form irrefutable probable cause for an arrest of the Respondent for attempting to engage in the sale of illegal arm as a member of Red Tide. Indeed, any prudent person in the shoes of Officer Calloway, considering all of those valid factors that he considered, would believe that the Respondent was in the process of committing a crime, meaning probable cause existed for an arrest. Beck, 379 U.S. at 225. As the Supreme Court itself has noted, requiring more information than Officer Calloway possessed to have probable cause for am arrest "would unduly hamper law enforcement . . ." as it sought to protect the citizens of Craven. Brinegar v. United States, 338 U.S. 160, 176 (1949).

6. The search of the Respondent's cell phone was a legal search incident to an arrest.

Extending current 4th Amendment jurisprudence to its logical conclusion, Officer Calloway's search of the Respondent's phone was an entirely legal search incident to an arrest. Where an officer conducts an arrest, they have the authority to conduct a search incident to an arrest of any area within the arrestee's reach. See Chimel, 395 U.S. at 763; and Robinson, 414 U.S. at 235. Such a search incident to an arrest "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect . . . a search incident to the arrest requires no additional justification." Robinson, 414 U.S. at 235. There is no doubt that a bright-line rule exists allowing officers to search the contents of any container found upon an arrestee's person. See id.; Chimel, 395 U.S. at 763.

Applying the Supreme Court's jurisprudence to the search of a cell phone, it is apparent that the bright-line rule created by the Supreme Court favors the constitutionality of Officer Calloway's actions in the present case. Indeed, the majority of those courts that have considered the constitutionality of a cell phone search incident to an arrest have found such cell phone searches entirely constitutional under the Supreme Court's jurisprudence. See United States v. Hunter, No. 96-4259, 1998 WL 887289, at *3 (4th Cir. 1998) (upholding as constitutional retrieval of numbers from pager under search incident to arrest); United States v. Ortiz, 84 F.3d 977, 983-84 (7th Cir. 1996) (holding retrieval of numbers from pager constitutional under search incident to arrest); United States v. Stroud, No. 93-30445, 1994 WL 711908, at *2 (9th Cir., 1994) (finding search incident to arrest permits search of pager).

For instance, in the recent Fifth Circuit correctly concluded in United States v. Finley, there is no discernable difference between the search of a cell phone found on an arrestee's person and the search of any other closed container on an arrestee's person. 477 F.3d 250, 253-254 (5th Cir. 2007). In Finley, the court followed the precedent set by Robinson, holding that a cell phone was no different from a closed container found on an arrestee's person, meaning that officers need no justification to search its contents. Id. at 260. Officer Calloway simply used the Respondent's telephone in order to glean information about the Respondent's contacts. Surely the Respondent cannot contend that any person who is arrested carrying an address book may have its contents searched, as is certainly the case under Robinson, but any individual arrested with an electronic address book, such as a cell phone, is immune to the bright-line rule established by the Supreme Court. For these reasons, the search of the Respondent's cell phone was constitutional.

B. SUBSTANTIVE DUE PRPOCESS OF THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT THE EMPLOYMENT TERMINATION OF A POLICE OFFICER FOR HIS PARTICIPATION IN AN EXTRA-MARITAL AFFAIR.

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property without due process of law". U.S. Const., amend. 14 § 1. The Fourteenth Amendment "affords not only a procedural guarantee against the deprivation of 'liberty' but likewise protects substantive aspects of liberty against constitutional restrictions". Kelley v. Johnson, 425 U.S. 238, 244 (1976). The concept of substantive due process is not addressed in the Constitution. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Rather, substantive due process is judicially

created and derived from an assortment of amendments. Id.

Substantive due process protections are limited and protect only certain fundamental rights and liberties from constitutional restrictions. Troxel v. Granville, 530 U.S. 57, 65 (2000). Beyond the specific freedoms enumerated in the Bill of Rights, the Supreme Court provided a comprehensive list of fundamental rights in Glucksberg v. Washington, 521 U.S. 702, 720 (1997). This list stated, "liberty protected by Substantive Due Process includes the right to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex. Rel. Willamson, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, Id.; Eisenstadt v. Baird, 405 U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952) and to abortion, Planned Parenthood v. Casey, 505 U.S. 833 (1992)." Glucksberg, 521 U.S. at 720.

A new fundamental right may be judicially recognized if it is deeply rooted in the history and traditions of the United and "implicit in the concept of ordered liberty". Glucksberg, 521 U.S. at 720-21. The Court acts with "caution and restraint" when determining new fundamental liberty rights. Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 502, (1977).

Substantive Due Process protects these fundamental rights by requiring the court to employ the most demanding of three standards of review, strict scrutiny, when reviewing a governmental action that allegedly infringes upon these rights. Glucksberg, 521 U.S. at 721.

1. The Court Of Appeal's Decision Should Be Reversed Because A Right To Private Sexual Intimacy That The Respondent Asserts Is Not Recognized In Supreme Court Precedent And Does Not Satisfy The Requirements Of Establishing A New Fundamental Right.

The Rushmore County Police Department properly terminated the Respondent due to his extra-marital affair with Chief Malone's estranged daughter. The Respondent argues that there exists a fundamental right to private sexual intimacy, particularly extra-marital affairs, and that the Rushmore County Police Department's termination violated his Constitutional rights.

The Supreme Court has not established private sexual intimacy as a fundamental right. Carey v. Population Servs. Int'l, 431 U.S.678, 688 (1977). Further, for a new fundamental right to be established it must satisfy two prongs. First, the asserted right must be carefully described and "deeply rooted in this Nation's history and tradition." Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 502 (1977). If the right is deeply rooted, then "the Court examines whether the right is 'implicit in the concept of ordered liberty' such that neither liberty nor justice would exist if they were sacrificed." Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937). Private sexual intimacy meets neither of these requirements.

Determining whether private sexual intimacy is a fundamental right is a matter of law and as such this reviewing court employs *de novo* judicial review. First Options of Chicago v. Kaplan, 514 U.S. 938, 948 (1995).

a. Past precedent has not established that private sexual intimacy is a fundamental right.

The Supreme Court has never recognized private sexual intimacy as a

fundamental right. Carey, 431 U.S. at 688. The Court even acknowledged that it had "not definitively answered the difficult question of whether and to what extent the Constitution prohibits state statutes regulating private consensual sexual behavior among adults." Id. Further when the Court listed all of the fundamental rights in Glucksberg, "private sexual intimacy was not listed as a right." Glucksberg, 521 U.S. at 720 Williams v. Attorney Gen. of Alabama, 378 F.3d 1232, 1238 (11th Cir.).

Since Carey, the Court has been provided repeated opportunities to recognize private sexual intimacy as a fundamental right, each time choosing not to do so. Williams, 378 F.3d at 1238. The most recent opportunity came in Lawrence v. Texas, 539 U.S. 558, 578 (2003). Lawrence involved a Texas statute that criminalized sodomy. 539 U.S. 558. Although the Supreme Court ultimately found the statute unconstitutional, nowhere in Lawrence did the Court designate private sexual intimacy as a fundamental right. 539 U.S. at 585 (Scalia, J., dissenting) (observing "nowhere does this Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause"). The Court described sodomy as "an exercise of liberty" and applied rational basis scrutiny. Lawrence, 539 U.S. at 585 (Scalia, J., dissenting). The Court failed to articulate both where the right to sodomy was located in the Constitution and whether sexual intimacy is at all protected. Lofton v. Sec'y of the Dep't of Children and Family Servs., 358 F.3d 804, 816 (11th Cir. 2004).

In Lawrence, the manner in which the Court struck down the statute further proves that the Court did not establish private sexual intimacy as a fundamental right. The Court determined that "the statute furthered no legitimate state interest which can justify its intrusion into the personal and private life of the individual." Lawrence, 539

U.S. at 578. Yet this language is consistent only with rational basis review, which requires that government action only be “substantially related to an important governmental objective”. Clark, 486 U.S. at 461. Due to this language, it is apparent that the Lawrence Court never applied strict scrutiny analysis indicating that private sexual intimacy was a fundamental right. Lofton, 358 F.3d at 817.

Lastly, Lawrence did not establish a fundamental right to sexual intimacy because the Court did not exercise the required utmost care in recognizing a fundamental liberty interest. See Glucksberg, 521 U.S. at 720. The Court did not exercise the utmost care because they neither stated that private sexual intimacy was a fundamental right nor affirmatively applied strict scrutiny. Lawrence, 539 U.S. at 720 (Scalia, J., dissenting). In conclusion, Lawrence did not establish a fundamental right due to private sexual intimacy because the Court did not unequivocally state that a new fundamental right was established, the language is consistent only with intermediate scrutiny and the absence of utmost care in establishing a new fundamental right. For these reasons, Lawrence provides little support for the Respondent’s theory that extra-marital affairs are constitutionally protected.

In addition to Lawrence, ideals and actions closely related to sexual intimacy have been deemed fundamental rights. See e.g. Planned Parenthood v. Casey, 505 U.S. 833 (1992) (abortion); Carey, 431 U.S. at 678 (contraceptives). However, “that many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.” Glucksberg, 521 U.S. at 727. Therefore, even though private sexual intimacy is *related* to rights the Supreme Court has deemed fundamental, private

sexual intimacy is not a fundamental right. Williams, 378 F.3d at 1236.

The cases involving private sexual intimate activities, like contraception and abortion, have not employed Substantive Due Process in their decisions and therefore do not support the proposition that private sexual intimacy is a protected fundamental right. See Roe v. Wade, 410 U.S. 113, 155 (1973); Eisenstadt, 405 U.S. 438; Griswold, 381 U.S. at 481-82. For example in Griswold, the Court found the "right to privacy" not within the substantive due process protections of the Fourteenth Amendment but rather in the penumbras of constitutional provsions, specifically the Bill of Rights. Griswold, 381 U.S. at 481-82; Lawrence, 539 U.S. at 594 (Scalia, J., dissenting). The Court in Griswold based the right of privacy on the right of association contained in the First Amendment, the prohibition of quartering soldiers found in the Third Amendment, the Fourth Amendment's right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures and the Fifth Amendment's self incrimination clause. Griswold, 381 U.S. at 484. Yet the Court did not acknowledge the Fourteenth Amendment in contributing to this judicially created "right of privacy". Id. Similarly, Eisenstadt, which overturned a law allowing only married couples to use contraception, was decided on equal protection grounds. 405 U.S. 438; Lawrence, 539 U.S. at 594 (Scalia, J., dissenting). Lastly, in Roe, the Court did establish abortion was a fundamental right but its analysis did not employ the traditional new fundamental rights analysis, which is required when expanding substantive due process. Roe, 410 U.S. at 155.

In addition rights closely related to private sexual intimacy, the fundamental right to marriage further proves that an extra-marital affair is not a fundamental right. Loving,

388 U.S. at 12. An extra-marital affair is directly contrary to the protected right to marry established in Loving, 388 U.S. at 12. Sodomy, the action the Court ambiguously protected in Lawrence, is virtually unrelated to marriage. An extra-marital affair contradicts an institution the Court has protected while sodomy does not. Therefore, Lawrence has little precedential effect on protecting extra-marital sexual acts the Respondent is attempting to assert in the current case.

The Ninth Circuit interpreted Lawrence as overturning the United States Military's controversial "don't ask, don't tell" policy, which bars homosexuals from serving openly in the military. See Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008). Like Lawrence, Witt did not involve a marital relationship like the present case does. Therefore, the rights protected in Witt were not contrary to an already established fundamental right. Therefore, Witt, like Lawrence, provides little guidance to the current situation.

The Respondent's attempt to assert private sexual intimacy, particularly the right to engage in an extra-marital affair, as a fundamental right has no support in substantive due process precedent. Further, it is not found in the Constitution. Therefore, the Respondent must establish private sexual intimacy as a new fundamental right utilizing a two-prong test from Glucksberg to prove the police violated his rights.

b. A right to private sexual intimacy is not found in the Constitution or in Supreme Court precedent and therefore must be analyzed as an attempt to establish a new fundamental right.

When attempting to establish a new fundamental right, a two-prong process is utilized. Glucksberg, 521 U.S. at 720-21. The first step requires the asserted right to be

carefully described and objective and objectively "deeply rooted in this Nation's history and tradition". Moore, 431 U.S. at 502. Vague generalities do not satisfy the "careful description" requirement. Chavez v. Martinez, 538 U.S. 760, 775 (2003) (finding freedom from unwanted police questioning was not fundamental right because it was not carefully described or deeply rooted).

Only after the asserted right is determined to be carefully described and "deeply rooted in this Nation's traditions and history", the Court will employ the second prong of determining new fundamental rights. The second prong requires "the asserted right be 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed'". Palko, 302 U.S. at 325, 326 (1937). The right to freedom of the press, peaceably assemble and practice religion were implicit in the concept of ordered liberty. Palko, 302 U.S. at 325.

When attempting to establish a new fundamental right under this two-prong analysis, there is reluctance to expand the concept of substantive due process and the Court acts with "caution and restraint" when classifying a particular liberty interest triggering substantive due process protection. Moore, 431 U.S. at 502. The Court acts with restraint and explains that previous liberty rights serve as "guideposts for responsible decisionmaking". Glucksberg, 521 U.S. at 720. The Court justified their restraint by stating "We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field' lest the liberty protected by Due Process Clause be subtly transformed into the policy and preferences of the Members of this court." Id.

When the two prongs from Glucksberg are applied to these facts, private sexual intimacy is not a fundamental right. First, the right to sexual intimacy is not carefully

described as required by the first prong in Glucksberg. The right to sexual intimacy is extremely vague and would encompass numerous prohibited activities. Even if the asserted right was limited to "private sexual intimacy among consenting adults", previously prohibited activities, such as prostitution, obscenity and adult incest would now largely be beyond the regulatory reach of the government.

Secondly, private sexual intimacy is not deeply rooted in the United State's history or traditions. The absence of private sexual intimacy's presence in the history or traditions of the United States is most evident in the numerous statutes barring certain sexual acts, such as adultery, prostitution and obscenity. Lawrence, 539 U.S. at 598 (Scalia, J., dissenting). Further, adultery, the specific sexual intimate act that the Respondent participated in, has long been condemned in the United States dating back to early beginnings of this Nation and continues to be outlawed in many jurisdictions today, including Craven. Marcum v. McWhorter, 308 F.3d 635, 642 (6th Cir. 2002). Emerging awareness of sexuality is not a substitute for historically deeply rooted concepts. Lawrence, 539 U.S. at 598 (Scalia, J., dissenting). Therefore, adultery was and continues to be directly contrary to the history and tradition of rights the United States recognizes.

Due to the asserted right of engaging in private sexual intimacy is neither carefully described nor deeply rooted in this Nation's history or traditions, it fails the first prong from Glucksberg and therefore cannot be recognized as a new fundamental right.

Assuming *arguendo* private sexual intimacy passes the first prong from private sexual intimacy satisfies the first prong from Glucksberg, it still would not pass the second prong of "implicit in the concept of ordered liberty". Liberty has existed even with statutory regulations placed on sexual conduct. Even with these regulations,

consenting adults may have sexual relations as long as they are married to each other or neither participating members are married to another person.

When compared to the rights exemplifying the "implicit in the concept of ordered liberty" in Palko, private sexual intimacy does not rise to the level of importance as freedom of religion or speech. Freedom of religion and speech were essential enough to be included in the Bill of Rights. Although inclusion in the Bill of Rights is not a prerequisite for a right to be "implicit in the concept of ordered liberty", precedent has still not found private sexual intimacy implicit in the concept of ordered liberty and has failed to offer protection from government intrusion to this asserted right. Due to liberty remaining even after regulation and past precedent not recognizing private sexual intimacy as implicit in the concept of ordered liberty, private sexual intimacy fails the second prong of Glucksberg used to establish new fundamental rights.

2. The Court Of Appeals Decision Should Be Reversed Because Rational Basis Is The Appropriate Standard To Review The Rushmore County Police Department's Actions And The Respondent's Termination Is Justified Under This Standard.

When governmental action infringes upon rights, the reviewing court employs three standards of review based upon the right the government allegedly infringes upon. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000). The most demanding standard of review is strict scrutiny. Adarand Contractors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Governmental action affecting fundamental rights, race or national origin is reviewed under strict scrutiny analysis. Id. For the governmental action to pass strict scrutiny review, the action must be "narrowly tailored to serve a compelling state interest." Id.

If a governmental action affects gender or illegitimacy, the governmental action is

reviewed under intermediate scrutiny. Craig v. Boren, 429 U.S. 190, 197 (1976). Intermediate scrutiny requires that the governmental action "be substantially related to an important governmental objective". Clark v. Jeter, 486 U.S. 456, 461 (1988) (determining Pennsylvania six-year statute of limitations for paternity suits did not survive intermediate scrutiny).

If the governmental action cannot be categorized as requiring strict or intermediate scrutiny, then rational basis scrutiny is employed. Kimel, 528 U.S. at 83. Rational basis scrutiny simply requires that the governmental action be rationally related to a legitimate government interest. Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992) (finding California property tax system was rationally related to government interest).

The Rushmore County Police Department's termination of the Respondent did not violate a fundamental right because private sexual intimacy has not been recognized as a fundamental right in the Constitution or past precedent. Further, the Respondent's termination was based solely on his affair, not on his race or national origin. Therefore, strict scrutiny analysis is not employed.

Intermediate scrutiny is also the wrong standard of review because Craven's adultery statute and the Respondent's termination do not involve gender or illegitimacy. As a result of the adultery statute and the Police Department's termination of the Respondent not qualifying for strict or intermediate scrutiny, intermediate scrutiny is the appropriate standard of review for Craven's governmental actions involving the Respondent.

a. Rational basis scrutiny is the proper standard for reviewing government action that infringes on private sexual intimacy

When employing rational basis review, the focus is entirely on the state's reason for governmental action and the strength of the individual's interest or extent of the intrusion are not considered. See Heller v. Doe, 509 U.S. 312, 324 (1993). When rational basis review is employed, there is a strong presumption of validity in the government's action. Lyng v. Auto Workers, 485 U.S. 360, 370 (1988). Those challenging the governmental action have the burden to "negative every conceivable basis which might support it." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973).

The presumption of validity is even stronger when the governmental action involves its own internal affairs. Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961). This presumption exists because the state has more interest in regulating the activities of its employees than the activities of the population at large. Kelley v. Johnson, 425 U.S. 238, 245 (1976).

When the governmental action involves police department regulations, the burden is on the plaintiff to demonstrate that there is no rational connection between the regulation and the promotion of safety. Kelley, 425 U.S. at 245. In Kelley v. Johnson, policemen brought suit under the Civil Rights Act of 1871 challenging the validity of the county's hair grooming regulation for male members of the police force. 425 U.S. 238. The Court noted that government can limit its employees' speech as decided in Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). The Court then decided in Kelley that "if such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of sate employees where the claim implicates only the more general contours of substantive liberty interest

protected by the Fourteenth Amendment." Kelley, 425 U.S. at 245. The restrictions on substantive due process interests were justified due to "the overall need for discipline, espirit de corps and uniformity". Kelley, 425 U.S. at 246.

The Fifth Circuit relied heavily on Kelley and reiterated the importance of discipline and uniformity amongst police officers when upholding a police department's internal rule prohibiting cohabitation among police officers. See Shawgo v. Spradlin, 701 F.2d 470, 483 (5th Cir. 1983).

In the present case, the reasonable government interest that justifies the Respondent's termination is ensuring the public trust and respect in the laws and law enforcement personnel of Craven. A police officer's duty is to enforce the laws of the jurisdiction he represents. Yet, the Respondent's extra-marital affair was directly contrary and in violation of Craven Statute 11-198.01 (R.at 4). By violating Craven law, public trust in the police department was jeopardized and likely cause damage to the important "espirit de corps" emphasized in Kelley. Accusations of officers being "above the law" would soon likely encourage civilian citizens to also break the law, leading the state of Craven riddled with crime.

Even if prosecutions had not been brought under the adultery statute, the Respondent was still engaged in unlawful activity. The statute had not been overturned and was still valid. The Respondent was still married, even if he was soon to be divorced. By being married and engaging in an extra-marital affair, the Respondent violated Craven Law.

As stated in Kelley and Pickering the government has more authority to regulate their employees than it does with the public at large. Therefore, even if a member of the

public had not been prosecuted for many years, this does not prohibit the government from placing a higher standard on employees' substantive due process rights.

If Craven was fortunate not to have a murder prosecution in many years, murder would still be illegal. The fact that a prosecution has not occurred in many years does not prevent police from terminating the Respondent when he does violate Craven law. Therefore, the governmental interest of preserving peace and a lawful environment was rationally related to the Respondent's termination.

Sexual activities and ranks superiority within the police department were also present in the Respondent's affair, as they were present in Shawgo. Although the present situation does not involve a subordinate having sexual relations directly with a supervisor, a subordinate, the Respondent, is having sexual relations with Chief Malone's daughter. Chief Malone is the supervisor of all of the Craven Police Department. The Respondent's relationship may cause him to receive disparate treatment, whether it be beneficial or detrimental to his career. This would again be detrimental to the "espirit de corps". The importance of rank and discipline within the Craven Police Department, a quasi-military unit, would be jeopardized if the Respondent remained on the police force, which further justifies the governmental action of the Respondent's termination. The sexual affair involving those related to superiors is yet another distinguishing characteristic between the case at bar and Witt.

Prior to the Police Department's notice of the affair between Ms. Malone and the Respondent, Ms. Malone was already known to the police due to allegations of corruption. (R. at 3). This past action was detrimental to the "espirit de corps" and likely caused much resentment towards her within the police department. Therefore, the

Respondent's extra-marital affair specifically with Malone would likely be even more detrimental to police unity and cause more resentment than if the affair was with a person unknown to the Police Department.

The government action was related to an important government interest. This government interest was public safety by preserving the "espirit de corps". Therefore, the presumption of validity was not overcome and the government's action survives rational basis scrutiny.

b. The Rushmore County Police Department's actions also survive strict and intermediate scrutiny.

Even if it was found that intimate sexual privacy was a fundamental privacy right worthy of substantive due process protection, the Respondent's termination would still survive under strict scrutiny. When analyzed under strict scrutiny, government action will be upheld only if it "necessary" or "narrowly tailored" to promote a "compelling" government interest. Johnson v. California, 543 U.S. 499, 505 (2005); Republican Party of Minn. V. White, 563 U.S. 765, 774-75 (2002).

The Craven Police Department's termination of the Respondent was necessary and narrowly tailored. The termination was a result of the adultery actions of the Respondent. The Craven Police Department's actions involved only one person, the Respondent. Further, they were the result of one specific sexual activity, adultery. Due to only one person involved in a specific sexual activity, the Respondent's termination was narrowly tailored and survives the first prong of strict scrutiny.

The same justifications that serve as an important government interest rise to the more demanding level of compelling government interest. These justifications again

include the important "esprit de corps" highlighted in Kelley that is critical in providing the utmost reliable assistance to public safety.

Because the Respondent's termination was narrowly tailored and served a compelling government interest, it survives the most demanding level of review, strict scrutiny. Due to the Craven Police Department's actions surviving strict scrutiny, they would logically also survive the lesser standard of intermediate scrutiny as well. This is true even though the subject matter involved in the Respondent's termination does not involve gender or legitimacy, the two areas where intermediate scrutiny has been traditionally used.

C. TRACEY'S TERMINATION DID NOT REQUIRE PROCEDURAL DUE PROCESS AND THIS ISSUE CANNOT BE RAISED AT THIS LEVEL OF APPEAL.

Procedural rules bar Tracey from raising a Fifth Amendment Due Process issue on appeal to the Supreme Court. Secondly, even if a Fifth Amendment claim were allowed, Tracey had neither a property interest in continued employment nor a liberty interest requiring procedural due process.

A new claim cannot be presented first on appeal. See Yee v. City of Escondido, 503 U.S. 519, 534-35 (1992) (differentiating between new arguments on appeal and new claims on appeal). Although Tracey may have a procedural due process claim because he was terminated within one day after the Craven Police Department learned of his affair, the lower court's decisions do not address procedural due process. These decisions are limited to purely substantive due process claims under the Fourteenth Amendment, not procedural due process claims under the Fifth Amendment.

Even if a procedural due process challenge is allowed, Tracey did not have a

liberty or property interest in continued employment. The Fifth Amendment provides, "No person shall be deprived of life, liberty or property without due process of law." Therefore, for a person to be entitled to procedural due process, a person must be deprived by the government of a "liberty" or "property" interest. Goldberg v. Kelley, 397 U.S. 254, 264 (1970).

Included in liberty interests are the rights for the individual "to contract, to engage in any of the common occupations of life…" Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Further "where a person's good name, reputation, honor, or integrity is as stake because of that what the government is doing to him, notice and opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Further, if there is a stigma that prevents him from obtaining other employment opportunities, notice and an opportunity to be heard are required. Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972).

Tracey's termination and justification as "behavior unbecoming of an officer" did not violate Tracey's liberty interest and trigger Fifth Amendment procedural due process protection. It is unclear based on the record if the justification of "behavior unbecoming of an officer" was provided only to him or if permanently placed in his employment file. Yet even if this unflattering assessment was placed in his file and shared with future employers, its vagueness would unlikely bar him from other employment outside of the policing field. Further it does appear some process was awarded to Tracey because he explained that he was not on duty when he was with Ms. Malone.

CONCLUSION

For the reasons stated herein, the Rushmore County and the Craven Police Department respectfully requests that the decision of the Court of Appeals be reversed.